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“Yearly Digest”  
OF  
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Reported in all the important Legal Journals during the year  
**1922**

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<b>Privy Council</b>	...	Indian Appeals	... XLIX.
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		The English Law Reports.	... 1922

## ABBREVIATIONS EXPLAINED.

### Reports.

All. or A.	...	...	...	Indian Law Reports, Allahabad Series
A. L. J.	...	...	...	Allahabad Law Journal.
1922 All. or 1922 A.	...	...	...	All India Reporter 1922, Allahabad.
Bom. or B.	...	...	...	Indian Law Reports, Bombay Series.
Bom. L. R.	...	...	...	Bombay Law Reporter
1922 Bom.	...	...	...	All India Reporter 1922, Bombay.
Bur. L. T.	...	...	...	Burma Law Times
Bur. L. J.	...	...	...	Burma Law Journal
Cal. or M.	...	...	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	...	...	Calcutta Law Journal.
C. W. N.	...	...	...	Calcutta Weekly Notes.
1922 Cal	...	...	...	All India Reporter 1922, Calcutta.
Cr. L. J.	...	...	...	Criminal Law Journal
I. A.	...	...	...	Law Reports, Indian Appeals
I. C.	...	...	...	Indian Cases
Lah	...	...	...	Indian Law Reports, (Lahore Series)
1922 Lah.	...	...	...	All India Reporter, Lahore
Lah. L. J. or L.L.J.	...	...	...	Lahore Law Journal
L. B. R.	...	...	...	Lower Burma Rulings
1922 L. B.	...	...	...	All India Reporter, Lower Burma
L. W.	...	...	...	Law Weekly
Mad. or M	...	...	...	Indian Law Reports, Madras Series.
M. L. J.	...	...	...	Madras Law Journal
M. L. T.	...	...	...	Madras Law Times
M. W. N.	...	...	...	Madras Weekly Notes
1922 Mad	...	...	...	All India Reporter 1922, Madras.
N. L. J.	...	...	...	Nagpur Law Reports
N. L. R.	...	...	...	Nagpur Law Journal
1922 Nag.	...	...	...	All India Reporter, Nagpur
O. C.	...	...	...	Oudh Cases
1922 Oudh	...	...	...	All India Reporter, Oudh
O. L. J.	...	...	...	Oudh Law Journal
P. R.	...	...	...	Punjab Record.
P. L. R.	...	...	...	Punjab Law Reports
P. W. R.	...	...	...	Punjab Weekly Notes.
Pat.	...	...	...	Indian Law Reports Patna, Series
1922 Pat	...	...	...	Patna Supplement to C. W. Notes
1922 P.	...	...	...	All India Reporter, Patna.
1922 P. C.	...	...	...	All India Reporter Privy Council Section
Pat. L. J.	...	...	...	Patna Law Journal
S. L. R.	...	...	...	Sind Law Reporter
1922 S.	...	...	...	All India Reports, Sind
U. B. R.	...	...	...	Upper Burma Rulings
1922 U. B.	...	...	...	All India Reporter, Upper Burma.

### Other Abbreviations.

Appl.	...	...	...	Applied	Expl	...	...	Explained.
Appr.	...	...	...	Approved	Foll.	...	...	Followed
Dist	...	...	...	Distinguished.	F. B.	...	...	Full Bench
Disc.	...	...	...	Discussed	P. C	...	...	Privy Council.
Diss.	...	...	...	Dissented from.	Ref	...	...	Referred to

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359	753	609	554, 1048	853	546
362	677, 932	611	777, 786	855	60
371	986	615	594	857	619
377	51	619	175	862	880
385	01	621	640	871	915
388	901 ; 1060	624	471	874	479, 501
390	613	625	149, 679	877	901
392	53	631	156	881	429, 455
393	823	636	230, 529	886	654
401	315	640	806	888	530
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420	135	650	178	900	896
422	266	654	1015	903	212
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471	224	693	498	927	892
472	433	694	438	930	1000
478	198	696	791	932	558
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89	110	5,9	1044	140	988
97	475	515	745	142	377
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994	72	325	45	267	956
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		193	325	415	953
		196	989	416	578
		199	859	418	579
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476	185	117	146, 285	350	919
478	789	122	918	352	191
480	907	124	265	358	740
484	903	125	1033	359	761
488	401, 484	128	196	361	673
491	566	130	909	363	125
496	1088	134	595, 755, 787	365	191
502	1079	141	947	369	1037
504	1102	145	1036	373	398
510	924	146	503	376	195, 667
511	1081, 1097	148	524	379	861
514	1084	151	919	380	662
516	1087	154	656	383	777, 786
526	1101	160	853	386	791, 924
528	1098	163	692	389	701
529	885	164	154	390	554
531	1085	167	185	392	594
532	1093	191	470	394	332
535	1098	193	417	397	156
538	1086	195	696	402	1018
		196	977	404	175
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17	365, 948	208	555	425	403
21	372	209	227	427	640
23	832, 923	215	780	430	1029
25	914	217	315, 1038	434	350
27	193	224	146	436	942
29	1032	225	259	437	1044
33	963	227	58	443	230
40	299	229	651	447	673
42	364	233	949	450	152
45	46	235	588	453	584
49	913	237	770	455	190, 984
50	570, 590, 859	239	617	458	847
52	282	242	372	460	297
56	357	245	146	462	1048
61	276, 583	247	1002	464	965
67	948	249	992	466	988
68	259	251	345	468	575
73	731	277	51	469	909
75	241	285	943	470	654
81	585	289	51	472	1034
83	210	293	971	474	372
84	349	295	346, 944, 946	477	317
85	941	297	278	480	245
87	194	299	53	483	306
89	1005	301	198	485	261, 910
91	340	304	207	488	390
93	222, 877, 878	308	1, 539, 373	490	837
94	342	311	966	492	628
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101	964	317	256	498	643
104	349	323	263	500	284
106	349	325	849	504	194
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515	646	34	1056	167	407
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523	810	36	1094	172	869
525	1041	38	263	173	593
529	748	40	716	193	870
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552	793	53	27	208	42
557	404	54	125	217	1057
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569	763	57	1052	219	225
573	1038	58	980	221	42
575	382	60	22	222	195
577	340	61	20, 162	225	721
579	259	65	706	226	35
581	554, 1048	66	25	227	1102
583	583, 636	70	267	228	41
587	247, 248	72	872	229	979
593	641	73	750, 938, 942	231	198
597	921	77	458	233	35
600	921, 1026	78	714	234	1049
605	8	79	160	235	36
609	629	81	53, 409, 637, 697	240	719
615	212	82	556	241	713
617	838	83	28	242	32
619	10 9	84	157, 304	244	408
622	1082	86	36	245	1052
623	584, 593	88	33	246	1053
626	265	89	1053	249	345
628	419	90	1050	252	560
630	1010	93	17, 26	253	42
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634	342	100	24	255	25
636	922	102	743	257	217, 558
638	945	103	707	258	31
639	558	104	718	260	40, 706, 1051
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652	1009	108	1018	268	528
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17	46	146	45	298	37
20	38	151	743	294	23
21	46	152	704	295	30
23	674	154	713	297	34
26	1086	156	151	299	1056
27	870	157	29	300	34
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326	1049	448	555	9	797
327	20	445	43	16	628
329	29	417	1055	20	671
330	1056	449	151	25	1047
331	25	451	1057	29	569, 650
333	21	453	554	34	1045
335	21	454	338	41	620
336	261	456	1051	65	959
339	872, 944	457	13	73	247
342	1051	458	37	77	121, 664, 668
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392	34	488	1051	174	803, 849
393	587	489	27	185	53, 696
396	1055	490	202, 710	189	828, 847, 858
398	556	492	1051	198	539, 829, 873
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410	1056	506	564	3	606
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412	20	509	147	6	428
414	732	510	722	9	483
415	716	512	715	10	466
416	1049	513	715	11	494
417	20	515	862	13	488
418	38	517	406	14	894
419	869	518	592	15	1070
420	556	521	705	17	903
421	871	522	707	18	490
422	872	523	870	20	883
423	234	524	1057	34	491, 505, 1049
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427	1053	527	42	53	506
428	714	529	976	55	888
429	31, 3	530	21	56	486
430	870	533	40	65	439
431	870	536	863	66	245
432	31	537	687	72	428
433	596	539	993	74	467
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99	498	257	633	986	906
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129	497	355	373	4	633
130	469	359	464	12	264
133	509	361	744	15	315
137	486	370	793	21	961
140	430	378	880	32	396
141	504	394	840	37	449
143	906	415	745	43	254
145	455	421	703	49	464
147	471	425	535	51	318
149	455	429	611	53	910
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165	901	443	755	61	74
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173	501	475	819, 932	74	691
174	892	489	646, 658	78	819
176	456	496	52, 696	80	619
178	487	504	672	94	814
181	430	518	684, 685	97	147, 241, 660, 698
185	487	527	528	101	620
187	420	537	356	108	460, 472, 884
189	446	548	843	113	819
190	497	565	719	118	206
191	448	586	126, 207, 682, 710, 818	119	745, 1047
198	459	612	652, 1022	124	635
201	606	620	683	129	823, 839
		628	947	133	193, 1045
		633	552	139	460
		641	777	141	925
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		716	819	149	817, 818
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		774	1018	161	819
		778	873	179	434
		785	740, 750	184	421
		812	653	185	943
		827	283	191	313
		839	451	193	1008
		842	816	202	966
		843	825	219	620
		846	481	236	380
		849	413	243	532, 932
		856	184	248	247
		867	1064	253	121, 664, 668
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		875	279	262	744
		882	329	268	755
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29	471	774	1018	161	819
31	927	778	873	179	434
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62	988	827	283	191	313
70	941	839	451	193	1008
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84	182	843	825	219	620
90	760	846	481	236	380
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167	940	875	279	262	744
178	396	882	329	268	755
180	880	890	820	272	990, 991
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333	614	124	178	556	711
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350	854	147	301, 989	566	1018
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356	181, 318, 858	152	549	572	163, 840, 990, 1046
359	719, 1001	153	689	579	741
361	186, 945	158	610, 823	589	299
364	785, 795	168	180, 740, 750	596	634
372	272, 334, 637, 644	174	653	615	166, 168
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392	672	184	176, 238, 739, 749, 802	624	444
401	498	191	1043	632	263
403	1045	194	824	634	131
410	652, 1022	199	49, 363, 377, 390	640	126, 207, 682, 710, 818
417	552	208	396	659	563
422	251, 279	211	969	663	906
426	940	218	223, 249	676	638
429	535	222	597, 819	682	932
432	999	264	820	695	873
436	592, 972	271	384	700	810
444	913, 1023	277	219, 240	707	1082
449	256	284	1046	710	462
457	780	288	816	713	233
473	186, 187, 237	290	343	716	435
475	583	293	598	721	776
477	182, 683	298	645	725	1091, 2
484	947	305	880	728	209
487	17	317	329	737	10, 784
490	900	323	819, 932	745	628, 656, 1028
492	677, 932	332	345, 346	758	208
507	659, 768, 785	349	630	761	278
551	391	347	3	763	847
559	936	354	331	765	747
560	843	368	184		
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17	677	428	646, 660		
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37	577	441	546	10	492
41	209, 402, 647, 939	444	399	11	318
49	956	448	159, 189, 512	12	442
55	79, 102	453	539, 829, 873	13	464
64	779	467	283, 788	15	853
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57	1047	266	947	483	260
58	709	268	236	484	435
61	1047	269	644	487	636, 659
63	923	278	936	91	821
67	819	280	819	494	498
70	995	303	839	495	343
71	460, 472, 884	304	344	498	385
74	990, 991	305	664, 682	501	8 0
77	925	307	683	506	597
79	817, 818	314	17	511	413, 822
83	191, 192, 305	316	219, 240	514	238, 739, 749, 802
89	217	319	915, 987	518	814
93	823, 809	323	913, 1023	521	149, 214, 219, 267
95	121, 664, 668	326	464, 901	506	159
98	1045	328	965	530	737
102	532, 932	330	822	512	298, 604, 663, 674, 784, 933, 1008, 1011, 1013
106	193, 1045	331	356	561	776
110	943	336	959	562	220
113	813	338	808	563	839
117	745, 1047	339	658	564	366
120	472	345	652, 1022	570	816
121	175, 558	349	231	571	3
122	460	353	684, 685	576	399
123	1046	356	499	579 (F B)	482, 490, 505
125	619	357	614	583	687
130	222, 223, 225	364	150, 700	584	184
132	793	368	209, 402, 647, 939	588 (F B)	831
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143	552	376	296, 300	597	598
146	710, 864	378	171, 541	600	263
147	575	381	931, 1031, 1039	601	472
153	843	384	47, 916, 931	604	329
155	816	386	1043	608	384
165	464	392	880	612	435
166	824	396	645	613	448
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168	755	410	646, 660	620	190, 746
171	288	415	79, 102	626	1007
172	989	418	178	629	444
173	251, 279	420	161	634	776
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177	437	422	549	639	711
180	719, 1001	424	996	641	481
182	468	428	740, 750	642	564
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185	583	434	577	647	810
186	227, 744	439	49, 363, 377, 390	674	284, 326, 915
188	703	442	556, 834	676	10, 784
189	277	444	365, 990, 1013	681	462
191	498	447	301, 981	683	209
192	840	450	1018	689	444
201	999	453	371, 873	690	451
203	391	455	223, 249	693	634
207	672	459	623, 640	704	990
213	535	462	653	707	286
215	659, 768	463	816	708	628, 656, 1028
242	528	464	534	717	940
246	843	468	159, 189, 562	719	642
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731	239, 300	283	881	318	425
732	875	291	52, 696	319	946
743	233	295	345, 346	351	460
745	961	30 M L T.—(H C)		31 M L T.—(P C)	
749	126, 207, 682, 710, 818	1	188, 619, 647, 719	1	191, 840, 989
763	707, 821, 917	14	667, 681	21	539, 684, 685, 829, 873
787	1062	15	257	31	819, 932
791	376, 391, 656, 1041	18	105	13	178
793	1039	21	763, 856	50	623, 640, 1065
798	699	25	47	54	126, 207, 682, 710, 818
800	882, 887	26	124, 266, 271	69	932, 1063
801	328, 461, 489	31	244	87	361
804	669	38	910	90	410, 693
821	1086	13	1037	94	7, 9, 61
822	1078, 1103	47	241, 959	96	808
824	1093	52	824	104	930
830	1076	60	620	107	726
831	1085, 1078	74	492	114	1104
840	1047	76	16	117	993
841	1095	101	191, 983, 990	131	299
845	1075	107	449	136	650, 975
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17	677	128	744	155	131
24	989	134	961	159	363
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32	100	148	437	193	747
34	856	151	264	195	865
36	50	152	940	200	670, 672
39	380	156	396	205	561
42	797, 811	160	575, 746	209	62, 286, 752, 761
50	670	168	635	213	1062
53	620	172	147, 241, 660, 698	217	376, 391, 656, 990, 1041
66	790	175	315, 991	219	155, 1039
85	124, 519, 622, 816	177	583	225	699
124	54, 977	178	186, 187, 237	227	684
126	1008	188	811	231	79, 102
132	124	194	189	238	54
138	98	202	296, 300	253	669
144	619	204	251	260	692
149	678	209	373	277	1065
154	150, 630, 701	217	272, 334, 637, 644	289	733
164	823	228	209, 318, 402, 647, 654, 939	302	1089
180	932	229	965	304	1101
181	672, 931	231	356	306	1090
182	105	238	745, 107	307	1066
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189	804	246	927	317	1089
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198	635	256	780	20	499, 843
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247	956	317	610, 823	61	360
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158	820	9	77	377	217
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369	882	236	819	535	496
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52	936	355	229	684	776
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98	549	440	343	721	875
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131	144	347	473, 478, 508, 905	550	210
132	864	352	240, 587, 683, 789, 797, 986	551	623, 680
133	677	362	863	556	833
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141	65	371	722	565	596
142	233	380	299	563	103
143	71	381	497	565	751, 805
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149	591, 611, 835	397	577		
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83	572	13	204, 258, 313, 627	67	868
89	459	17	274	69	867, 1043
93	178, 598	18	649, 650	70	345
95	591, 885	23	61	73	36
98	957	25	144	75	29
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3	665, 676	57	436, 438	89	19
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10	744, 785	71	289, 802	92	261
17	423	75	417	93	268
18	206	79	885, 911	96	580
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40	778	5	25	2	410
43	309, 696, 720, 871	6	7, 7	3	211
50	571	7	1050	4	964
61	9, 799	8	869	6	1100
63	666	9	19, 50, 569, 706	7	109
66	523, 1062	10	4, 1052	8	515
68	608	12	21	9	684
69	585	15	35, 47	11	579
71	921	16	22	12	686
72	290	18	22	14	1015
73	426	20	31	16	1036
74	885	21	38	17	512
76	857, 864	24	1054	18	371
79	574, 661	25	876	21	829
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93	50	38	862	32	274
95	394	39	381, 408, 748	33	584
96	181	41	202, 710	37	942
97	810	43	696, 1050	38	500
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66	283	178	339, 1015	285	433
67	953	180	514	286	1102
68	177	182	84	286 (1)	1005
72	274	183	376	286 (2)	429
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75 (2)	776, 801	186	863	289	352
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82	302	189	512	295	1057
83	1031	190	200	297 (L.)	201
85	223	191	920	299	124
86	195	191	924	303	263
87	1102	192	103	305	253
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91	952	202 (1)	105	310	788
92	219	202 (2)	108	311	1010
93 (F B) (1)	1058	204	402, 997	312	823
93 (2)	701	205	6, 202	315	749
99	138, 253	207	216	317	819
101	420	208	109	324	344
103	700	209	217, 284	326	576
110	920	210	787	327	650
114	843	211 (O)	1032	328	1017
115	659	211 (L.)	1032	330	82
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118	90	217	238	334	170
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125	308, 967	221	347	337 (2)	302
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131	447	228	227	352	10
132	481	230	852	353	189
133	895	231	763	356	654
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148	274	259	344	370	1070
150	991	260	60	371	424, 892
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158	551	271	873	386	252
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410	831	518	536, 631	649	70
413	1038	520	557	657	483
415	120	522	182	663	109, 492
416	919	523	942	665	490
417	187	524	355, 808	666	426
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418 (2)	551	527	218	671	475
420	227, 237, 282, 601	528	725	673	833
426	43	531	004	674	56
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431	771	547	174	688 (1)	1080
433	612, 632	549	517	688	309
436	334, 947	550	706	689	736
438	1054	551	706	692	294
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445	86	553	6	695	443
447	357	555	114, 241	696	90
448	875	556	301	698	639
451	1032	559 (P C)	959	703	307
453	1030	563	214, 219	704	825
454	745	564	112	706	58
456	833	565	909	709	134
457	593	568 (1)	653	711	707
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462	798	572	434, 995	718	625
465	528, 567	573	949	719	403
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470	318	577	700	724	155
471	5	580	149	726	539
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474	665	582	411, 699	729	136
476	278	583	540	730	1030
480	924	584	411, 699	732	237
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485	854	598	813	738	303
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488	675	603	158	742	860
490	275	605	46	744	867
491	46	606	421	747	972
492	1023	610	687	750	80
493	180	611	602	751	536
496	256	612	854	752	676
497	862	613	8	756	85
499	889	614	619, 620	757	744, 785
500	653, 906	617	924	763	1092, 1093
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502	571	622	806	768	930
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821	219	957	118	92	347
824	586, 705, 723	958	259	93	168
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829	712	961	585	98	514
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833	465	964	46	101	40
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842	429, 898	974	783	107 (1)	948
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847	59	977	1005	114	421
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861	879	1000	114	125	346
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230	187, 292	352	10	474	93
234	101	353	830	475	198
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241	138	358	812	479	338
242	922	360 (1)	281	481	453
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246	262	365	1048	492	908
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263	395	398	199, 567, 568, 911, 929	513	444, 470
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284	867	420	450	532	105, 148
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318	169, 534	437	481	555	427
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322	123, 533	439 (1)	1003	557	482
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325	1018	440	499	559	137
327	218	441	453	560	731
329	1025	443	477, 698	561	571
331	275, 291	444	446	570	455
332	813	445	510	571	813
334	942	446	474, 908	571	69
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584	103	697	787	837	324
585	249	699	567	839	80, 714
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589	85, 707	701	122, 718	842	988
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593	662	704	303	849	570, 590
594	997	705	2	851	446
596	947	706	204	852	606
599	912	707	540, 721	853	442
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601	271	710	234	855 (1)	442
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610	465	719	146, 302	858	490
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613	450	724	651	862	468
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631	495	741	341	942 (F B)	260, 840
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633	43	745	128, 205, 207	952	137, 666
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637	451	749	5, 11, 15, 929	959	138, 760, 782
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641	833	769	15	966	949
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647	780	776	665, 676	973	583
648	38	779	349	974	678
650	281	780	537, 876	977	538
653	630	782	170	979	161
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654 (2)	160, 315	786	623	983	147
656	83	795	57, 352	983	287
658	643, 644	797	227	984	266, 529
661	267	798	41, 228	988	285
665	762	799	154	990	814
666	1025, 1038	801	318, 856	992	517
668	204, 627	805	840	993	464
669	92	810	102	994	452, 908
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682	374	826	537, 792	4	601, 846
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10	781	147	194	322	466
11	552	148	780	323	107
15	569, 596, 598	149	641, 1017	324	499
19	639	150	647	325	471
21	407, 872	152	863	326	597
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59	264	184	491, 505, 1049	360	1029
61	712	185	883	360	579, 1004
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67	910	192	887	368	980
68	493	193	677, 932	370	336
69	429	198	363	372	311, 534
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71	493	201	582	377	79
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101	744	222	265, 568	412	359
103	99	237	556, 833	413	1067
104	947	239	642	415	985, 986
106	540, 868	257	624	417	71
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110	537, 868	261	612	419	446
113	333	265	823, 839	420	434
114	409	267	285	421	446
115	17	268	419	422 (1)	506
116	603	270	238, 741	422 (2)	904
118	976	271	942	423	463
119	871	273 (1)	360, 232	425	431
120	765	273 (2)	1018	427	510
121	658	280	575	428	70
125	44	285	206, 304	429	817, 818
127	218	287	256, 581	433 (2)	10, 523, 846, 913
128	626	303	623, 763	441	370
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460	263	599	322	793	1073
461	8 382	600	181, 600, 699, 704, 1003	796	57, 149, 227, 238
465	136 137	603	559	799	796
466	50, 923	604	542	800	816
468	848	606	211	808	874
469	530	608	176	811	402
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473	598	613	197	815	164
478	879	616	918	816	949
480	630, 1044	618	1036	817	439
481	912	620	1056	817	108, 293, 887, 904
482	526	621	219	821	892
484	735	622	1103, 1089, 1095	826	481
485	627, 647	628	676	832	496
489	374, 948	631	313, 1018	833	197, 335, 520, 552, 688
490 (F B)	778	640	1088, 1090	837	192, 191, 305
492	194	642	184, 281, 330, 355, 369	839	67
494	545	655	686, 770	841	417
494	272	657	484, 501	844	1046
494 (2)	525	662	502	846	703
499	53	665 (1)	128	850	322
500	1096	665 (2)	894	852	529
501	169	670	135	853	931, 1039
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503	861	678	764	865	167, 584
504	620	679	278	866	331, 1034
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510	363 , 389 ; 396	681	971	869	1061
513	430	682	543	873	244, 758, 777
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514	129	686	819	878	277
515	216 ; 494	687	369, 643, 850	881	637
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520	961	694	123, 285	886	926
527 (1)	439	704	849	888	612
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529	25	711	881	893	185
530	3	714	44	894	572
536	1005	715	927	898	516
538	120	720	1064	899	1002
545	230, 814	721	210	900	771
548	342	722	174	902	588
550	1054	726	370, 390	903	1078
551	708	741	58	904	975
551 (1)	299	744	273	907	58
554	771, 1040	745	49	909	341
557	578	751	154	910	1055
558	345	752	765	911	69
559	22, 846	755	849	913	517
562	314	758	180	914	796
564	668	760	528	915	45, 151
566	609, 821	764	16, 795	919	958
572	919	766	305	920	207
573	117	768	322	922	334, 547
578	966	769	412	923	5, 10, 248, 255, 576, 764
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944	317	123	188	267	116
945	624, 740, 994	124	209, 402, 647, 939	269	220, 594
979	684, 685	129	988	271	1075
982	343, 360, 532	130 (1)	233	272	513
986	653	130	114, 419	273	316
992	239	132	253, 392, 1036	276	516
993	865	134 (F B)	779	277	411
994	460	144	227, 979	278	192, 220
996	904, 890	146	703	280	106
997	50	148	650	281	246
998	50	149	557, 603	282	265
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6	173, 177, 200	167	881	300	659
8	1061	169	808	301	808
10	1, 308, 519	170	8, 15, 92	302	271, 609
16	664, 1035	176	5	304	922
18	704	177	432	305	708, 950
19	583, 1059	188 (1)	168	306	295, 410
25	702	195	508, 604	308	790
29	1031	200	890, 952	309	615
31	7, 618, 631	202	487	312	963, 823
38	517	203	438	310	1079, 1102
40	384	204	457	314	1017
43	110	205	437, 889	315	912, 978
44 (1)	50	209	109, 157	317	334, 346, 944, 946
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48	957	215	1059	320	264, 1076
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67	198	229	139	325	220, 213
69	167	230	724	327	542
70	135	231	527, 930	338	903
71	521	235	573, 668	339	498
73	266	237	336, 579	340	450, 480
76	639, 921	238	938	343	590
77	829, 837	240	953	346	427
84	988	241	93	348	425
87	579	242	273	349	461
89	639	244	759	350	431
90	723	245	691	351	480
91	91	246	793	352	423
93	146	248	582	353	1003
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96	75	252	306	356 (2)	551, 688
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366	960	530	81	668	623
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369	228	538	172, 810, 916	671	829
373	136	543	282	673	794
374	512	546	186, 187, 206	684	937
375	75, 92, 246	547	174	686	151, 255, 632, 697, 994
379	517, 688	549	941	700	998
381	88	550	623, 680	705	841
383	325, 324	554	725	706	833
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388	207, 737	556	873, 664	710	93
394	910	561 (P C)	629, 149	713	332
395	922	565	578, 583	714	365, 386
397	676	569	623, 640	718	206, 458
398	991	572	12, 790	719	880, 1014
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415	523	584	441, 488	724	509
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419	605	586	894	728	503
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425	874	588 (2)	902	731	899.
426	107	589	491, 907	734	462
427	286	591	507	737	512
430	106	592	480	739	350
431	1064	593 (F B)	175	740	598
433	997	595	778	741	63
434	1047	596	300	742	226 322
435	202	597	555	744	592, 721
436	198	600	780	752	289
438	173	602	362	753	178, 598
439	196	606	180, 380	754	762
440	142	608	524	755	149
443	358	609	1099	757	749, 926
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478	331, 747	619	903	772	740, 920
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485	158	623	451	777	690
487	51	625	956	777	1004
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494	335	629	578	781	704, 566
497	901	631	405, 556	787	200
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500	437	636	815	793	953
502	475, 507	638	396	794	8
504	728	639	706	795	957
505	469	640	694, 1004	796	558
506	485	641	224	797	732
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511	980	652	1021	803	217, 393
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826	471	935	616	100	756
827	900	936	1012	104	383
828	1058	937	521	106	267
828 (2)	595	938	212	107	554
830	497	939	779, 786, 1040	109	90
831	898	940	598, 997	111	634
832	459	941	357	113	590, 883
833	658	943	768	149	436, 438
835	74	945	258, 224	157	882, 901
839	78	946	84	160	452
840	545	948	912	161	74
841	206	949	547	164	666
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847	319, 599	960	675	175	804
848	653	963	852	177	792
850	617	964	522	178	104, 708
851	271, 948, 950	965	1006	179	940
852	965	966	1006	180	434
856	381	968	418	182	280
857	176, 762	971	835	183	990, 996
859	79	982	848	185	755
865	998	983	404	187	1000
866 (1)	349	985	710	188	182, 355
866 (2)	348	990	781	190	779
868	48	991	208	191	63, 367
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885 (1)	290	17	571	223	98, 694, 917
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887	945	32	504	226	112
888 (1)	168	33	459, 735	227	420
888 (2)	909	35	434, 430	229	50
894	253, 761, 601	36	890	232	1001
899	811	38	499	235	305
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900	855	40	900	238	1029
901	411	41	486	239	290
902	697	43	429	241	393
905	380	44	447	242	165
909	598	45	493	245	761
913	304	46	457	246	336, 664
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263	16	414 (2)	49, 458	575	48, 742
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267	600	425	717	577	252, 360, 605
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271	216	428	403	601	827
272	268, 565	429	176, 290	605	390
274	134	430	217	607	307
277	110	432	324	609	487
282	567	433	84, 87	612	864
283	629	439	401	613	608
285	406	443 (1)	275	615	490, 505
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289	104	444	417	620	898, 899
289	287	448	329	621	903
291	612	449	68	623	596
293	347	441	130, 646, 658, 660	623 (2)	607
294	619	460	942	624	461, 489
295	705, 863	462	627	625	97
297	659	465	312, 588	626	206
298	152	467	338	627	281
299	9, 527, 702	469	839	629	287
301	101	472	103, 161	631	189
302	1008	474	611	638	806
303	124	475	192	641	13
304	207	476	532	643	227, 235, 282, 288
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306	328	481	375	648	63, 1019,
307	338, 642	482	878	653	560, 581
314	560	487	616, 790	656	324
316	414	489	782	657	172
320	800	490	1003	659	250, 258
322	662, 649	491	68	662	65
325	621	494	582	663	210
329	560	495	714	664	193, 411, 712, 1041
330	114	497	390	667	175
331	542	498	101	671	935
332	200, 1017	500	66, 199, 639	673	182, 581, 827
333	1011	502	324	675	955
334	336	404	677	676	575, 713
335	719	506	105, 812	678	691
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340	945	510	166	681	524
341	927	512	186, 945	682	655
345	417	514	260	687 (F B)	652
346	646	516	229	690	212
349	804	518	613	693	160, 172, 175
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363	288	524	761	700 (F B)	417
366	173, 1020	529	1040	703	254
372	368	534	9, 648, 965	707	785
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394 (2)	665, 670, 1024	553	521, 847, 952	715	782
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729	95	6	6	145	468
730	421	7	69	145	565
731	798	7	142	145	508
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734	791	13	378	153	459
740	591	15	562	153	609
741	315, 1032	15	189	158	442
744	175	15	159	159	467
746	109	18	107	238	441
747	1048	29	387	272	447
749	831	31	1065	284	449
750	308	35	569	376	504
750	791	41	379	384	500
751	174	44	977	438	481
751	951	44 (1)	205	447	467
752	1024	47	638	630	475
753	226	48	1067		
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760	995	57	1043	728	477
761	390	57	973	735	453
763	620	59	967	739	447
764	837	65	849	741	895
767	524	69	61	742	906
769	634, 636, 972	71	670	750	883
776	662	71	672	755	59
777	238, 748	74	47	754	1075
778	366	74	719	756	456
780	276	80	208	758	424
783	381	81	891	760	496
785	725, 330	81	889	766	429
786	190, 984	81	461	768	440
787	356	84	361	768	439
790	284	86	669	766	1102
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798	104	95	904	1	884
802	187	96	545	1	471
804	877	97	857	2	1070
805	641	97	864	3	474, 892
807	148, 230	99	705	5	885, 887
811	958	102	616	8	469
812	743	103	966	9	487, 893
815	768, 296	109	390	11	476
817	511, 882	110	921	17	862
818	58	111	216	19	889
819	511	12	236	20	653
820	469	114	131	20	906
821	503	117	715	21	473
824	489	123 (P C)	650	22	423, 571
825	464	123	975	23	891
826	483	126	11	27	437, 445
827	494	126	98	30	901
829	455, 495	126	602	31	458, 505
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55	889	148 (2)	460	260	499
57	432	149	450	261	471
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58 (2)	898	154	480	264	906
59	896	157	502	266	464
62	430	158	590	267	108
63	59	161	474, 507	268	468
64	444	162	4 3	271	470
65	730	164	905	272	891
67	606	166	440	273	71
68	450	167	495	274	901, 1060
69	452	168	499	275	446
70	488	169	113	276	433
71	492	171	907	277	446
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74	906	175 (1)	816	278	904
78	59	175 (2)	426	279	463
79	490	176	457	281	431
80	481	177	361	283	510
81	911, 1049	191	1058	284	70
82	450, 890, 891	192	472	285	817
84	494	193	570, 590	288	440
85	481	195	446	289 (1)	470
86	428	196	606	289 (2)	430
87 (1)	1003	197	442	290	129
87 (2)	929	198	486, 607	291	216
88	499	199 (1)	442	291	494
89	453	199 (2)	1070	292	445
91	477	200	435, 568	293	604, 605
92	446	202	490	296	961
93	510	203	472, 460, 884	303	439
94	474, 905	205	453	303 (2)	980
95 (1)	59	206	468	305	484, 501
95 (2)	1058	208	888	310 (F B)	502
97	453	209	464	313 (1)	128
100	428	210	452, 908	313 (2)	894
107	423	216	902	319	470
108	908	218	510, 563, 959	320	466
110	498	220	902	321 (1)	108
111	895	221	904	321 (2)	293, 439, 887, 904
113	461	223	479	325	892
114	468, 478, 482	225	440	330	481
117	117	227	910	336	496
119	428	228	493	337	865
120	482	229	429	338	480
121	413, 420	230	888	339	60
122	429	232	471	340	890, 904
123	427	233	594	341	502
124	473	235	503	342	507
125	443, 482	236	472, 1009	343	485, 993
126	501	240	907	344	894
127	137	241	491	345	423, 510
127 (F B)	571, 731	243	462, 480	347	892
138	455	244	476	349	235
139	69	248	491, 505, 1049	853 (F B)	432
140	894	249	883	371	508, 609
141	507	250	433	376 (1)	890
142	430	251	450, 509	376 (2)	952
143	597	255	430	379	438

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380	457	497	735, 459	638	504
381	437, 889	498	434	639	436
385	542	499	430	641	461, 889, 891
386	903	500	890	650	440
387	498	502	499	652	890
388	480, 450	502	1087	654	907
391	590	504	900	655	904
394	427	505	486	657	468, 508, 565, 597, 883
396	425	507	429	664	903
397	461	508	447, 606	665	608
398	431	509	493	670	442
399	480	510	457	671	467
400	423	511	882	680	449
401	901	513	590, 883	684	441
402	486, 900	527	439	688	447
403	462	549 (F B)	436, 438	696	504
404	437	557	882, 901	704	500
406	476, 507	560	452	710	481
408	728	561	572	712	495
409	469	562	446	719	467
410	485	563	895	742	745
414	466	567	425	745	426
415	980	567	511	749	428
417	572	572	445		
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426	894	577	487		
427	474	579	608		
428	903	580	864		
428 (2)	902	581	608	1	1047
429	491, 907	583 (F B)	490, 505	2	619
431	507	587	432	6	74
432	480	588	898	11	315
433	1099	589	903	14	959
437	483	593	511, 882	17	931, 1031, 1039
439	466	591	687, 596	20	592, 972
440	473, 478, 508, 905	592	461, 489	23	247
443	903	593	882	26	380
446	502	594	58	27	71
447	451	595	511	33	635
449	591	596	469	39	121, 664, 668
450	58	597	503	41	720
451	494	600	489	46	171, 541
452	509	601	464	48	98
454	424, 430	602	483	51	939
456	503	603	494	54	178
457	886, 425	605	455, 495	56	194
458	455	606	505	59	124, 519, 622, 816
459	899	607	904	63	677, 932
462	462	608	608	69	645
465	460, 898	609	59, 425	71	619, 647
466	887	610	906	80	150, 630, 700
474	471	611	477	84	9, 7, 61
475	900	612	438	91	532, 932
476 (1)	1058	613	462	94	708
476 (2)	595	614 (F B)	492	96	681
478	497	617	449	102	569, 600
479	898	619	451	105	47, 916, 931
480	459	621	8, 607	107	828, 837, 858
481	571	622	967	112	345, 346
490	617, 842	623	498	115	880
496	504	625 (F B)	885, 911	120	52, 696
		638	981	123	790

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139	950	356	670, 67	62	282
142	79, 102	359		63	964
146	565	61	358, 931	64	349
154	823	365	699	65	170
159	(1921) Dig Col 817, 831	206	1065	68	259
162 (1)	932	371	1073, 1088, 1090	69	215
162 (2)	541, 977	374		70	859
163	915, 986	378	588	71	41, 228
165	211	382	851	72	914
167	373	383	718	74	938, 750, 942
168	823	384	844	76	851
176	913, 1023	391	839	79	944
178	379	393	1015	80	1031
181	797	397	645	81	239
185	791, 931	403	752, 865, 1084	82	388, 1005
186	931	405	1074	83	903
187	808	409	1091, 1104	84	17, 26
193	678	412	1079	86	428, 1070
195	135	414	1092	87	342
197	1008	446	380	88	194
201	646 658, 660			89	210
209	1045	(1922) All—		90	340
212	746			91	311
215	647	1 (1)	221	95	45, 151, 134
216	620	1 (2)	266, 529	98	277
225	250	5	922	99	453
226	670	6	382	100	154
228	660	7	545	101	278
233	50	9	963	102	44
235 (P C)	989	13	276, 583	104	852
237	237, 402, 647, 939	16	241	106	58
241	(1921) Dig Col 53, 130	19	158	107	235
243	819	21	491, 505, 1049	110	259
247	623, 610	22	909	111	39
249	254	24	570	112	949
252	856	25	918	113	146, 770
253	149, 279	26	1054	114	486
257	819, 932	27	156	115	780
261	669	28	576	116	647
266	650, 972	29	947	117	146
269	228	30	506	118	207
272	11, 77, 92	31	25	120	1061
279	977	33	259	122	491
281	539, 829, 873	35	169, 334	124	43
289	866	37	595, 755, 787	124	203
292	126, 207, 682, 770, 818	41	1033	126	668
304	299	42	585	128	943
307	669	43	342	129	44
311	1062	44	630, 1044	133	350
315	49, 679, 1066	45	196	134	1035
318	932	46	46	135	315
325	719, 989	47	41	139	529
333	131	48	57, 352	140	731
336	62, 74	50 (1)	265	141	524
336	286, 752	50 (2)	798	143 (1)	486
339	363	51	625	143 (2)	444
341	1039	54	977	145	158, 179
345	777	55 (1)	738, 794	147	1038
347	376, 391, 656, 1041	55 (2)	21, 30	153 (1)	579
349	861	56	185	153 (2)	1036
351	729	57	18, 44, 124	155	832
352	747	59	1036	158	1054

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161	949	265 (1)	946	362	849
162	279	265 (2)	433	363	831, 835
164	413	266	474	366	345
165	585	272	889	367	168
167	992	273 (1)	895	370	705
168	464	273 (2)	710	372	36
169	651	274	17	375	602
173	46, 47	275	1015	377	156
174	850	276	135	379	245
178	1003	77	25	381	666
181	1038	278	277	383	217, 317
182	919	279	861	384	1029
184 (1)	480	280 (1)	331, 413	386	1057
184 (2)	894	280 (2)	966	387	423
185 (1)	222, 877, 878	281	919	388	812
185 (2)	856	282	291	390	231
188 (1)	198	283 (1)	838	391	833
188 (2)	470	283 (2)	196, 1004	392	1015
190	273	284	393	394	1041
191	131	285	987	396	297
192	331, 1034	291	624	397	59
194	1017	292	455	399	4
195	740	293	536	400	930, 1100
200	146, 285	294	22, 846	401 (1)	153, 792
203	703	297 (1)	433	401 (2)	125
205	829	297 (2)	593	402	626
206	346, 944, 946	301	35, 165	403 (1)	1034
208	224, 466	310	646	403 (2)	761
209 (1)		312	38	404	244, 749
209 (2)	299	314	260	405	1033
210	559	316	631	407	941
211	463	317	35	408	554, 1048
213	584	318	791	409	766
214 (1)	466	319	39	410	777, 786
214 (2)	588	320	763	411	175
215	626	321 (1)	471	413	154
216	1049, 1055	321 (2)	640	416	847
217	651	323	627	417	837
219	51	324	401	420	662
223	227	332 (1)	346	421	201
226	332	332 (2)	311	422	861
228	417	333	594	424 (1)	256
230	753	334	216	424 (2)	17
231	971, 977	335 (1)	643	425	791
232	578	335 (2)	432, 497	426	366
233 (1)	510	336	150	428	469
233 (2)	53	337 (1)	425	429 (1)	908
233 (3)	493	337 (2)	264	429 (2)	488
235	266	337 (3)	1009	430 (1)	371
238	230, 814	338	611	430 (2)	438
238	230	340	509	432	808
240	127	342	627, 638	433 (1)	791, 807
241	197	345	503	433 (2)	6
243 (1)	545	346	913	435	906
243 (2)	210	347	829	436	641
244	467	348	38	438 (1)	216, 494
245	901, 1060	349	191	438 (2)	701
247	165	352	1032	439	199 10 2
254	335	355	1038	441 (1)	340
258	357	356	46	441 (2)	217, 218
260	372	358	416	442	46
262	586	360	366		

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445	150	8	110	148	205
446	804	9 (1)	877	149 (1)	106
448 (1)	941	9 (2)	1021	149 (2)	224
448 (2)	169	11	213	150	202
449	46, 190, 1019	12	116	152	167
457	424	14	378	155	1059
458	393	17	106	156 (1)	404
459 (1)	469	18	14	156 (2)	854
459 (2)	1048	25	112	157	966
461	381	27	635	158	107
463	15, 298	28	293, 652	160	749
465	230, 529	29	164	164	700
467	1044	30	116	167	859
471	398	31	187	168	544, 768
473	673	22	654	169	510
475	162, 775	38	457	170	538
477	1058	30	451	171	114
478	390	41	584	172	421
479	320	42	113	173	634
480	486	44	362	176	635
481	812	45	724	177 (1)	477
483	1053	46	960	177 (2)	578
485	1057	51	573, 668	179	679
487	490	52	361	183	753
488	491	66	374	184	848
489 (1)	423	70	115	186	1023
489 (2)	628	74	960	188	166
490	743	75	684, 685	189	964
493	583	78	116	191	484
495	1037	79	552	192	114
496	881	80	938	193	287
497	270	81	374	194	808
499	984	82	906	195	599
501	39	83	551, 688	197	114
502	504	84	110, 1001, 1014, 1020	198	111
503	498	94	5	199	909
504	547	95	180	200	616
508	1023	96	109, 157	201	544
510 (1)	575	97	107	202	988
510 (2)	247, 248	99	891	203	387
514	962	102	670	205	292
519	982	105	620	207	223
523	51	107	62	207	262
524	788	108	475	209	762
525	783	109	114	210	237
526 (1)	530	110	109	211	1040
526 (2)	654	111	108	213	545
528 (1)	446	113 (1)	251	215	312
528 (2)	501	113 (2)	114	216	1003
529	901	114	112	217	1035
531	653	116	110	218	618
537	1060	118	808	220	545
538	717	119	248, 654	221	108
539	640	121	379	222	114
540	615	122	642	223	779
541	430	124	833	233	204, 912
542 (1)	606	126	112	234	790
542 (2)	191	127	156, 320	235	719
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241	183	382	617	53	773
243	16, 795	383	208	54	7, 204
245	605	384	432	56	91
247	107	385 (1)	313	57	901
254	701	385 (2)	322	58	215, 304
256 (1)	965	386	107	59	432
256 (2)	585	387	673	73	51
257 (1)	783	390	926	76	470, 907
257 (2)	110	392	623, 825, 838, 983	77	90
261	892	397	621	79	767
267	263	399	702	80	74
271	804	402	111	83	438
273	294	404	997	85	78
274	112, 115	405	613	86	1081
276	149	407	553	87	11, 98, 602, 731
277	854	408	375	95	100, 218
278	612	409	471	96	722
280	915	410	109	97	426
281	648	413	658	99	72
284	884	415	543	101	75, 92, 246
289	544	416	965	104	365
290	480	420	633	106	485
292	653	424	1032	107	468, 508, 565, 597, 883
293	112	426	361	114	559, 757, 857
295	636	432	113	116	1063
296	1091	433	117	118	60, 695
299	307	436	304	122	879
300	619, 620	437	1012	123	711
303	370	438	117	124	511
319	745	440	1027	128	251
321	619, 620, 621, 633, 663	443	734	129	878
329	111	444	56	130	209
331	306	449 (1)	296, 302	135	717
334	313	449 (2)	294	136	739, 899
335	615	451	13	138	150, 188
336 (1)	147, 997	453	456	140	675, 680
336 (2)	544	454	242	141	88
337	112, 1067	455	459, 755	143	87
340	181, 231			145	841
341	3	(1922) Cal.—		146	95
342	616			147	405
344	43	1 (1)	236, 256, 916	148	338, 862
345 (1)	264	1 (2)	385	149	757, 1009
345 (2)	687	8	814	150	613
346	639	4	700, 701	151	94
347	590, 621	8	6, 782	151	80
350	616, 790	12	1067	152	80, 94
352	677	18	101	153	706
354	243	19	185	157	753, 767
356	755	21	825	160	561, 579, 1028, 1078
356	757	23	316, 936	163	97
359	812	28	229	164	284, 760
361	734	30	276	165	344
365	715	32	13	166	421, 284
368	476	32	90, 99	168	1026
320	1034	35	320	172	736
376	420	38	935	176	102, 796, 791
377	172	41	234	178	730
377	252	42	307	180	100
378	551	44	818	181	933
380 (1)	108			181	352



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185	12, 80, 205, 914	355	774	539	899
187	100, 754	358	1018	542	593
189	776, 801	364	439	544	1074, 1077, 1096
191	886	365	358	550	729
192	475	380	133	557	795
193	12, 142, 69	382 (1)	442	567	731
194	72	382 (2)	509, 511, 572	569	434
196	938	386	703	571	600
197	873	387	47	572	227
198	1102	388	1018	573	465
200	274	390	308	575	83, 94
201	79	391	132		
203	252	394	554	(1922) Lah.—	
203	605	397	930		
203	360	398	339	1	590, 883
222	98	399	152	26 (1)	897
224	794	401	466	26	1000
226	353	402	130	28	504, 505
229	761	404	55, 304	30	502
234	170, 232	407	736	30	298
235	777	408	298, 308	31	591, 885
237	594	409	372	33	959
242	415	412 (1)	455	34	409
243	96	412 (2)	718, 815	35	290
246	328	417	97	36	920
247	48, 742	419	782	36	166
248	101	422	828	37	798
251	94, 562, 970	427	134	39	255
254	909	429	829, 837, 858	40	828
255	252	436	975	41	955
258	850	443	735	42	922
260	49	447	56	43	975
267	569, 596, 598	452	1004	44	158
271	287	454	687	45	907
273	85	456	335	47	187
274	921, 698	458	830	49	481
279	333	459	244, 784	54	215
280	447	461 (1)	475	55	149, 215
281	142	461	87, 126, 610	56	381
284	97, 1043	468	101, 649	57	954
287 (1)	830	473	142	58	327
287	80, 694	474	1014	59	14
298	460, 503	475	132	59	759
300	66, 538	479	934	59	489
302	3, 1062	483	433	61	668
307	877	484	730	61	300
311	153, 175, 598	488	62	63	224, 258
313	10, 915	491	692, 803	64	373, 1012
316	209	492	132	65	199, 511
317	201, 605, 917	493	534	68	1000
320	912	499	768	69	517
321	601, 671, 673, 781	500	240	70	10
328	735	502	458	71	472
329	316	503	686	72	966
330	763	505	509, 899	72	500
331	98, 694, 917	506	415, 256	73	424, 892
334	508	508	899	75	845, 898
335	300, 736	510	84	76	898
337	719	511	724	78	297
342	450, 670, 571	513	321	79	654
345	153, 240, 594	514	132	80	902
348	715	515	250 ; 728 ; 730	82	616

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84	645	178	332, 339, 951	293	525
85	487	182	296, 768	298	835
87	328	183	955	299	515
88	953	185	327, 737	300	920
89	398	187	893	301	638
91	13, 517	188	772	302	287
93	326	189	449	303	529
94	781	191	325	305	123
95	513	193	797	307	582
97	351	194	52, 457	309	192
98	781	195	879	311	897
100	219, 367	198	778	313	888
101	298	200	627	314	883
102	5	204	668, 765	315	570
103	776	205	6	316	772
105	512	207	636	317	667
108	282	210	957	320	984
111	247	211	694, 803	323	519
112	654, 972	213	854	325	4, 7
113	480	214	945	327	702
114	518	215	535	329	1075, 1077, 1098, 1103
115	522	216	864	337	461
115	359	217	513	338	574, 771
117	518	219	746	344	956
118	247	220	952	346	457
119	572, 573	221	455	347	340
121	514	222	524	348	440
122	271, 522, 769	224	517	349	777, 959
124	792	225	341	353	352
125	782	227	898, 936	354	1005
126	517	229	411	355	194
127	122	230	246	356 (2)	196
131	212, 298, 791	232	1058	356	323
133	450, 890, 891	233	742	356	972
135	885, 887	234	512, 1060	358	165, 179, 520
137	423	235	880	361	154
138	59, 481	236	415, 1009	362	521
139	653, 906	237	450	363	958
140	198	239	333	364	327
141	59, 958	240	197	365	695, 908
142	920	241	639	366	522
143	473	243	634, 636, 972	367	919
144	468	250	115	368	516
145	690	252	849	369	170
146	461	254	852	380	953
147	182	257	516	380	898
148	403	259	173, 280	380	899
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168	462	275	518	394 (2)	460
169	524	277	601, 846	395	616
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405	887	54		193	236
406	524, 835	55		194	780
407	846	57	745, 1047	195	464, 901
408	373	59	793	197	683
409	488, 489	62	460	200	843
410	467, 886	63	558	206	528
415	744 747	63	225	209	496
416	851	63	223	210	860
417	578, 583	63	222, 223, 225	211	416
421	1064	65	318	214	936
423	747	66	277	215	617, 842
424	511	67	391	219	839
425	769	70 (1)	611	221	182, 531, 827
425	753	70	227	223	471
432	796	71	575	224	988
433	468	76	437	227	344
437	918	78	498	228	822
451	1100	79	813	231	965
452 (2)	907	79	464	232	822
455	1099	82	710	233	161
459 (1)	907	83	1046	234	324
461	998	83	288	236	982
470	951	85	816	236	187
471	524	93	251, 279	236	657
473	660	95	802	236	648
474 (1)	952	96	229	243	927
474 (2)	168	97	719, 1009	246	942
475 (1)	691	99	186, 187, 237	247	320, 812
475 (2)	424, 431	100	583	249	853
477	462	100	703	259	990
479	494	102	843	259	168, 840, 1046
480 (1)	349	104	755	263	610, 823
480 (2)	174	106	824	268	740, 750
		106	620	269	799
		110	468	271	17
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1 (1)	16	119	683	281	819
2	989	119	398	290	720
3	179	123	434	299	181, 318, 858
5	552	125	313	300	947, 950
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10	233	129	809	303	597
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16	999	135	614	306	1065
17	188	137	824	307	176
23	373	143	927	311	652, 1022
28	363	147	943	314	380
29	796	150 F. B.	659, 768	317	193, 1305
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31	186, 945	173	839	321	149, 214, 219, 267
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33	264	176	219, 240	327	814
34	819	177	182	329	498
35	961	179	236	330	946
40	449	181	801	330	147, 241, 660, 698
43	464	183	371, 672, 873	332	577
44	396	185	990, 996	334	940
46	633	186	854	335	609, 821
49	254	186	947	337	635
51	940	188	234	341	582
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351	1043	15	949	161	634
352	206	16	618	162	554, 738
353	423	19	136	164	409
356	446	21	139	166	812
357	670, 1015	23	787	167	137, 170
360	272	24	140, 675	168	105
361	821	26		169	141
362	967	27	141, 905	170	104
369	799	28	642	172	590
373 (F B)	819	39	53	174	163
390	162, 1018	40	452, 902	175	265
392	824	46	1067	179	192
394	159, 189, 362	47	137	180	427
397	365, 1013	48	848	182	316
398	549	49	392	184	733, 769
399	653	50	384	185	618, 1000
401	756	52	200, 632, 682	187	675
402	301, 981	58	1022	189	160, 172, 175
404	139, 534	60	594, 775	191	542, 585
405	900, 309	62	146, 421	192	386
406	797	65	897	193	646
407	12, 648, 663	67	857, 568	195	903
409	190	70	403	197	809
413	189	71	508, 858	197	809
416	260	73	676	198	179
417	238, 739, 749, 802	76	762	199	1037
421	413	79	1016	200	782
423	636, 659	81	322	201	623, 763
426	684	82	237	207	142
427	821	84	215	207	139
429	360	86	980	209	889
435	465	87	423, 510	210	172
436	223, 249	89	853	212	762
437	435	96	201, 401	213	330, 758
439	940	98	135, 180, 181, 847, 1025	216	137
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441	927, 1036	104	217, 393, 631	219	369
443	462	105	252	221	942
445	816	108	940	222	137, 666
446	3	109	596	226	200, 1017
447	760	111	136, 137	227	140, 573, 694
452	159	112	811	229	903
456	814	113	272, 289, 801	232	613, 960
457	298, 604, 674, 784, 933, 1008, 1011, 1013, 1066	115	224, 997	244	634
481	184	117	140	246	249
485	310	119	579, 850	247	383
486	366	121	336	248	275, 291
491	3	122	461	249	185
495 (F B)	459, 737	124	981	250	738
497	399	125	691	251	942
499	492	126	238, 250	252	138
502	490, 505	127	139	253	845
505	332	128	169, 398	254	754
510 (1)	278	129	218	255	1075
510 (2)	208	136	104, 248, 610	256	1704
512	472	138	624	259	755
514	707, 821, 907	141	183	260	1084
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264	1084	112	665	228	885
264	1079	113	778	229	921
265	1092	114	641	231	15, 569
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		122	852	249	698
1	242	123	390, 1029	250	467
7	12, 790	124	914	251	831
11	558	124	500	254	574
14	264	124	772	256	441
15	785	124	169	257	778
16	109	124	167	259	382
17	1038	129	847	265	393
18	454	129	290	266	254
20	937	130	948	268	251, 320, 368
21	504	131	232, 688	270	585
22	1061	133	76	271	367
24	9, 799	135	255, 626, 754	273	426
26	428	138	650	274	126
27	652	140	698	275	608
29	432	142	985, 986	276	348
30	383	144	499	277	634
31	744	145	470	278	523, 1062
33	317, 635	146	287, 291, 632	280	902
34	343, 532, 360	147	490	283	1030
38	871	148	344, 781	287	717
39	747	149	408	289	674, 693, 866
40	407, 872	150	305	300	488
42	537, 868	152	382	302	575
45	697	156	923	318	1063
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47	796	159	831	(1922) P—	344
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50	625, 643	161	980	4	243, 326, 723
55	568, 650	162	35, 587	5	482, 468, 478
58	1030	165	928	8	967
59	369	168	678	9	82, 551, 606, 759
73	941	170	964	12	900
75	251	171	245, 671, 674	13	412, 436, 443, 610
75	720	175	666	17	1101
75	309	178	265, 568	19	709
75	696	180	188, 305, 352	22	627, 637
75	871	196	608	24	843
79	309, 696, 720, 871	197	805	28	143, 144
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82	418	199	440	30	649, 650
85	629	200	181	33	795
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60	499	239	433	393	465
61	416	240	391	394	74
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63	160, 162	243	240, 587, 683, 789, 797, 986, 987	399	136
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73	504, 901	255	748	404	415
75	732	258	48 592, 721	406	733
77	445	265	900, 974	407	174
79	531, 537	267	908	408	283
84	437, 889	269	726, 727	408	980
87	575	276	178, 276, 918	409	238, 278
88	506	279	406, 712	411	78, 610
92	318, 856	281	330, 346	415	580
96	243, 657	284	412	416	865
97	507, 609	286	70, 71	417	93, 207
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121	261	303	65, 156	431	551
122	535, 562, 591, 641	308	294, 345	435	436, 438
154	858	310	806	442	604, 605
157	471	311	886	445	992
158	478	362	538	446	756
160	891	315	224	447	243, 563
161	710	317	135	448	310
162	881	318	324	449	442
165	990	321	475	450	624, 740, 994
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167	204, 1025, 1038	334	431	480	144, 970
169	84	334	431	481	970
171	82, 83, 101, 371, 563, 734	337	271, 384, 951	483	411
178	986	339	1018	483	709
181	856	340	439	484	72
183	71	346	986	485	258, 259, 262, 270
184	1, 257, 145, 949	347	641, 1017	488	567
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193	66, 81	352	555	491	851
196	173	354	81	492	504
197	293, 299, 439, 904, 887	359	643	493	324
201	751, 805	361	219, 414	494	500
204	236	364	687	497	91
205	805	368	773	498	886
207	910	369	180, 380	499	788, 1036
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214	447	382	602	511	286
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220	1083	387	12	527	612
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546	75	604	728	10	584
548	971	606	8072	15	606, 825
549	751	607	90, 91	16	283
550	285, 289	608	714	17	902
552	485	608 (2)	881	18	177
553	650	608	730	22	178
554	446	611	208	25	1021
555	210	615	417	27	694, 1004
555	863	618	463	28	118
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564	447			8	450
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567	833	6	49, 57, 227 238, 453	12	119
569	256	13	308	14	413, 420
575	335	15	1	15	496
577	341	18	113	16	344
580	108, 1096	20	265, 1000	18	946
582	1086	21	109, 492	20	1059
582	1087	22	485, 993	22	290
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—686 Ref 64 I C 953.  
—849 Dist 3 Lah 35.
- 891 R 64 I C 689.  
—922 Ref 46 B 250.
- 23 Bom 15 Ref 44 A 230  
—83 Foll 65 I C 14.  
—103 Ref 64 I C 534.  
—65 Rel 15 S L R 93.  
—137 Foll 42 M L J 364.  
—153 Foll 20 A L J 401.  
—177 Dist 26 C W N 213.  
—177 Ref 64 I C 988.  
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—602 Appr 1 Pat 292.  
—682 Dist 4 I C 68.  
—789 Ref 64 I C 614.  
—789 Foll 45 M. 266.
- 24 Bom 45 R (1922) M W N 477.  
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—507 Foll 20 A. L J 593.
- 25 Bom 275 Ref 26 C W N 364  
—337 Ref 20 A L J 329.  
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—479 Ref 64 I C 476  
—631 Foll 64 I C 860  
—639 Ref 9 O L J 444.
- 26 Bom 163 Ref 25 O C 145  
—396 Ref 64 I C 959  
—430 Ref 26 C W N 772.  
—445 Rel 25 O C 80.
- 27 Bom 23 Ref 44 A 65 : 105 ;  
109 Foll 64 I C 909.  
—363 Dis app 24 Bom L R  
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—424 Rel 64 I C 534.
- 28 Bom 11 Ref 26 C W N 488.  
—74 Ref 24 Bom L R 1040.  
—153 Foll 44 A 462 : 20 A L  
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—533 Ref 64 I C 657
- 29 Bom 107 Ref 1 Bur L J 12.  
—249 Cons 46 B 250.  
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—391 Foll 64 I C 750.  
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—580 Rel. 67 I. C 744.
- 30 Bom 1 Ref 64 I C 935 : 948.  
—537 Foll 64 I C 704.
- 31 Bom 54 Ref 42 M. L. J 507.  
—381 Ref 68 I C 298 : 64 I C  
721 Rel : 67 I C 237.  
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- 32 Bom 81 Foll 1 Pat 266.  
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—516 Exp and Dist 46 B 385 :  
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—572 Ref 64 I C 476.
- 33 Bom 325 Ref 16 L W 891.  
—636 Foll 46 B 651.  
—636 Foll 24 Bom L R 111  
dist 3 Lah 92
- 34 Bom 171 Dist 42 M L J 118  
—287 Ref 20 A L J 744.  
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—502 Disc 46 B 561.  
—618 Foll 64 I C 585.
- 35 Bom 29 Cons 24 Bom L R  
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—190 Disc 46 Bom 561.  
—225 Foll 2 P L T 626.  
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—452 Ref 9 O L J 444.  
—516 Ref 65 I C 220 : 18 N  
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- 36 Bom 1 (P C) Rel 64 I C 584.  
—94 Ref 16 L W 931.  
—156 Ref 26 C W N. 169.  
—275 Ref 64 I C 949 : 20 A L  
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- 37 Bom 84 Foll 42 M L J 364.  
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—639 Ref 68 I C 209.
- 38 Bom 10 Ref 65 I C 459.  
—41 Foll 49 C 880.  
—84 Ref 64 I C 876.  
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- 39 Bom 261 Dist 66 I C 584  
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- 40 Bom 34 Ref 65 I C 224.  
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—158 Not Foll 64 I C 618.  
—248 Ref 64 I C 966.  
—289 Foll 24 Bom L R 203.  
—386 Foll 49 C 698.  
—557 Cons 49 C 454.
- 41 Bom 70 Dist 64 I C 752.  
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—480 Foll 46 B 137.  
—636 Ref 64 I C 913.
- 42 Bom 5 Foll 3 Lah 30.  
—373 Appl 64 I C 809.

—411 Rel 68 I C 429.  
—629 Con and Dist 46 B 663.

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—181 Rel 46 B 195.  
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18 Bom L R 163 Foll 24 Bom L  
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 —633 Ref 36 C L J 161 : Ref  
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 6 C 8 Foll 65 I C 105,  
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- 493 Dist 67 I C 315.
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- 114 Foll 26 C W N 992.
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- 173 Dist 20 A L J 401.
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—346 Foll 45 M 450.  
—529 Foll 64 I C 738.

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—181 Foll 26 C W N 529 Ref 26 C W N 534.  
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—346 Foll 45 M 450.  
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—426 Ref 68 I C 167.  
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—191 Ref 36 C L J 472  
—281 Foll 49 C 661.  
—284 Disc 49 C 280.  
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—451 Foll 26 C W N 408.  
—523 N Foll 16 L W 178.  
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—155 36 C L J 124.  
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—56 Ref 64 I C 829.  
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—537 Foll 26 C W N 408  
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—672 Foll 49 C 574.  
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—47 Foll 68 I C 194.  
—73 N Foll 16 L W 178  
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—223 Dist 49 C 875.  
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—926 Dist 49 C 161  
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- 57 (F B) Foll 64 I C 210.
- 102 Rel 36 C L J 140.
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- 52 Foll 49 C 529.
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- 250 Appr 20 A L J 126.
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 ---56 Foll 26 C W N 772  
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 ---265 (F B) App 24 Bom. L  
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 ---312 N Foll 68 I C 191.  
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- 35 M 1 Ref 64 I C 689.  
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- 811 Ref 68 I C 641.  
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 ---952 Dist 45 M 528.  
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 ---687 Foll 3 Lah 35.  
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 ---246 Dist 9 O L J 285.  
 ---251 Ref 26 C W N 529  
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 ---440 Dist 45 M 434.  
 ---467 Ref 64 I C 732.  
 ---524 Dist 45 M 434.  
 ---561 Foll 64 I C 433.  
 ---577 Ref 65 I C 805  
 ---616 Disc 26 C W N 169.  
 ---659 Ref 44 A 29.  
 ---995 (F B) Dist 26 C W N  
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- 42 M. 41 Dist 64 I C 461.  
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36 C L J 406.

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# THE YEARLY DIGEST

1922

## I—INDIAN DECISIONS.

### ABADI

**ABADI**—Building on land—License—Implied from long user. See LANDLORD AND TENANT.

L R. 3 A. 152 (Rev)

**ABANDONMENT**—Ala maliks—Failure to Recover malikanam dues whether. See ADVERSE POSSESSION. 69 I. C. 6.

**ABATEMENT**—Order setting aside—If amounts to a judgment See LETTERS PATENT (CAL). CL. 15. 49 Cal. 62.

See under C. P. Code O. 22.

**ABWAB**—Nature of—Effect of Reg. V of 1812, S. 3—Law if affected by Bengal Patni Regulation, S. 3. See BENGAL PATNI REGULATION. S. 3. 26 C. W. N. 634.

#### ———Test of.

To find out whether a certain payment in a lease is an *abwab*, the test is to see if the particular item is the lawful consideration for the use and occupation of the land. If it is really part of the rent, it is not an *abwab*. 31 Cal 834. 18 C. L. J. 83 followed. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI v DEBI NATH MANJHI (1922) Pat 154 : (1922) P. 184

**ACCOMPLICE** — Evidence of — Corroboration necessity. See EVIDENCE ACT, S. 114, ILL. (B).

4 Lah. L. J. 91.

**ACCOUNTS SETTLED**—Re-opening of. See (1921) DIG. COL., I. PULIN BIHARI ROY. v. MAHENDRA CHANDRA GHOSAL. 67 I. C. 10.

#### ———Re-opening of—Not allowed.

Where the defendant examined the accounts and then executed a later account acknowledging the correctness of the prior account and a promissory note to pay the sum due, he cannot be allowed to go back on the settlement of accounts and reopen them. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDE v. BISHUN DATTA PATHAK. L. R. 3 A. 308.

#### ACCOUNTS—Splitting of—Test.

If the items in an account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be conti-

### ACQUIESCENCE.

nuous, so that one item if not paid, shall be united with another and form one continuous demand the whole together forms but one cause of action and cannot be divided.

It is a question of fact, to be determined on the merits of each case, whether there was an intention to keep only one account for all the dealings. (*Kemp. A.J.C.*) FIRM OF LILARAM MADHAVDAS v. FIRM OF HUSSEINBHAY KARIMJI AND SONS. 15 S. L. R. 207 : (1922) S. 15 : 67 I. C. 44.

#### ———Sut for — Procedure — Determination of defendant's liability—Filing of accounts.

In a suit for accounts by a principal against his agent or a beneficiary against a trustee where the defendant disputes his liability to account, that issue must first be determined before an account is taken. In a suit for accounts the court should, in the first instance, follow the procedure of calling upon the defendant to file his accounts. (*Miller, C. J., and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH v. MAHARAJA KESHO PRASAD SINGH. 3 Pat. L. T. 638

#### ACQUIESCENCE—Essential elements of—Assertion of right—Knowledge.

Where acquiescence is pleaded in bar of a claim it must be shown that the person acquiescing was aware of the matter in which he acquiesced and of the effect of such acquiescence. (*Miller, C. J. and Adami, J.*) BHONU LAL CHAUDHURI v. W. A. VINCENT. 3 Pat. L. T. 653 : 65 I. C. 822.

#### ———Elements necessary to constitute—Lessor and lessee—Trees.

For a defence of acquiescence to be successful it is necessary that the deft. should have acted in good faith believing that he had a valid lease and was entitled to plant the trees and that the plaintiffs knowing that he was under this mistaken belief should have abstained from doing anything to prevent his spending money in planting the trees. 21 A. 496 P. C.; 53 I. C. 683 Ref. (*Daniels, A. J. C.*) JAGANNATH v. DIN MAHOMED. 65 I. C. 705.

**ACQUIESCENCE.**

*Landlord and tenant—Building on land of landlord—Easement—Effect of.* See *ESTOPPEL, LANDLORD AND TENANT.*

4 U. P. L. R. (A) 82.

**ADMINISTRATION—Account—Suit against administrator as heir.**

Where an administrator is sued along with another as heirs for a valid debt and payment is made by him, credit must be allowed for that amount in accounts of administration. (*Macleod C. J. and Coyajec J.*) *JAMASJI v. JAMSETHI.*

(1922) Bom. 341.

**Marriage—Reasonable expense.**

Where the administrator without the authority of the court allowed 1/3 of the estate for the marriage of a girl although the direction of the testator was that all marriage expenses should be paid out of the estate; *Held*: what was meant was that reasonable expenses should be paid; and 1/3 of the estate was unreasonable. (*Macleod C. J. and Coyajec J.*) *JAMASJI v. JAMSETHI.*

(1922) Bom. 341.

**Suit against executor de son tort — Parties.** See **EXECUTOR.** 43 M. L. J. 486.**Suit for—Decree declaring shares of the heirs—Subsequent suit for distribution of shares**

—Maintainability of. See C. P. CODE, S 11  
64 I. C. 813.

**Suit for—Filing within 6 months from grant of probate—Maintainability.**

A suit for administration can be instituted before the expiry of the period of six months from the grant of probate as otherwise an estate might be irreparably wasted but there must be some good ground for bringing it before the period of 6 months. (*Woodroffe and Cuming, JJ.*) *J. N. GHOSE v. B. B. DAS.*

(1922) Cal. 302.

**Suit for—Rule of *lis pendens* if applies.** See T. P. ACT S. 52. 1 Bur. L. J. 133.**Suit for—Properties situate outside British India—Form of decree.**

One of the incidents of an administration suit is the partition of the estate and, where necessary, the sale thereof under the orders of the Court. Such suits cannot be filed in places other than the place where the property is situate except where the property is situate within the jurisdiction of different courts in British India, in which case the plff. is at liberty to choose his forum. Where however a person in whose hands are properties situate outside British India claims a share in the administration suit, the court can rightly place the condition that on his obtaining such share he will account for that portion of the estate in his hands. (*Maung Kin and Higginbotham, JJ.*) *AYESHA BEE v. GULAM. HUSAIN.*

66 I. C. 530.

**Will—Bequests to charity—Sanction of Advocate General—Not necessary.** See C. P. CODE S. 92. 31 M. L. J. 63 (H. C.): 16 L. W. 922.**ADMINISTRATOR GENERAL'S ACT, S. 52—Administration commenced before Act of 1913—Distribution of assets after the Act—Right of Administrator General to commission.****ADVERSE POSSESSION—Communal Land**

For the purpose of arriving at the amount of commission payable to the Administrator General in the administration of an intestate estate in cases where the administration commenced before April 1914, the value of the assets is to be taken at the date of their distribution. (*Sir Walter Schwabe, C. J. and Coutts Trotter, J.*) *THE ADMINISTRATOR GENERAL, MADRAS v. RAMIAH.* (1922) M. W. N. 571: 43 M. L. J. 347: 16 L. W. 711: (1922) Mad. 491.

**ADMIRALTY JURISDICTION—Bombay High Court—Service on ship—Writ of summons—Warrant of arrest.**

It is not essential under the Admiralty Rules of the Bombay High Court to issue a writ of summons in addition to issuing a warrant of arrest. (*Marten, J.*) *FREEMAN v. S. S. "CALANDA."* 24 Bom. L. R. 1167.

**ADMISSION—Reliance on—Scope of.**

It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of the defendant, he must accept the admission as a whole. It is not open to him to pick out such parts of it as may be favourable to him and neglect the rest. (*Brown, A. J. C.*) *MG. SHWE MYIN v. MA NAING* 1 Bur. L. J. 248.

**ADVERSE POSSESSION — Animus Possidendi Adopted son in possession —Invalid adoption —Effect of.**

The status of joint ownership with rights of survivorship could not be acquired by prescription. *Held* that an adopted son, whose adoption was found to be invalid, had not prescribed for an absolute estate with rights of survivorship with his adoptive father. (*Ayling and Odgers, JJ.*) *RAJAMBAL AMMAL v. SHANMUGA MUDALIAR.*

(1922) M. W. N. 481.

**Buddhist monasteries —If can be acquired by.** See LIM. ACT, ART, 144. 1 Bur. L. J. 108.**Burden of proof.**

When a title by adverse possession is set up, the burden of proof is upon the person who sets it up to allege and establish such title. (*Mookerjee, A. C. J.*) and *Fletcher, J.* *BEPIN BEHARI SAHA v. CHARU CHANDRA GHOSE.* 35 C. L. J. 192.

**Co-heirs — Entry of name in revenue papers—Ouster.** See (1921) DIG. COL. 3, *DEOKI-NANDAN v. ZAMIR HUSAIN KHAN.*

(1922) All. 399: 64 I. C. 24.

**Co-heirs—Possession of one not adverse.**

In the case of co-heirs the possession of one is presumed to be on behalf of all the heirs and is not adverse to them. (*Hopkins, S. M. and Freeman, J. M.*) *WILAYAT SHAH v. WAHID SHAH.*

4 U. P. L. R. (B R.) 10.

**Communal land—Shamlat land—Acts necessary to constitute adverse possession**

Where with the permission of the proprietary body of a village a cosharer encloses a much larger portion of the shamlat than he would be entitled to on partition, his possession is not adverse to the general body of cosharers. A vendee from such cosharer stands in the same position as his vendor unless he gives notice to

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the cosharers that he holds in his own right the whole of the enclosed area. Exclusive occupation by a cosharer only for a portion of the year of common land does not vest in him an absolute title thereto even though such periodical occupation continued during 12 years. 48 C. 1; 14 P. R. 1916 : 38 B 84 Ref. (*Broadway and Harrison, JJ.*) *BIRJOO v. BHIKHU*. (1922) Lah 325 : 4 L. L. J. 3 : 64 I. C. 876.

— Co mortgagors — Redemption by one. See (1921) DIG. COL. 3 *RAM NARAYAN RAI v. RAM DENI RAI*. 6 Pat. L J 680 : (1922) Pat. 129.

— Constructive possession—Possession of part, if possession of whole—Trespasser.

As a general rule possession of part is in law the possession of the whole if the whole is otherwise vacant ; but constructive possession of this kind can only be presumed when there is a claim based on title and possession by a trespasser is confined to the land actually occupied by him. 12 O. C. 58 Ref. (*Wazir Hasain, A.J.C.*) *DURGA v. RAM PADARATH*. 65 I. C. 749.

— Constructive possession—Trespasser. See (1921) DIG. COL. 3 *MAHARAJAH OF COOCH BEHAR v. RAJA MAHENDRA KANJAN RAI CHAUDHURI*. 66 I. C. 923

— Co-owners—Entry in records as owner—Claim set up in suit—Effect.

When the question was as regards title to a well and the evidence let in consisted of entries in revenue records of 1857 wherein the wells were claimed in ownership, the same being set up in a litigation of 1891 between the parties.

Held, possession began to be adverse at least from 1891 and referred to ownership in twelve years therefrom. (*Broadway and Abdul Qadir, JJ.*) *LALA v. KHALAS*. (1922) Lah. 102 : 4 Lah L. J. 181

— Co-owners—Onus.

In a suit for possession by one co-owner against another, the latter cannot succeed unless he definitely proves that he has been holding the land adversely against the world for 12 years ; plaintiff having proved title, the onus is on the defendant to prove he was not entitled to property. (*Macleod, C.J. and Shah, J.*) *VINAYAK KESHAV GULVE v. BALA SHIVRAM HINGNE*. 24 Bom L R 261 : (1922) Bom. 94 : 67 I. C. 176.

— Co owners—Ouster—Exclusive possession.

The sole occupation by one cosharer, of a portion of joint property, does not constitute an ouster of the other cosharers ; and a cosharer in possession of a portion of the common land, with the tacit or express consent of his cosharers cannot change the nature of that possession. 43 M. 244 ; 28 C. L. J. 437 ; 21 C. L. J. 253 ; 41 C. 436 Ref. (*Mookerjee and Cuming, JJ.*) *KAILASCHANDRA NAG. v. BIJAYCHANDRA*. 36 C. L. J. 434.

— Co-owners—Ouster—Necessity for.

Among co-owners the possession of one is the possession of all the co-owners and, in the absence of an ouster or something equivalent to ouster, there is no question of adverse possession, 37 A;

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203 *Corea v. Appuhany* (1912) App. Cas. 230 foll. 38 M. L. J. 313 (P. C.) Ref. (*Stuart. J.*) *LACHMI NARAIN alias LALMAN v. NAUNHA MAL*. 64 I. C. 471.

— Co-owners—Ouster—Necessity for—Issue necessary to be raised. See (1921) DIG. COL. 3 *CHANDBHAI MAHOMEDBHAI v. HASANBHAI RAHIM-TULA*. 46 Bom. 213 : (1922) Bom. 150 : 64 I. C. 205.

— Co-owners—Ouster Possession of one joint tenant when adverse. See (1921) DIG. COL. 4 *JOYNARAYAN SEN UKIL v. SRIKANTA ROY*. (1922) Cal. 8 : 26 C. W. N. 206 : 65 I. C. 8.

— Co owners—Sale by one of Specific portion in possession.

Where the sale is made by one co-sharer of a specific portion of the joint holding, which portion is in his possession and possession of which is immediately delivered to the purchaser, the possession of such purchaser is adverse from the moment of his entry. A co-owner's possession of the area cannot be adverse to his co-sharers until he has definitely declared to them his intention of holding on his own behalf, but this principle does not apply to the alienee of a co sharer and if the purchaser obtains possession of the entire area brought by him under the deed of sale that possession must be regarded as adverse to the co-sharers from its commencement, (*Broadway J*) *ANWAR v. KISHEN SINGH*. (1922) Lah. 205.

— Co-owners—Trespass by stranger—Co-owner holding as lessee under trespasser—Effect of.

Where a stranger trespasses on land and ousts all the co-owners and subsequently one of the co-owners holds the land as lessee from the trespasser for more than 12 years, the possession of the lessee is not the possession of his co-owners and it extinguishes the title of all the co-owners to the land. (*Chatterjee and Sukrawardy, JJ.*) *BHOLANATH DE v. GOLABDI SARDAR*. 35 C. L. J. 164 : 64 I. C. 553.

— Co-sharers—Acquiescence — Effect of — Permissive possession—Presumption.

It is not an inflexible rule of law that a co-sharer's possession is the possession of all the co-sharers. The question depends on the circumstances of each case. Where co-owners are cousins by marriage who succeed to certain property, and one of them occupies more than his own share of the property without in any way indicating that he is doing so on behalf of the other, he really ousts the other co-sharer from possession of the portion exclusively occupied by him. A consent to usurpation of possession by another does not prevent his possession from becoming adverse. (*Walsh, J.*) *MUSTAFA KHAN v. DULARI*. 3 U. P. L. R. (A) 5 : (1922) All. 433 : 65 I. C. 75.

— Co-sharers — Adna maliks and Ala maliks—Non-payment of dues—Effect of.

Where the defendants rights as *ala maliks* existed before the settlement of 1858 and were affirmed in that settlement, their omission to enforce their rights does not imply an abandonment of their rights, Mere failure to pay dues



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does not establish adversity of possession. (*Le Rossignol and Abdul Qadar, JJ.*) *LEKHU RAM v. MAHOMED RAMZAN.* 69 I. C. 6.

—Co-sharer—Alienation by—Position of alienee.

Where a cosharer in a field alienates his share the alienee is in the same position as the cosharer. Consequently the delivery of symbolical possession to an execution purchaser of the share of another co-sharer does not start adverse possession against the private purchaser. 104 P. R. 1919 foll. (*Wilberforce, J.*) *MALIK KHAN v. NAWAB.* 4 Lah. L. J. 307.

—Co-sharer—Alienation—Possession of when adverse.

Where a vendee from one of the co-sharers of shamilat land occupied the land and enjoyed it in the same way as his vendor, but the land was utilised by the other co-sharers for pasturing as before held that the possession of the alienee was not adverse to the body of co-sharers. 48 Cal. 1; 14 P. R. 1915; 39 Bom. 84 Rel. (*Broadway and Harrison, JJ.*) *BIRJOO v. BHIKHU* (1922) Lah. 325; 4 Lah. L. J. 3; 64 I. C. 876.

—Cosharer—Denial of title.

Possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title. Limitation can run, if at all, only from that date. (*Lord Atkinson.*) *ARAB ALI KHAN v. MAHMAD ALI KHAN.* 43 M. L. J. 104; 35 C. L. J. 554; 31 M. L. T. 94 (P. C.); 20 A. L. J. 545; 24 Bom. L. R. 951; (1922) P. C. 84; 67 I. C. 444 (P. C.).

—Co-sharers—Exclusive possession—Ouster.

Where the widows of two brothers inherited their husband's property and one of them left her husband's abode and became a mendicant while the other continued in sole possession of the entire property and paid rents and taxes and appropriated the whole profits of the estate to the exclusion of the other widow, Held that the possession of the widow was exclusive and hostile so as to deprive the absent widow, of her rights in the estate. (*Teunon and Newbould, JJ.*) *CHAITANA KRISHNA MANDAL v. SOUDHAYAMANI DAS.* 64 I. C. 773.

—Co-sharers—Ouster—Binding on land—Elements necessary to constitute adverse possession among co-sharers. See (1921) DIG. COL. 5. *JAGANNATH MARWARI v. CHANDNI BIBI.* 67 I. C. 31.

—Co-sharers—Ouster—Knowledge essential to constitute possession of one co-sharer adverse to others.

In order to prove dispossession of one co-sharer by another, it must be shown that there was exclusion or ouster to the knowledge of the former. The principle does not depend on whether the parties are members of a joint family but rests upon the ground that they are co-owners and is applicable to all cases of co-owners. There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy, and if no notice is given to the cosharer of the denial of his

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right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. 26 C. W. N. 65; 26 C. W. N. 206; 29 Bom. 300 Rel. (*Chatterjee and Pearson, JJ.*) *JAGENDRA NATH MOOKERJEE v. RAJENDRA NATH BHATTACHARJEE.* 26 C. W. N. 890; (1922) Cal. 54; 68 I. C. 200.

—Co sharers—Shamilat land—Evidence of hostile enjoyment—Entry in Govt. records—Interruption of possession.

The rule deducible from the various authorities is that in order to establish complete ownership by adverse possession over shamilat land, the co-sharer claiming exclusive ownership must show two things, namely, (i) that the land has been in his exclusive possession, and (ii) that he has openly asserted his exclusive ownership or has done some overt act to show the intention of holding the land as his own.

The mere retention by the Revenue Authorities of the names of other co-sharers as such, after exclusive possession was taken by one co-sharer after some overt act does not prevent limitation running against them. 45 P. R. 1914. Nor does even a decree in their favour, not accompanied by actual effective assertion of rights and taking of possession of those rights, help them. 29 B. 300, (1911) 1 M. W. N. 207 Rel. (*Abdul Raoof and Moti Sagar, JJ.*) *HANS RAJ v. MAULU.* 63 I. C. 881.

—Co-sharers—Sole occupation by one.

As between co-sharers, the mere fact that one of the co-sharers is in sole occupation of the property does not, by itself, show that such possession is adverse to the others. 16 C. W. N. 849; 24 C. W. N. 1057 Rel. (*Chatterjee and Cumming, JJ.*) *SHEIKH SHACHUNI v. SHEIKH BASIR.* 64 I. C. 613.

—Co-sharers—Withholding of share of collections—Effect of.

Where there is joint collection of rents the mere failure to deliver to the plaintiffs their share of the collections would not constitute adverse possession. 6 Pat. L. J. 478; 8 M. I. A. 199 Rel. (*Coutts and Das, JJ.*) *KULDIP SINGH v. RAM SEWAK SINGH.* 67 I. C. 795.

—Co-tenants—Ouster—Non participation in profits.

Where a tenant-in-common has not been in participation of the rents and profits for a considerable length of time and other circumstances concur, the court may take that fact into consideration in deciding whether there has been an ouster. (*Mears, C. J. and Piggott, J.*) *NANHAY LAL v. LACHMI NARAIN.* L. R. 3 A 605.

—Elements of—Possession of tenants when adverse to landlord. See (1921) DIG. COL. 7. *JOGENDRA NATH SAHA CHAUDHURY v. JAGADIN NATH ROY BAHADUR.* 67 I. C. 170.

—Elements of—Precarious or permissive possession—What is.

A person who has acquired a precarious possession is not deemed to have judicial possession.

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He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation, in such circumstances, is imperfect. It is vitiated by the duty to restore and must, therefore be deemed as equivalent to permissive possession. Permissive possession does not barely rest on an expressed agreement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. (*Wazir Hasan, J.*) *MAQBUL AHMAD v. FARHAT ALI*,  
4 U. P. L. R. (O C) 6 : (1922) Oudh 152 :  
66 I. C. 461

**—Evidence of—Beneficial owner.**

Against a person clothed with all the insignia of beneficial ownership, strong and reliable evidence is necessary to prove dispossession or adverse possession. (*Lord Atkinson*), *ARAB ALI KHAN v. MAHMAD ALI KHAN*,  
43 M. L. J. 104 : 20 A. L. J. 545  
35 C. L. J. 554 : 31 M. L. T. 94 (P. C.)  
24 Bom. L. R. 951 : (1922) P. C. 84 :  
67 I. C. 444. (P. C.)

**—Hindu reversioner—Possession adverse to nearest reversioner, not adverse to a remote reversioner.** See LIM ACT, ART. 144.  
4 Lah. L. J. 201,

**—Hindu widow—Family arrangement—Possession under if adverse to other members of the family.**

The possession of a Hindu widow of family properties under an award embodying a family arrangement is not adverse to the other members of the family. (*Stuart and Sulaiman JJ.*) *RADHA DULAIYA v. RASHIK LAL*,  
L. R. 3 A. 544. 20 A. L. J. 814.

**—Hindu widow—Reversioner if bound.**

Adverse possession against the widow is not adverse against the reversioners during the life time of the widow. (*Scott Smith and Dundas, JJ.*) *NAND SINGH v. MT. DHAN KAUR*,  
2 Lah. L. J. 573 : 68 I. C. 299.

**—Hindu widow—Possession adverse to widow not adverse to reversioner.**

Possession adverse to a Hindu widow which commences during her life-time cannot be adverse to the reversioners. (*Daniels and Lyle, A. J. C.*) *MT. PARBATI v. SAYYID MAHOMED HADI*  
9 O. L. J. 304 : 68 I. C. 534.

**—Hindu widow—Possession under ekrar-namah.**

Where after the death of the last male owner, a brother of his takes possession claiming it under a gift deed, and later obtains an ekrar-namah from the widow, admitting the gift, his possession is not adverse to the widow. (*N. R. Chatterjee, and Sukrawardy, JJ.*) *SARAT CHANDRA CHATTERJEE v. SATINDRA MOHAN BANERJEE*,  
63 I. C. 887.

**—Interruption of—Abandonment or relinquishment—Disclaimer.**

Where a trespasser in adverse possession of property makes a statement to the rightful owner

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that he disclaimed interest in the property but does not abandon or relinquish possession, the mere admission does not convert possession which was previously adverse into possession of a different character. (*Lindsay, J. C.*) *MAULVI ABDUL RASHID v. JANKIDAS*,  
9 O. L. J. 2.  
4 U. P. L. R. (O C.) 61 : (1922) Oudh. 24 :  
66 I. C. 941.

**—Interruption of—Attachment under S. 146 Cr. P. Code—Effect on title of true owner—Possession of court on behalf of party rightfully entitled.** See (1921) DIG. COL. 8 *SARAT CHANDRA NAITI v. BIBHABATI DEBI*,  
66 I. C. 433.

**—Interruption—Declaratory judgment—No interruption of possession.**

A merely declaratory judgment against the defendant in a suit does not have the effect of putting an end to the adverse possession of the defendant nor does such a decree give a fresh starting point to the true legal owner to sue for possession of the property. 44 B. 234 dissented from. 9 M. L. T. 171 ; 9 M. L. T. 420 followed. (*Spencer and Venkatasubba Rao, JJ.*) *SINGARAVELU MUDALIAR v. CHOKKA MUDALIAR*,  
16 L. W. 544 : (1922) M. W. N. 676 :  
43 M. L. J. 737.

**—Interruption of—Delivery of symbolical possession.**

Delivery of symbolical possession does not in any way affect the possession or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings 5 C. 584 ; 16 C. 530 ; 27 C. L. J. 191 Ref. As regards persons not so parties only actual possession can interrupt their adverse possession. The same principle has been extended to the case of purchasers at a revenue sale. (*Mookerjee and Chotzner, JJ.*) *JOBEDA KHATUN v. TULSI CHARAN DAS*,  
36 C. L. J. 472.

**—Interruption of—Effect of delivery of symbolical possession.** See C. P. CODE, O 21, R. 95,  
24 Bom. L. R. 232,

**—Interruption of—Submerged land—Periodical inundations—Effect of Sec (1921) DIG. COL. 9 MAHARAJAH OF COOCH BEHAR v. RAJA MAHENDRA RANJAN RAI CHAUDHURI**  
66 I. C. 923.

**—Interruption—Symbolical possession—Effect of.**

Symbolical possession interrupts adverse possession of a party against whom the symbolical possession is obtained (5 Cal. 584 and 22 C. W. N. 330 followed). (*Walmsley and Ghose, JJ.*) *JOGENDRA NATH BHOMICK v. DINANATH DASS*,  
(1922) Cal. 313.

**—Interruption of—Symbolical possession—Delivery of in cases not contemplated by the C. P. Code and against person not bound by the decree, ineffective to interrupt adverse possession.** See C. P. CODE O, 21, R. 36.  
24 Bom. L. R. 499.

**—Landlord and Tenant—Ejectment—Decree conditional on payment of compensation.**

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*Decree not executed—Effect of—Subsequent suit for redemption.*

A suit for ejectment by a landlord against his tenant was decreed subject to the payment of compensation for improvements. The decree was not executed and the tenant continued in possession thereafter for more than 12 years. In a suit to eject the defendant on redemption by payment of the sum specified in the previous decrees as compensation.

*Held*, that the decree in ejectment suit did not create or establish the relation of mortgagor and mortgagee between the parties to the suit and therefore a suit for redemption did not lie.

Ever since the previous suit, the possession of the defendants had been adverse to the plaintiff and the present suit was, therefore, barred by time. (*Scott-Smith, J.*) *FAZAL v. MIHAN KHAN.*

15 P. L. R. 1922. (1922) Lah. 70 : 64 I. C. 352.

———*Landlord and tenant—Entries in revenue records—Non-payment of rent—Effect of.*

Notwithstanding non-payment of rent a tenant entered as such in the revenue records continues to be a tenant and mere non-payment of rent does not give any higher rights. (*Wazir Hasan, A. J. C.*) *DURGA v. RAM PADARATH.*

65 I. C. 749 : 8 O. L. J. 495.

———*Landlord and tenant—Non payment of rent—Non-performance of services.*

Mere non-payment of rent or discontinuance of payment of rent does not start adverse possession against the landlord 40 C. 173 Ref. A thekadar who fails to collect the rents and pay the sums to the proprietor does not acquire an adverse title to the proprietor (*Mr. Amcer Ali*) *JAGDEO NARAIN SINGH v. BALDEO SINGH.* (1922) P. C. 272 :

36 C. L. J. 499 : 3 Pat. L. T. 605 : 49 I. A. 399 (P. C.)

———*Landlord and tenant—Notice to quit—Continuance of tenant in possession—Effect of.* See LANDLORD AND TENANT, NOTICE TO QUIT.

68 I. C. 178.

———*Lessor and lessee—Case of successive leases.*

The possession of a trespasser during the continuance of a lease does not become adverse against the lessor; the lessor is in possession by receipt of rents from the lessee and so long as such rent is not intercepted by a trespasser, he cannot be said to be dispossessed.

The position may be different where there are successive leases for terms and the termination of one. If the landlord gives a fresh lease without exercising his right to eject, time may begin to run against him from that date. Case Law fully referred to (*Mookerjee, Neubould and Pearson, JJ.*) *UDAI KUMAR DAS v. KATYAINI DEBI.*

35 C. L. J. 292 : (1922) Cal. 87 : 69 I. C. 126.

———*Limited owner—Mortgage right—Void mortgage—Mortgage in possession—Rights of.* See (1921) DIG. COL. 40. *SONTYANA GOPALA DASU v. INAPUTALAPULA RAMI.* 64 I. C. 328.

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———*Limited interest—Sale invalid—Lease for a long term—Acquisition of that interest.* See BOM. BHAGDARI ACT, S. 3.

24 Bom. L. R. 1315.

———*Limited interest—Status of tenant.*

Limited interest, such as the status of a tenant can be acquired by prescription, (*Mookerjee, A. C. J. and Fletcher, J.*) *SATYENDRA NATH BANERJEE v. KRISHNASAKHA KAR.*

35 C. L. J. 185 : (1922) Cal. 193 : 69 I. C. 7.

———*Limited interest—Status of a tenant, if can be acquired by.*

The status of a tenant can be acquired by prescription on the well recognised principle that a Limited interest in property can be acquired by adverse possession, (*Mookerjee, A. C. J. and Fletcher, J.*) *UJIR ALI SARDAR v. SHADHAI BEHARA.*

35 C. L. J. 182 : (1922) Cal. 185 : 68 I. C. 1003.

———*Limited interest—Under proprietary right.*

It is open to a person to acquire an under-proprietary right by prescription. (*Hopkins S. M. and Fremantle, J. M.*) *RAM NARAIN v. SHEIKH ABDUL RAHMAN.* 4 U. P. L. R. (B. R.) 59.

———*Malabar Tarwad—Tavazhi—Possession of Tavazhi when adverse to tarwad of which it is a branch.* See MALABAR LAW, TARWAD.

16 L. W. 768.

———*Mortgagor and mortgagee.*

Mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless they can prove a subsequent valid sale. (*Scott Smith, J.*) *AMIR v. NADIR ALI.*

68 I. C. 733.

———*Mortgagor and Mortgagee.*

During the continuance of a mortgage no act of mortgagee alone can make his possession adverse but where both parties treat the mortgage as having come to an end, any continuance in possession must be deemed to be adverse. (*Daniels and Lyle, A. J. C.*) *BIJAI PARTAB SINGH v. RAGHURAJ SINGH.* 9 O. L. J. 173 :

4 U. P. L. R. (J. C.) 33 : 25 O. C. 115 : (1922) Oudh 7 : 67 I. C. 572.

———*Mortgagor and mortgagee—Decree of court declaring that relationship never existed—Possession subsequent to decree.*

A decision of Court which in effect says that the relationship of mortgagor and mortgagee never existed between two persons renders the subsequent possession of the mortgagee adverse to the mortgagor. (*Ayling, Off. C. J. and Odgers, J.*) *OMAYURUPAGAM MUTT v. SIVA-SOORIA THEVAN.* 42 M. L. J. 144 : 16 L. W. 475 : (1922) Mad. 407.

———*Mortgagor and mortgagee—Mortgagee acquiring rights of one mortgagor—Effect.*

If a mortgagee gets in the equity of redemption from one of two co mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, then it may be said that the right of the co-mortgagor to redeem his share;

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will be extinguished after twelve years. The position is otherwise, in the absence of knowledge of the purchase. (*Macleod, C. J. and Shah, J.*) IBHRAM GULAM HUSAIN MULNAJI v. MOHIDDIN BALKU MODAK. 24 Bom. L. R. 287. (1922) Bom. 1: 67 I. C. 219

—Mortgagor and mortgagee—Puisne mortgagee if bound to sue for possession See (1921) DIG. COL. 11. INDAR SINGH v. BASANTA.

4 Lah. L. J. 13: (1922) Lah. 91.

—Mortgagor and mortgagee—Simple mortgagee not entitled to possession.

An adverse possession against a mortgagor does not affect a simple mortgagee who as such is not entitled to possession. 44 Cal. 425 Ref. (*Mookerjee and Pantou, JJ.*) SITAL CHANDRA MAJHI v. PARBATI CHARAN CHAKRABARTI.

35 C. L. J. 1: (1922) Cal. 32.

—Mortgagor and mortgagee—Simple mortgage—Possession adverse to mortgagor when adverse to mortgagee.

When after a simple mortgage has been granted, a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against the mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. 39 M. 811; 44 C. 425 Ref. (*Adami, J.*) KUNJ LAL v. KANHAI MAHTO. 68 I. C. 641.

—Mortgagor and mortgagee.

Where the mortgage is still subsisting, the mortgagee cannot be allowed to set up any title by adverse possession during the period within which the right of redemption subsists. (*Chevis, J.*) ZORA v. CHANDU. 68 I. C. 883.

—Mortgage with possession—Void sale of equity of redemption—Effect of.

S, the owner of certain property mortgaged it in 1898 with possession. S died in 1899 and soon after his eldest son, a minor, purported to sell the equity of redemption to the defts. The vendees redeemed the mortgage in 1908 and an younger son of S. instituted a suit for redemption in 1918. The defendant contended that their possession was adverse since 1899 and that the present suit was barred. Held, that the sale to defts. being void, the possession of the mortgagee was on behalf of the rightful owners, the sons of the mortgagors and was not adverse to them till 1908 when the defendants obtained possession. Consequently the suit for redemption was in time and there was no acquisition of title by adverse possession on the part of defendants. (*Shah, A. C. J. and Crump, J.*) RAMLINGAPPA v. DHONDI SUBRAO.

24 Bom. L. R. 1304.

—Nature of—Question of fact.

The question of adverse possession is essentially a question of fact. (*Das and Adami, JJ.*) KHUB LAL UPADHYA v. JUGDISH PRASAD SINGH. 1 Pat. 23: (1922) P. 398; 3 Pat. L. T. 195.

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—Office—Vatan lands—Adverse possession by Jaghirdars—Patilki and Kulkarni vatan Nadgir vatan—Knowledge of assertion of hostile right.

The plaintiff was one of the eldest members of the family of Jaghirdars, to whom the village of Hebli was granted in Jaghir in 1748 A. D. inclusive of the confiscated lands of the Patilki and Nadgir Vatan. The latter lands had been resumed by Government prior to 1723 for non-payment of jodi. The plaintiff's family was in possession of the bulk of those lands and exercised the rights of the service of Patilki and Kulkarni: the lands were entered in their names as 'Kamavishi' in Government records. Somehow a small portion of the lands went into the possession of the defendants who belonged to the Nadgir family. In 1876, the defendants obtained possession of another portion of the lands from the plaintiff's family through a Civil Court: but from the date of the suit in 1868, the plaintiff's family discontinued entering the Vatan lands as 'Kamavishi', in its books. In an inquiry under the Bombay Hereditary Offices Act 1874 it was held by the Collector in 1906 and by the Government in 1908 that the whole of the Patilki and Kulkarni Vatan should be entered as such in the Vatan register against the names of Nadgir defendants and that so much as was required for the emolument of the officers should be recovered from the Jaghirdars in possession. Accordingly, a contribution was levied against the Jaghirdars in 1913. Thereupon, the plaintiff sued for a declaration that his family were Vatan-dars' Patils and Kulkarnis by virtue of the grant; or in the alternative by their long and exclusive possession and enjoyment of the offices until 1908:—

Held that the manner in which the Vatan lands were treated both by Government and the Jaghirdars showed that the lands had not become the absolute property of the Jaghirdars:

(2) that it was not competent to the Jaghirdars to acquire the offices of Patil and Kulkarni by adverse possession:

(3) that assuming that the Nadgir defendants were entitled either by agreement or by custom to get back their Vatan lands on payment of 'jodi' time would not begin to run against them until they were made aware that the Jaghirdars were setting up a title to hold the Vatan lands in their own right and there was nothing to show that the Nadgirs were aware of any alteration in the method of keeping the village accounts. (*Macleod, C. J. and Shah, J.*) SHRINIVAS LINGO NADGIR v. SECRETARY OF STATE FOR INDIA.

24 Bom. L. R. 214: (1922) Bom. 18.

—Pond—Not capable of physical possession—Intermittent user—Effect of.

Intermittent user of a pond accompanied by no assertion of right is a very common phenomenon in India and often arouses no opposition. The pond is not susceptible of actual physical possession by the legal owner and possession follows title unless the usurper can prove long and continuous exclusion of the rightful owner. (*Le Rossignol, J.*) BHURU v. DATU RAM. 4 Lah. L. J. 461: (1922) Lah. 99.

**ADVERSE POSSESSION.**

—Proof of—Possession referable to lawful origin.

Where possession can be referred to a lawful origin the presumption is that it was acquired lawfully and the burden is on the party asserting adverse possession to prove his case. (*Daniels and Lyle, A. J. C.*) *KUAR NAGESHAR SAHAI v. SHIAM BAHADUR* 9 O. L. J. 262 : (1922) Oudh, 231

—Religious Endowment—Property vested in idol and mahant—Distinction between—Starting point of limitation. See LIM. ACT. ART. 144. 3 Pat. L. T. 352.

—Running of time—Abandonment of right—Evidence.

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title by being in possession for the full prescriptive period. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the interruption took place. 29 C 518 P. C. Ref (*Wazir Hasan, A. J. C.*) *DURGA v. RAM PADARATH.*

65 I. C. 749 : 8 O. L. J. 495.

—Service tenure—Failure to perform services—Effect.

In the case of a service tenure, the fact that no services were performed for more than 12 years cannot make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service. (*Coutts and Ross, JJ.*) *NAND LAL SAHU v. TIKAIT SRINIVAS HUKUM SINGH DEO.*

1 Pat. 292.

—Submerged land—Derelict condition—Title of true owner when lost. See (1921) DIG. COL. 11 SECRETARY OF STATE FOR INDIA v. WAZED ALI KHAN. 65 I. C. 866.

—Submerged land—Discontinuance of possession—Revival of possession of true owner—Interruption of adverse possession. See LIMITATION ACT, ARTS. 142 AND 144. 20 A. L. J. 756.

—Submerged land—Interruption of possession—Constructive possession.

Where land in the possession of a trespasser is submerged on account of floods the possession of the land during the period of submersion vests in the true owner and operates as an interruption of the possession of the trespasser. (*Wazir Hasan, A. J. C.*) *BACHCHA SINGH v. SRI KAMLAPAT PRASAD.* 65 I. C. 769 : 8 O. L. J. 501.

—Submerged land—Possession with true owner. See (1921) DIG. COL. 12 JOGENDRA NATH SAHA CHAUDHURY v. JAGADINDRA NATH ROY BAHADUR. 67 I. C. 170.

—Symbolical possession—Effect of delivery

Where the property is Zemindari property, is let out to tenants for cultivation and is not of a nature of which actual possession could be obtained by the purchaser, the delivery of formal possession to the pff., gives a fresh starting point of limitation to him against the defendant

**AGENCY RULES.**

judgment-debtor. 19 A. L. J. 469 dist. (*Ryves and Gokul Prasad, JJ.*) *RAM LALLAN SINGH v. HARAKH NARAIN RAI.*

20 A. L. J. 641 : (1922) All. 463.

—Vacant land—Presumption—Possession and title.

Possession of open sites would naturally go with the possession of the building which they adjoin. Where plaintiff is the owner of the building as well as the site and has been in possession of the building, this is one of these cases in which the fact of the plaintiff's title comes to his aid with greater force as far as the evidence goes with regard to the possession of the open sites. (*Macleod, C. J. Coyajee, J.*) *MAHAMED SAHIB IBRAHIM SAHIB v. TILOKCHAND.* 24 Bom. L. R. 373 : (1922) Bom. 243 : 66 I. C. 764.

—Vacant site—Temporary acts of user—If confer title.

In the case of a vacant site which is not of any use to the owner, mere storage of bricks and wood and tethering cattle would not be considered objectionable by the proprietors of the lands and such user would not amount to an assertion of ownership, so as to confer title by adverse possession. 16 Bom 338 ref. to. (*Broadway, J.*) *CHANDAN v. BAHADUR.*

4 Lah. L. J. 168 : (1922) Lah. 82 : 68 I. C. 263:

4 U. P. L. R. (L) 106.

—Waste land—Intermittent and temporary user.

In the case of waste land, mere intermittent and temporary user such as tethering of cattle and storing of fodder are insufficient to establish a title by adverse possession. 16 B 338 foll. (*Abdul Raoof, J.*) *MANSA v. KHUSHALI RAM.*

4 Lah. L. J. 467 : 56 P. L. R. 1922 : 69 I. C. 4.

**ADVOCATE**—See LEGAL PRACTITIONER.

**AGENCY RULES**—Decree passed by Court outside Agency tracts for sale of property within such area—Execution—Legality of decree—Objection to.

It is not competent to civil courts exercising jurisdiction outside the Agency area to pass a decree for the sale of properties situate within the area. When such a decree is sought to be executed within the Agency area, the Agency court has a right to refuse execution on the ground that the decree is, on its face without jurisdiction and a nullity, 42 M. 813 foll. 43 M. 675 dist. (*Krishnan and Venkatasubha Raw, JJ.*) *KRUTHIVENTI PERRAZU v. SRI RAJAH NALLAPARAZU MEERJA SEETHARAMA CHANDRA.*

16 L. W. 669 : (1922) M. W. N. 728.

**AGENCY RULES (GODAVARI)** R. 3, 2 and (3)—Cancellation of pleader's sanad—Judicial act—Suit for declaration.

Where the Government Agent of Godavari Agency cancelled the sanad of a pleader in the Agency tract for misconduct, and the pleader first preferred an appeal to Government who declined to interfere, and subsequently filed a suit in the Agency Court for the cancellation of the Agent's order. Held, the Agent acted as a Court and no suit lay against a Court for what it did as such Court. 9 Mad. 888 Dist. (*Spencer and*

## AGENCY RULES.

*Ramasam, J.J.* VKNKATARAMAYYA v. SECRETARY OF STATE FOR INDIA. 42 M. L. J. 148 : 15 L. W. 236 : (1921) M. W. N. 830 : 30 M. L. T. 76 : (1922) M. 1 65 I. C. 345.

**AGENCY RULES (VIZAGAPATAM) 20**—*Agency tracts—Claim procedure—Remedy by suit—Erroneous provision of law—Citation of—Effect.*

The remedy by way of claim petition does not exist in the Agency Courts and the institution of a suit is the only remedy available to a person whose property has been attached in execution of a decree obtained against a third person.

*Held*, that in the circumstances of the case, the claim petition presented to the Agent's Court could be treated as a suit and the order thereon as a decree subject to appeal or interference by the High Court under Rule 20 of the Vizagapatam Agency Rules (*Oldfield and Venkatasubba Rao, J.J.*) THE KANI OF TUNI v. THE MAHARAJAH OF JEYPORE. 42 M. L. J. 487 : 30 M. L. T. 339 : 16 L. W. 8 : (1922) M. W. N. 314 : (1922) Mad. 271 : 66 I. C. 116.

**AGRA TENANCY ACT (II of 1901)**—*Applicability—Retrospective—Succession—Death of tenant before new Act—Law applicable.*

The Agra Ten. Act has no retrospective operation so as to affect a succession to the holding of a tenant who died before the Act. The succession is governed not by the pure Hindu law but by the Hindu Law as modified by the Rent Act. 38 A 197 : 16 A. L. J. 459, 27 A. 658 Ref. (*Ryves and Gokul Prasad, J.J.*) BECHU SINGH v. BALDEO SINGH. 44 A. 327 :

L. R. 3 A. 93 (Rev.) : 20 A. L. J. 165 : (1922) All. 84. 65 I. C. 507. 4 U. P. L. R. (A) 12.

—S. 177 (f)—“Question of jurisdiction has been decided”—*Meaning of.*

In order to make a question of jurisdiction, which can be decided within the meaning of S. 177 (f), there must be a plea by the defendant that the suit as brought is not cognizable by a Revenue Court. In other words there must be a plea that assuming the allegations made in the plaint to be true, a Revenue Court has no jurisdiction to entertain the plaint. (*Stuart, J.*) POHAP SINGH v. MOHAN SINGH. (1922) All. 424.

—Ss. 196 and 197—*Ejectment suit—Revenue Court's decision whether binding.*

Where a suit in ejectment was based on the ground that the defendants had incurred forfeiture because of their denial of the plaintiffs' title in the Revenue Courts. *Held*, this was not one of the grounds on which a tenant could be ejected under the provisions of the Tenancy Act. The decision of Revenue Court in the suit for arrears of rent was binding on the Civil Courts, Ss. 196 and 197 have no application to suits which do not lie at all but they only contemplate suits which might have been brought in one Court but have been by mistake or otherwise brought in another. 8 A. L. J. 431 followed. (*Gokul Prasad, J.*) JANKI v. DEBI SHANKER. (1922) All. 274

—*Exemplar land—Non-occupancy land if can be taken.*

## AGRA TENANCY ACT, S. 4.

It is doubtful whether, according to the wording of the Agra Ten. Act, it is legitimate to take into consideration the land which was not recorded as occupancy but if the enhancement is only 25 per cent. and the average rate of the new rent falls at Rs. 3-8-per bigha while the average rate paid by non-occupancy in Kharka is Rs. 6-5-11, there is no case for revision. (*Fremantle, J. M.*) HARNANDAN v. PARMADH PRASAD. 4 U. P. L. R. (B B.) 45 : L. R. 3 A. 406.

—Occupancy rights—Merge—Proof

In considering the acquisition of occupancy right to establish a plea of merger it is necessary to show that the tenant had become complete proprietor of the holding (*Burn, J. M.*) AJAI SINGH v. RAM SARUP. L. R. 3 A. 194 (Rev.)

—Proceedings under—Provincial Insolvency Act not applicable. See PROVINCIAL INSOLVENCY ACT 20 A. L. J. 147.

—Scope of—Not exhaustive—Contract for payment of nazrana—Neglect or failure—Rights of landlord.

The Agra Tenancy Act is not exhaustive as to the terms and conditions on which a contract of tenancy can be made. An agreement between a landlord and tenant that the latter should pay a certain sum as nazrana and should then be immune from ejectment until the nazrana and the expenses of clearing the land were both repaid is perfectly legal and enforceable. If the tenant neglects to pay the amount of the nazrana the landlord is at liberty to rescind the contract and eject the tenant on his refunding that part of the nazrana which had been already received. (*Fremantle, J. M.*) MAHOMED RAFIQ v. GANGA DIN. L. R. 3 A. 105. (Rev.)

—S. 1 (2)—*Applicability of—Cantonment land.*

The Agra Ten. Act has no application to cantonment lands. They are under the direct administration of the Government of India. (*Stuart, J.*) SECRETARY OF STATE FOR INDIA v. MULLA. L. R. 3 A. 169 (Rev.) : (1922) A. 57 : 66 I. C. 582.

—Ss. 4 (2) and 12 (d) — *Building of house by tenant without permission of landlord.*

If a sub-tenant of *sir* or a non-occupancy tenant puts up a house on land from which he is liable to be ejected at any time by the landlord, he has only himself to thank for not fortifying himself with a long lease or waiting till he has got occupancy rights which he can do by lapse of time if the land is not *sir*. Simply because agricultural land has been built upon, it does not cease to be “land” within S. 4 (2) of the Agra Ten. Act. (*Lovett, S. M. and Farard, J. M.*) M. T. AMRIT BIBI v. MAHADEO. L. R. 3 A. 270 (Rev.)

—S. 4 (3)—*Interpretation—Land—Meaning of.*

Where it is proved that the area in dispute a small plot, 14 of an acre was covered partly by buildings and partly by a bamboo clump. *Held*, that the plot did not come within any of the classes mentioned in S. 4 cl. 3 of the Tenancy

## AGRA TENANCY ACT, S. 4.

Act. (Pearson, J.) BINDYACHAL PD. GOBIND RAI  
v. RUP KURMI. L. R. 3 A. 405 (Rev.)

—Ss. 4 (5) and 11—Acquisition of occupancy right—Period of joint tenancy if counted.

The period during which a tenant held a holding jointly with other persons not members of a joint family with him, cannot be added in computing the period necessary to give occupancy rights. (Hopkins, S. M. and Fremantle, J. M.) THAKUR SARDAR SINGH v. RAGHUNANDAN.

4 U. P. L. R. (B. R.) 89.

—Ss. 4 (5) and 11—Idol—Acquisition of occupancy right as tenant.

An idol is not a person and cannot be a tenant as defined in S. 4 (5) of the Agra Ten. Act. Consequently it cannot acquire occupancy rights. (Hopkins, S. M.) MAHANT GOVIND DAS v. BIND-  
ESHRI SINGH.

4 U. P. L. R. (B. R.) 53:  
L. R. 3 A. 366 (Rev.)

—S. 4 (12) (b)—Sir land—Cultivation of proprietor—Period requisite.

Unless land has been in personal cultivation of the proprietor for 12 years immediately before the commencement of the Act, it is not sir land. The fact that it was in his personal cultivation for 12 years at an earlier period is immaterial. (Ferard, S. M. and Harrison, J. M.) SHEO  
GHULAM KOERI v. THAKUR PARMESWRI LAL.

L. R. 3 A. 304 (Rev.)

—Ss. 8 and 9—Rent payable—Rate of—Evidence—Adam wasal—Meaning of.

The rate of rent entered at the last revision of records as the rent of the fixed rate holding must in the absence of evidence to the contrary be held to be the amount payable by the tenant, to the landholder. So long as the former claims to be a fixed rate tenant. The entry of the word *adam wasal* in respect of any portion of the rent in the column of remarks or elsewhere does not operate to reduce the amount payable (Hopkins, S. M. and Burn, J. M.) SHRI NARAIN SINGH v. BABU  
SHEO PADARATH SINGH.

L. R. 3 A. 348 (Rev.)

—S. 10—Expropriatory rights—Mortgage before the passing of the Tenancy Act of 1901—Lease by mortgagee to mortgagor.

A tenant mortgaged his land while the Act XII of 1881 was in force and took a lease of it from the mortgagee. After the Agra Ten. Act of 1901 was passed, he sold the equity of redemption. On a question arising as to whether expropriatory rights could grow up while the land was under mortgage, Held, that since at the date of the mortgage Act XII of 1881 was in force under which, expropriatory rights did not arise during mortgage the cultivation of the proprietor would be such as to allow the rights under S. 10 to arise and since the land in which those rights were now claimed was khudkasht of over 12 years when the equity of redemption was sold, the debt had expropriatory rights. (Fremantle, J. M.) MURLI  
v. JOGAI KISHORE.

L. R. 3 A. 266 (Rev.)

—S. 10—Expropriatory right—Landlord and tenant—Khudkhasht land.

## AGRA TENANCY ACT, S. 11.

A co-sharer would not necessarily be entitled to hold as an ex-proprietary tenant, a khudkhasht holding of 16 years' standing. (Hopkins, S. M.) MT. SRIMATI AUSANBATI DEBI v. RAM JAS.

4 U. P. L. R. 9 (Rev.)

—S. 10—Sale of proprietary rights—Relinquishment of ex-proprietary rights—Subsequent suit for declaration—Maintainability.

A proprietor sold his proprietary rights and on the same day executed a deed of relinquishment of expropriatory rights. He subsequently sued for declaration of expropriatory rights. Held, that the law applicable turned entirely on the question of fact whether plff actually vacated the land and was out of possession for more than 6 months and plff having given up possession the suit had to be dismissed. (Burn, S. M.) MESI  
TULLAH v. KALLU.

L. R. 3 A. 463. (Rev.)

—S. 10—Sir—Transfer of a portion—If land loses its character as sir.

Where a portion of sir land is mortgaged and then sold, it does not lose its character as sir until the land is specified and demarcated. (Hopkins, S. M. and Fremantle, J. M.) BALDEO  
PAL v. CHILLU AHUR.

4 U. P. L. R. 66 (B. R.)  
L. R. 3 A. 439 (Rev.)

—S. 10—Voluntary alienation—Transfer of proprietary rights under decree for foreclosure.

Expropriatory rights arise under S. 10 of the Agra Ten. Act on the foreclosure of a mortgage, as the transfer in such a case amounts to voluntary alienation. (Hopkins, S. M. and Porter, J. M.)  
BILAS RAI v. ABHIRAJMAN TIWARI.

L. R. 3 A. 327 (Rev.)

—S. 11—Accrual of occupancy rights—Tenant in possession—No agreement to take lease at the beginning of the cultivation—Effect of.

A tenant was holding under a lease for 7 years given from faslis 1319 to 1325. But he had no agreement to take the lease when he started cultivation in the beginning of fasli 1319. In a suit to eject him brought in September 1911. Held that the lease did not prevent the accrual of occupancy rights as it had not the effect of giving possession for 3 years. (Pearson, J. M.)  
BADRI NARAIN SINGH v. BISHNU PRASAD TIWARI.

L. R. 3 A. 412 (Rev.)

—S. 11—Decree in ejectment—Acceptance of fresh lease for 7 years—Period of ejectment proceedings—Not continuous occupation within the meaning of section.

After a decree in ejectment is passed, where the tenant is re-admitted by a 7-years lease, the period during which the ejectment proceedings are in progress cannot be regarded as continuous occupation under S. 11 of the Agra Tenancy Act (Hopkins, S. M. and Fremantle, J. M.) AJUDHIA  
PRASAD v. INDER.

L. R. 3 A. 8 (Rev.)

—S. 11—Joint tenants—Separation of holdings—Effect of.

Where joint tenants cultivating their land jointly separate the holdings with the consent of the Zemindar, the tenant after the separation is a different person from the tenant before

## AGRA TENANCY ACT, S. 11.

separation. (*Hopkins, S. M. and Fremantle, J. M.*)  
*RAM BAHAL RAI v. MATA BADAL.*

L. R. 3 A. 417 (Rev.)

———S. 11—Landholder—Admission to share in occupancy tenancy.

A landholder can contract to admit a person to a share in an occupancy tenancy. (*Burn, S. M. and Pearson, J. M.*) *KANTA PRASAD v. BAUNATH SAHAI.*

L. R. 3 A. 482 (Rev.)

———Ss. 11 and 97—Lease—Not attested—Occupancy rights—Accrual of.

Where a lease is invalid for want of registration within four months it is inoperative as barring occupancy rights under S. 11 of the Tenancy Act. (*Hopkins, S. M. and Fremantle, J. M.*) *MOTI v. COLLECTOR OF COURT OF WARDS BULANDSHAHR.*

4 U. P. L. R. (B. R.) 102.

———Ss. 11, 35—Occupancy rights—Acquisition of.

A co-sharer whose khudkhas land was allotted to another at partition as non-occupancy land cannot be considered a trespasser and is entitled to occupancy rights (*Pearson, J. M.*) *THAKUR RUDRAPAL SINGH v. RUSTAM SINGH.*

L. R. 3 A. 529 (Rev.)

———S. 11—Occupancy rights—Acquisition of—Rent free grantee

A cultivator can acquire occupancy rights as against the rent-free grantee from whom he holds (*Hopkins, S. M. and Porter, J. M.*) *LALI v. BANKEY LAL*

L. R. 3 A. 321 (Rev.)

———S. 11—Occupancy tenancy—Contract.

There is nothing in the Agra Ten. Act which prevents the landholder from contracting with a tenant that the latter shall have the same rights as an occupancy tenant. (*Hopkins, S. M. and Fremantle, J. M.*) *JALEHRI v. THE MANAGER, COURT OF WARDS, NANKA CHAND ESTATE.*

L. R. 3 A. 335 (Rev.)

———S. 11—Occupancy right—Creation of—Assertion of title.

A right of occupancy is created by twelve years' continuous occupation under S. 11 of the Agra Tenancy Act and this right is not affected by the fact that the tenant was recorded as a non-occupancy tenant and did not claim a higher right. (*Stuart, J.*) *PRAG NARAIN v. ANGAD.*

L. R. 3 A. 132 (Rev.) : (1922) A. 55.

———Ss. 11 and 13—Occupancy rights—Ejection—Effect of.

Where a landholder ejected the father who was the recorded tenant of the disputed land and immediately gave a lease of it to the son, it is a question of fact in each case whether there was a real change of tenancy or only a change of name. The question depends upon whether the lessee had an individual capacity or was only one of a body of individuals forming a joint cultivating partnership, and whether the landholder knew that this was so. (*Hopkins, S. M. and Fremantle, J. M.*) *MAHDI v. PANDIT MANNU LAL.*

4 U. P. L. R. 12 (Rev.) : L. R. 3 A. 333 (Rev.)

## AGRA TENANCY ACT, S. 13.

———S. 11—Occupancy rights—Possession of landholder fraudulent—Tenant if acquires rights

Per *Walsh, J.* : A tenant who has held the same land continuously for a period of 10 years gets occupancy rights, but this only refers to a tenant to whom the landlord rightfully leases the land possessed by him.

Where the landlord obtained possession of the land fraudulently by colluding with the guardians of a minor, the possession is not legal and the tenant having obtained from the landholder possession, which in its nature was a fraudulent one, did not acquire any rights of occupancy or otherwise by holding the land continuously for 12 years. (*Walsh and Ryves, JJ.*) *JAMMU v. MAHADEO PRASAD.*

L. R. 3 A. 195 (Rev.)

4 U. P. L. R. (A) 84 : (1922) A. 294 : 66 I. C. 559.

———S. 11 (a)—Lease for seven years—Period during which lease is to run—Evidence.

Where under an agreement of a lease for seven years, the tenancy commences from the beginning of the agricultural year but the formal execution and registration of the deed are delayed, the land would be deemed to have been held under a registered deed for the whole of that agricultural year. If the tenancy does not commence at the beginning of the agricultural year, a recital in a subsequent deed that the lease was to be operative from the beginning of the year would not make it so. (*Hopkins, S. M. and Fremantle, J. M.*) *CHAJJO v. PANDIT RAJARAM.*

4 U. P. L. R. 16 (Rev.) : L. R. 3 A. 333.

———S. 11 (a)—Lease for 8 years—Power of re-entry on conditions—Tenancy from year to year—Ejection of lessee.

Where a lease for 8 years, provided for re-entry on non payment of rent or if the landlord required the holding for his own cultivation, held it was not "a lease for a term of not less than 7 years" within the meaning of S. 11 (a) of the Agra Tenancy Act, but only a lease from year to year. But this does not mean that the landlord can evict his lessee otherwise than according to the terms of the lease. (*Hopkins, S. M. and Fremantle, J. M.*) *HIRA v. SYED ASKARI HUSAIN.*

4 U. P. L. R. 18 (Rev.)

———S. 11 (d)—Leases for seven years—Power of re-entry reserved to landlord—Effect of.

Where a lease which purports to be for not less than 7 years contains a provision for re-entry by the landlord within the period on the whole or part of the holding on the occurrence of a contingency, the period of holding under the lease could be counted towards the acquisition of occupancy rights. (*Ferard, S. M. and Hopkins, J. M.*) *KUAR ABDUL JALIL KHAN v. MAN SINGH.*

L. R. 3 A. 286 (Rev.)

———Ss. 13 and 73—Acquisition of occupancy right—Continuous possession

A decree for ejection was passed against a tenant on 27-1-1908 and executed on 11-8-1908. On 1-7-1909 the tenant was readmitted. Held that the tenant was out of possession for the whole year and was not re-admitted within a year so as to obtain the benefit of S. 13 of the Act.



## AGRA TENANCY ACT, S. 13.

(*Hopkins, S. M. and Fremantle, J. M.*) GAURI SHANKAR LAL v. CHANDAN AHIR.

L. R. 3 A, 60 (Rev.)

—Ss. 13 and 58—Joint tenants—Ejection—Lease to one of them—Effect of.

Certain joint tenants were ejected from the holding and a lease was granted to one of them alone from the following year. On a question arising as to the acquisition of occupancy rights by the tenant. Held that though there was no break in continuity, still the tenant having been changed he could not count his joint occupation with others as continuous holding within S. 13 of the Agra Ten. Act. (*Ferard S. M. and Harrison, J. M.*) CHAUDHARI KARAN SINGH v. KALYAN SINGH.

L. R. 3 A 294 (Rev.)

—S. 13—Lease to non-occupancy tenant—Non-cultivation—Effect of.

Where a zemindar leased lands for 3 years in favour of a non-occupancy tenant who was his own relative and who neither took possession nor cultivated it, the lease is a nominal transaction and it cannot be allowed to override the provisions of the Ten. Act regarding the rights acquired by continuous occupation: (*Hopkins, S. M. and Fremantle, J. M.*) SHEO DAYAL KURMI v. THAKUR PRASAD PANDEY.

4 U. P. L. R. (B. R.) 57 : L. R. 3 A 441 (Rev.)

—S. 14—Exchange of holding—What constitutes.

A tenant held a certain holding A up to 1315 Fash. In 1316 Fash according to the records he sublet holding A to T and N and took another holding B from the landlord. In 1317 Fash he relinquished holding A and retained holding B while T. and N. became tenants in chief in holding A. Held that the above transactions amounted to an exchange of land and there was an accrual of occupancy rights within S. 14 of the Tenancy Act, (*Hopkins, S. M.*) PANDIT KHEDPAL v. KHERGA

L. R. 3 A 434 (Rev.)

—S. 14—Lands exchanged—Continuous cultivation—Acquisition of occupancy rights.

Where a person gives up cultivation of one holding and takes up another simultaneously it amounts to an exchange. If the admission to the new land precedes the surrender of the old, the requirements of S. 14 are satisfied. To acquire occupancy rights, the continuous cultivation need not be in respect of the same land. (*Hopkins, S. M. and Fremantle, J. M.*) SHER SINGH v. ZAHRIA SINGH.

4 U. P. L. R. (B. R.) 1.

—S. 14—Landlord and tenant—Continuation of tenancy—Acquisition of occupancy rights.

Some of the tenants defendants originally held one holding and the remainder a different holding. Later on a new holding was given to all of them. Held that the defendants could not be said to be holding in continuation of their former tenancy and they could not count the period of their prior holding towards the acquisition of occupancy rights. (*Burn S. M. and Pearson, J. M.*) KRISHAN SINGH v. PATIA.

L. R. 3 A, 481 (Rev.)

—S. 14—Occupancy right—Acquisition of—Joint tenants—Acceptance of lease by one.

## AGRA TENANCY ACT, S. 18.

Where two persons held lands as joint tenants and before the expiry of the period required for the acquisition of occupancy right one of them accepted a lease for less than 7 years from the landlord Held (*Per Hopkins S. M. and Fremantle J. M. dissenting*) that the lease was not binding on the other joint tenant and it was no bar to his acquisition of an occupancy right. (*Hopkins, S. M. and Fremantle, J. M.*) SHEORAJ v. SAHU NAND KISHORE

4 U. P. L. R. (B. R.) 3.

—S. 14—Period of occupation—Exchange of land—Rights of tenant.

The essential requisite under S. 14 of Agra Tenancy Act is that the tenant should not be out of possession of the old lands for more than a year before getting the new. The tenant does not lose his right of exchange by reason of the overlapping of the period of the occupation of the two lands. An agreement of exchange could be implied from the conduct of the parties. (*Hopkins, S. M. and Burn, J. M.*) MULWA v. RAMKISHUN.

L. R. 3 A, 100 (Rev.)

—S. 14 (3)—Interpretation of—Exchange of fields—Occupation of lands.

S. 14 of the Agra Ten Act is difficult to apply when shufflings of holdings and fields goes on over a series of years. The only practicable method and the one accepted by the Board of Revenue is to ascertain in which of the 12 years preceding the year in suit the land occupied by the tenant has been of lowest letting value and to take the holding of that year as the basis for determining an equivalent out of his present holding. This equivalent which has to be demarcated under S. 14 (3) is to be deemed the "Same land" under S. 14 (2) and he is entitled to occupancy rights in it. (*Ferard, S. M. and Harrison, J. M.*) MT. DURGA KUAR v. BALDEO

L. R. 3 A 288 (Rev.)

—S. 17—Acquisition of occupancy rights—Period, calculation of—Succession of sons—Record of names

The first tenant was M. in whose name the holding was recorded and he died in 1313 Fash. From fasli 1313 the land was in the names of two of his three sons, the third being probably a minor. From 1320 Fash, the holding was also recorded in the name of the third son. The evidence was clear to the effect that the sons had always cultivated together. Held that the tenants were the same all through and they were entitled to occupancy rights (*Fremantle, J. M.*) THAKUR SUJAN SINGH v. ISHRI

L. R. 3 A. 400 (Rev.)

—S. 17—Addition of son's name—If evidence of change of tenancy.

Where up to Fasli 1317 the father's name alone was entered and subsequently his son's name was also joined, it is most unlikely that the addition of the son's name indicated any change of tenancy. (*Hopkins, S. M. and Fremantle, J. M.*) BIBI KULSUM UNNISSA v. NAWLA.

L. R. 3 All. 411 (Rev.)

—S. 18—Payment of rent by sub tenant directly to Zemindar—Entry in revenue records—Status of tenant.

## AGRA TENANCY ACT, S. 18.

In the absence of proof that the occupancy rights of a tenant have been lost in one of the ways laid down in S. 18 of the Act *e. g.* by surrender, abandonment, etc., the mere payment of rent by the sub-tenants directly to the Zemindar does not extinguish the tenancy. Nor does a mere entry in the patwari's papers (which may have been collusive) that the sub-tenant was holding direct from the Zemindar annul the rights of the occupancy tenant. (*Hopkins, S. M. and Fremantle, J. M.*) *SITLU KOERI v. RAM SARUP UPADHIA.* L. R. 3 A 158 (Rev.)

—S. 18—Tenant out of possession for a long time—Extinction of occupancy right.

Notwithstanding the fact that a tenant has been out of possession of his occupancy holding for a period of 18 years, the tenancy would be presumed to continue in the absence of proof that it was extinguished in any of the ways specified in S. 18 of the Agra Ten. Act (*Hopkins, S. M. and Fremantle, J. M.*) *MT. SUGA KUNWAR v. SHAH MAHOMED HASAIN.* L. R. 3 A 255 (Rev.)

—Ss. 19 and 22—Succession—Non-occupancy tenancy—Terms of the lease.

A tenant holding lands *naslam bad naslan* under a lease executed before the Act of 1873, is a non-occupancy tenant and succession to the tenancy is to be guided by the terms of the lease and not by S. 22 of the Act. (*Hopkins, S. M. and Fremantle, J. M.*) *RAI BAHADUR MUNSHI RAVINANDAN v. RAGHUNATH SINGH.* 4 U. P. L. R. (B. R.) 5.

—S. 20—Occupancy holding—Mortgage—Relinquishment by mortgagor—Right to redeem.

A relinquishment by the mortgagor of an occupancy holding in favour of the zemindar for a cash consideration is in law a transfer of the right to redeem, (*Stuart, J.*) *YAD RAM v. BALDEO SINGH.* 64 I. C. 418.

—Ss. 20 and 79—Occupancy tenant—Transferee—Position of—Possessory right—Ejectment.

The transferee from an occupancy tenant has no title to the land but he has a possessory title good against all the world except the Zemindars. Consequently a person who is not a member of the Zemindari body cannot forcibly oust the transferee without incurring a liability to pay damages (*Gokul Prasad, J.*) *RAMESHWAR DUBE v. SHEO HARAKH DUBE.* (1922) A. 277 : 4 U. P. L. R. (A.) 87 : 66 I. C. 529.

—S. 20—Occupancy holding—Usufructuary mortgage—Void—Personal covenant also unenforceable, See T. P. Act, S. 68.

20 A. L. J. 318.

—S. 20—Sir—Mortgage under old Act—Transfer of proprietary right under New Tenancy Act—Mortgagee if entitled to possession—Fixation of rent—Exproprietary rights. See (1921) DIG. COL. 14 *RAM SUNDAR RAI v. JANG BAHADUR RAI.* L. R. 3 A 331 (Rev.)

—S. 22—Acquisition of occupancy rights by widow—Succession—Occupancy rights if transferable and heritable.

## AGRA TENANCY ACT, S. 22.

Under the Act X of 1859 the right of occupancy tenancy was neither transferable nor heritable and came to an end on the death of the tenant if it took place before the passing of Act XVIII of 1873. If the tenant's widow remained in possession in such a case, she acquires the rights of an occupancy tenant by twelve years adverse possession. If the widow having acquired a title by prescription dies after the coming into operation of the Agra Tenancy Act, the succession to the holding is governed by S. 22 of the Act. 7 W. R. 528, 13 B. L. R. 274 ref (*Gokul Prasad and Stuart, JJ.*) *MANPAL SINGH v. RAJ PARTAB SINGH.* L. R. 3 A 66 (Rev.) : 44 All. 376 : (1922) A. 31 : 20 A. L. J. 181 : 65 I. C. 824.

—S. 22—Co-widows—Sale of proprietary right—Exproprietary tenancy—Survivorship.

Where on the death of a Hindu tenant his two widows sold their proprietary rights and became ex-proprietary tenants in the *sir*, the widows acquired the ex-proprietary tenure in their own rights and not as heirs of their husband. The widows must be deemed to have been joint tenants in the ex-proprietary tenure and on the death of one her interest would pass by survivorship to the other. (*Hopkins, S. M. and Burn, J. M.*) *RAGHUBAR DAYAL v. GANGA SAHAI.* L. R. 3 A 61 (Rev.)

—S. 22—Death of occupancy tenant before Act—Succession by widow—Reversioners, when can succeed—Law governing—Hindu Law, modified by N. W. P. Rent Act, S. 9

An occupancy tenant died before the Agra Tenancy Act of 1901 came into force and was succeeded by his widow. She died after the Act, and the reversioners claimed to succeed; *held*, succession must be governed by Hindu Law as modified by the N. W. P. Rent Act, S. 9 and they could succeed only if they cultivated jointly with the deceased tenant. (*Ryves and Gokul Prasad, JJ.*) *BECHU SINGH v. BALDEO SINGH.* 20 A. L. J. 165 : 4 U. P. L. R. (A.) 12 : 44 A. 327 : (1922) A. 84 : L. R. 3 A 93 (Rev.) : 65 I. C. 507.

—S. 22—Hindu widow—Succession to occupancy holdings—Rights of brother of deceased on death of widow.

A Hindu widow was in possession of her deceased husband's occupancy holding from before 1901 and she died after the Agra Ten. Act came into force. On a question arising as to the succession to the holding, *Held*, that the brother of the deceased male owner was entitled to succeed under S. 22 (c) of the Act though he was not a sharer in cultivation with his brother at the time of his death. (*Ferrard, S. M. and Hopkins, J. M.*) *BUDHOO v. SATDEO TEWARI.* L. R. 3 A 285 (Rev.)

—S. 22—Hindu widow—Succession—Occupancy holding—Surrender—Effect of.

Where a Hindu widow who has succeeded to an occupancy holding of which her deceased husband was the sole occupancy tenant, surrenders the holding under S. 18 (c) of the Agra Ten. Act, the occupancy right is extinguished thereby (*Ferrard, S. M. and Harrison, J. M.*) *GOVIND PANDEY v. DIPKA KOERI.* L. R. 3 A 291 (Rev.)

## AGRA TENANCY ACT, S. 22.

—S. 22—*Sharing in cultivation—Meaning of.*

Where a tenant has more than one holding and his daughter's son claims to succeed as being a sharer in cultivation, it is enough if the daughter's son proves that he was sharing in the management of the cultivation generally. It is not necessary that he should have shared in the actual cultivation of each and every parcel of land to entitle him to succeed. (*Hopkins, S. M.*) VINDHYA CHAL PRASAD RAI v. UDIT AHIR.

L. R. 3 A. 53. (Rev.)

—Ss. 22 and 58—*Mahomedan widow—Succession to occupancy holding—Remarriage—Effect of.*

Where a Mahomedan widow succeeded to the occupancy holding of her deceased husband before the Agra Ten. Act (1901) was passed and remarried after that Act came into force, she does not forfeit rights on remarriage under S. 22 of the Agra Ten. Act. (*Hopkins, S. M. and Porter, J. M.*) MUST MARIAM v. KANVAL NARAIN

L. R. 3 A. 311 (Rev.)

—S. 22 — *Succession—Daughter's son — Rights of—Sharing in cultivation.*

The interest of a tenant does not devolve upon a daughter's son who did not share in the cultivation with the deceased tenant, such a daughter's son is not in the category of heirs at all Sub S. (d) of S. 22 is meant to define one of the classes of heirs upon whom the interest of the deceased tenant devolves. The words in it can thus mean only "a daughter's son who shared in the cultivation with the deceased", and the words in sub S. (e) "failing such daughter's son" can only mean "failing heirs of the class mentioned in the preceding subsection. (*Hopkins, S. M. and Burn, J. M.*) CHHOTY LAL v. DURGA PRASAD

L. R. 3 A. 353 (Rev.)

—S. 22—*Succession to holding—Collateral—Sharing in cultivation—Guardian or agent in possession.*

Where a collateral of an absconding occupancy tenant of the suit land had cultivated the entire holding as sub-tenant or *quabi* at the time of the presumed death of the absconder, the collateral could not inherit the tenancy in the absence of proof that he was the nearest collateral. Moreover it could not be said that he shared in cultivation with the deceased. A person who manages cultivation on behalf of another whether as agent, guardian, or in any other representative capacity cannot be said to share in cultivation by reason of such management. (*Hopkins, S. M. and Fremantle, J. M.*) SHYAM SUNDAR MALI v. SITAL SINGH.

4 U. P. L. R. (B. R.) 51 : L. R. 3 A. 359 (Rev.)

—S. 22—*Success on—Co-sharing in cultivation—Collaterals.*

Co-sharing in cultivation through an agent could not be accepted for the purposes of S. 22 of the Agra Ten. Act. (*Pearson, J. M.*) RAM KISHORE SHUKLA v. SHAIK MD. HABIBULLAH.

L. R. 3 A. 403 (Rev.)

—Ss. 22 and 58—*Widow of deceased tenant—Relinquishment—Effect on collaterals.*

## AGRA TENANCY ACT, S. 23.

Where one of a deceased tenant relinquishes the occupancy holding, it puts an end to the collaterals' right of succession even though they might have shared in cultivation with the tenant in his life-time. (*Burn, J. M.*) HANUMAN PD. NARAIN SINGH v. RAMKHELAWAN.

L. R. 3 A. 489 (Rev.)

—S. 25—*Sub-lease—Five years—Bond for entire rent—Construction.*

Plffs. sued to eject certain occupancy tenants together with their sub-tenants and the sub-tenants on the ground of illegal subletting. It was found that the occupancy tenant executed a bond for Rs. 600 in favour of a certain person—and on the following day executed a sub-lease of the holding to his son for a period of 5 years with an annual rental of Rs. 190 during the period *Held*, that the sub-lease did not come within S. 25 of the Agra Ten. Act and that the tenant was liable to ejectment. (*Burn, S. M. and Pearson J. M.*) BHUDEO v. MEGH SINGH.

L. R. 3 A. 505 (Rev.)

—S. 25 (4) — *Exproprietary tenancy — Joint holding by female and males—Ejectment.*

An exproprietary tenancy was held by a female along with three males. It was sublet for more than five years by them. *Held*, that the tenants were liable to ejectment and that the exception under S. 25 (4) of the Act did not apply. (*Lovett, S. M. and Ferard, J. M.*) CHHAB NATH v. DEBI PERSHAD

L. R. 3 A. 272 (Rev.)

—S. 25 (4)—*Occupancy tenancy held by males, females and minors—Sub-letting.*

The exception under S. 25 (4) of the Agra Ten. Act does not apply where an occupancy tenancy held by one adult male member and certain minors and females was sublet in the life-time of the minors and females and was again sub let after their death but within 2 years of the former sub-letting. The Sub-lease is therefore illegal. (*Fremantle, J. M.*) AJUDHIA v. CHANDI PRASAD.

L. R. 3 A. 83 (Rev.)

—S. 28—*Sub-lease by tenant—Death of tenant—Zamindar's rights.*

An occupancy right is not a permanent right adhering to the land. When the family, in which it is created comes to an end without legal heirs, the right disappears altogether and therefore a sub-lease granted by the occupancy tenant becomes unenforceable for the simple reason that there is no one left against whom it can be enforced. To hold otherwise would be to offend against the principle of law that persons with limited interests cannot make valid transfers of interests exceeding those which they have themselves. (*Burn, S. M. and Pearson, J. M.*) SYED ABBAS ALI v. ADHAR SINGH.

L. R. 3 A. 501 (Rev.)

—S. 28—*Sub-letting by sir holder—Applicability of section.*

S. 28 of the Tenancy Act applies only to cases of sub-letting by a tenant and not to cases of sub-letting by a Sir holder. Where the sub-tenants had accepted the exproprietary tenant as their land-holder and had paid rent to him and not to the zemindar they could not deny that the relation of landholder and tenant existed. (*Hopkins*

## AGRA TENANCY ACT, S. 31.

S. M. and Burn, J. M.) SUNDAR LAL v. JEORAKHAN. L. R. 3 A. 44 (Rev.)

—S. 31 (2)—*Illegal sub-letting—Suit for ejectment of a tenant.*

It is not the law that a suit for ejectment of a tenant on the ground of illegal sub letting can be brought at any time during the continuance of the sub-letting. Such a suit must be brought within one year from the date on which the illegal sublease was made. When there are several acts of illegal sub-letting, a fresh cause of action will arise in respect of each successive act, (*Hopkins, S. M. and Porter, J. M.*) BHARAT INDU v. MULTAN KHAN. L. R. 3 A. 329 (Rev.)

—S. 34—*Ejectment—Non-occupancy tenant—Consent—Presumption from long occupation.*

The mere fact that defendant had been recorded as non occupancy tenant of 22 years' standing without payment of rent does not constitute a valid defence to a suit for ejectment by the Zamindar on the ground that he was holding without consent. (*Hopkins, S. M. and Freemanille, J. M.*) GOPAL LALJI v. GAYA. L. R. 3 A. 157 (Rev.)

—S. 34—*Grove—Tenant's right to cut down—Ejectment by Zamindar.*

No length of occupation on the part of a tenant who has cut down a grove prevents the landholder from suing him under S. 34 of the Act and ejecting him if he so desires. (*Hopkins, S. M. and Freemanille, J. M.*) MAHARAJAH OF BENARES v. RAM SUNDAR UPADHIYA. L. R. 3 A. 160 (Rev.)

—S. 34—*Mortgage of share—Redemption.*

Where the plaintiff (mortgagor of a share) sued for redemption without showing when he reported the redemption of the mortgage, the suit is not maintainable. (*Burn, J. M.*) SOBHA v. DARYAL. 4 U. P. L. R. (B. E.) 46.

—S. 34—*Proprietary title—Dispute as to—Jurisdiction—Civil and Revenue Court.*

S. 34 was not meant to authorise the Revenue Courts to enquire precisely into questions of disputed title and to decide questions of a civil nature between persons who are *bona fide* claimants to the same land. The section does not apply to cases in which the evidence of long standing adverse possession is considerable. Where therefore in a case before deciding to whom the proprietary right belonged the court would have to decide two difficult questions, first, whether in the particular circumstances of the case any part of the land in suit came by gradual accretion or otherwise and secondly, whether any or all the plots in dispute have been held in adverse proprietary possession by the appellant or respondent, *held*, that the matter was one for the decision by a Civil Court. (*Freemanille, J. M.*) RAJA SRI PRAKASH SINGH v. SURAJ PRASAD. L. R. 3 A. 137 (Rev.) : 4 U. P. L. R. (B. E.) 75.

—S. 34—*Squatter—Cultivation to the knowledge of zamindar—No presumption of consent—Treating squatter as tenant—Prior cultivation cannot be availed of, for occupancy rights.*

Where a person squats upon a piece of land

## AGRA TENANCY ACT, S. 43.

and holds it without the consent of the zamindar for a long period, the mere fact that the latter had knowledge of it cannot imply or raise a legal presumption of consent within the meaning of S. 34, *Agra Tenancy Act*.

Even when the zamindar chooses to treat such a squatter as a tenant, the latter cannot under S. 34 count his previous occupation towards the accrual of occupancy rights. (*Hopkins, S. M. and Freemanille, J. M.*) RUDRA PRATAP NARAIN SINGH v. PARTAP NARAIN. L. R. 3 A. 6 (Rev.)

—Ss. 34 and 58—*Cultivation of land—Knowledge of Zamindar—Rights of cultivator*

Defendants had held and cultivated for over 40 years certain plots of land without the consent (though probably with the knowledge) of the Zamindar and had paid no rent for the plots. *Held* that mere knowledge on the part of the Zamindar did not imply or raise a presumption of his consent within the meaning of S. 34 of the *Agra Ten. Act*. It is open to the Zamindar to withhold his consent as long as he pleases and when he chooses to treat the cultivator as a tenant, he cannot count his previous occupation towards the accrual of occupancy rights. (*Ferard S. M. and Harrison J. M.*) THAKUR MURLIDHAR SINGH v. GYSAI RAM. L. R. 3 A. 295 (Rev.)

—S. 35—*Variation in rent or rate of rent—When binding on tenant.*

The rent originally payable was a grain rent. In fasli 1317 one of the landholders induced the tenant to pay a cash rent. There was however no registered agreement or decree or order of Court embodying the variation.

*Held* that notwithstanding the payment of cash rent for a number of years, the rent payable remained as it was before fasli 1317 under the provisions of S. 35 of the *Agra Ten. Act*. The presumption mentioned in that section can only be rebutted by proof of a registered agreement, decree or order. It is not rebutted by the fact that landholders and tenants or some of them have actually received and paid rent differing in amount or kind from the rent previously payable. (*Ferard, S. M. and Hopkins, J. M.*) HARDWARI v. SURAJBHAN. L. R. 3 A. 279 (Rev.)

—Ss. 41 and 95—*Registered lease—Oral agreement for enhancement of rent.*

A claim for enhanced rent under an oral agreement or unregistered deed cannot be enforced in a revenue court. 23 I. C. 417 Ref. : (*Stuart, J.*) PRAG NARAIN v. ANGAD. L. R. 3 A. 132 (Rev.) (1922) A. 55.

—Ss. 43 and 44—*Enhancement of rent—Basis of assessment—Exemplar area.*

Circle rates may be applied by a Settlement Officer enhancing rents during settlement under S. 87 (b) (ii) of the *Land Rev. Act* but not by an Assistant Collector trying a suit for enhancement under the *Tenancy Act*. The Assistant Collector must examine exemplars of his own selection and should not limit himself to those filed by the applicant. The Assistant Collector has no legal authority to fix rent at Settlement rates. (*Hopkins, S. M. and Freemanille, J. M.*) RAM SWAROOP v. UDEY RAM. 4 U. P. L. R. (B. E.) 30.

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—S. 43—*Enhancement of rent—Suit by thekadar—Compromise with mukararidars no bar.*

In a suit for enhancement of rent brought by a thekadar from the Maharaja of Benares, a compromise giving up all rights to enhance rent entered into between the tenants and certain mukararidars who had not been authorised to enhance rents, cannot be pleaded as a bar (*Porter, J. M.*) HANUMAN *v.* NARAIN PRASAD.

4 U. P. L. R. 20 (Rev.)

—S. 51—*Biswadaran Sabiq—Status of—whether entitled to remission of land revenue—wajib-ul-arz* See (1921) DIG. COL. 16 NATHA *v.* GOBIND RAM. 64 I. C. 153.

—S. 52—*Suit under — Commutation of rent—Necessity for previous notification.*

A suit under S. 52 of the Agra Tenancy Act does not lie unless a notification as laid down in the opening words of that section has been made by the Local Government. (*Hopkins, S. M.*) MT. DEVI *v.* NANWA. L. R. 3 A. 432 (Rev.)

—S. 57—*Ejectment—Construction of building on a portion of the land.*

Where a tenant constructs a building on a part of the holding he can be ejected from the portion built upon and not from the entire holding. (*Hopkins, S. M. and Fremantle, J. M.*) MUSHTAQ *v.* HOLAS RAI. L. R. 3 A. 429 (Rev.)

—Ss. 57 and 59—*Ejectment—Arrears of rent—Failure to pay decree amount.*

Ejectment on the ground that a decree for arrears of rent remains unsatisfied under Ss. 57 (a) and 59 of the Tenancy Act is not a step in execution of the decree for arrears. It is an enforcement of the forfeiture of the tenancy of the holding on the ground of breach of one of the conditions on which the tenancy is held, viz., the punctual and complete payment of the rent of the holding. Under the Tenancy Act the grounds of forfeiture are those set in S. 57. The collection of sums payable under Act VIII of 1873 may be made in the same way as the collection of rents payable under the Tenancy Act; but the law nowhere provides that failure to pay such sums when decreed involves forfeiture of the holding. (*Hopkins, S. M. and Burn, J. M.*) KUNDAN SINGH *v.* KARAN SINGH. L. R. 3 A. 345 (Rev.)

—Ss. 57 and 59—*Notice — Ejectment—Costs—Interest accruing after notice—Liability to pay.*

In proceedings under Ss. 57 and 59 of the Agra Ten. Act the notice should not require the judgment debtor to pay the costs of ejectment or the interest accruing after the notice. Where therefore the judgment debtor paid the full amount of the decree but not the interest and costs as decreed, an order directing ejectment of the judgment debtor is ultra vires. (*Hopkins, S. M. and Fremantle, J. M.*) PERSHADI *v.* RAMJAS MAL. L. R. 3 A. 358 (Rev.)

—S. 57 (a)—*Construction of.*

The wording of S. 57 (a) of the Agra Ten. Act is unhappy but its intention undoubtedly was

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that the tenant should not be ejected before the expiry of the year on account of which decreed arrears are due. The literal sense of the wording is that he should not be ejected, unless a decree is obtained for a given year and remains unsatisfied at the end of the year. (*Ferard, S. M. and Hopkins, J. M.*) MT. MASUM FATIMA *v.* NAJIBULLAH. L. R. 3 A. 287 (Rev.)

—S. 57 (b)—*Fixed rate tenancy—Agricultural purposes—House construction*

The record of land as a fixed rate tenancy is conclusive proof that the land was left for agricultural purposes. The construction of a house on land in a fixed rate holding is inconsistent with the purpose of the letting and renders the tenant liable to ejectment. (*Hopkins, S. M. and Burn, J. M.*) SRI MAHARAJA PRABHU NARAIN SINGH BAHADUR *v.* PANDIT ACHUTA PRASAD DUBE. L. R. 3 A. 401 (Rev.)

—S. 57 (b)—*Planting of trees by tenant—Rights of landlord—Suit—Limitation.*

If a tenant plants trees without the written permission of the landholder, the landholder has a right of suit under S. 57 cl. (b), the limitation for which is one year, and he cannot plead that the trees were planted without his written permission if he does not avail himself of this remedy. (*Hopkins, S. M.*) BHOLA KAURIA *v.* DAN PRASAD. L. R. 3 A. 106 (Rev.)

—S. 57 (c)—*Lease for seven years — Clause for re-entry—Status of tenant*

A provision for re-entry in a lease for a period of 7 years on the happening of a contingency does not have the effect of making the tenant a tenant-at-will. (*Hopkins, S. M.*) MT. SARWATI KUNWAR *v.* KALWA. L. R. 3 A. 242 (Rev.)

—S. 57 (c)—*Non-payment of rent—Ejectment—Maintainability of suit.*

Where a tenant held under a condition that he was not to be ejected so long as he paid rent and he committed default in payment of rent, he could not be ejected unless a decree for arrears of rent had been obtained against him. Otherwise the provision for forfeiture would be inconsistent with the policy of S. 56 of the Act. (*Mears, C. J. and Piggott, J.*) KUBER DAS *v.* RAM DIN KALWAR. 20 A. L. J. 769.

—S. 58—*Applicability of—Ejectment—Grove—Agricultural purpose — Acquisition of occupancy right.*

Under S. 58 of the Agra Ten. Act a non-occupancy tenant can be ejected from land, groves etc. unless he has acquired occupancy rights by reason of the land having been let or held for agricultural purposes. If a man has a grove part of which is fit for cultivation and lets it solely for cultivation then the land is let or held for agricultural purposes. (*Hopkins, S. M. and Fremantle, J. M.*) KRISHNAN PRASAD *v.* GOBINDA. L. R. 3 A. 399 (Rev.)

—S. 58—*Ejectment—Compromise—Orders directing correction of papers—Nature of.*

Orders for the correction of the revenue papers are made in compliance with Rule 43 A. B. C. 6-11. They are administrative and not judicial

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orders, and obvious by the entries made have no greater validity than the decrees or orders on which they are based. An entry that a tenant holds under a seven years registered lease would not give any right if the lease was not in existence. (*Hopkins, S. M.*) CHIDEY KHAN v. MIRAD KHAN. 4 U. P. L. R. B. R., 88.

## —S. 58—Grove—Agricultural tenancy Ejectment

Though a grove is not agricultural land within the meaning of the Agra Ten Act the tenant in possession of it is liable to a suit under S. 58 of the Act. A tenant is one who pays rent in cash or kind not only for land held by him but also on account of groves, tanks, rights of pasturage, or of gathering produce, forest rights, fisheries, the use of water for irrigation or the like. (*Hopkins, S. M. and Fremantle, J. M.*) BABU KHETER MOHAN CHATTERJI v. DOMI. 4 U. P. L. R. 55 (B. R.) L. R. 3 A. 356 (Rev.)

## —S. 58—Grove—Ejectment—Permissive occupation.

Under S. 58 of the Agra Ten Act a suit for ejectment from a grove is maintainable though the tenant can resist on the ground that the grove had been planted with the permission, express or implied of the landholder. (*Hopkins, S. M.*) BABBAN SINGH v. RAMASHANKAR. L. R. 3 A. 88 (Rev.)

## —S. 58—Joint tenants—Ejectment Lease to one—Effect. See AGRA TENANCY ACT, SS. 10 AND 58

L. R. 3 A. 294 (Rev.)

## —S. 58—Mahomedan widow—Succession to occupancy holding—Remarriage—Effect of. See AGRA TENANCY ACT, SS. 22 AND 58.

L. R. 3 A. 311 (Rev.)

## —S. 58—Mortgage of occupancy rights—Extinction of.

A mortgage of occupancy rights however old is extinguished on the extinction of the occupancy right. Thereafter the mortgagee becomes liable to ejectment. (*Harrison, J. M.*) RAJA RAM TEWARI v. BINDESHARI PRASAD. L. R. 3 A. 304 (Rev.)

## —S. 58—Mortgagee in possession—Agricultural lease—When binding on mortgagor.

Where a mortgagee in possession of agricultural lands grants a lease of the same and there is no evidence that the rate of rent fixed was unreasonable or that the grant of the lease was collusive, *Held* that the leasing of the land was within the ordinary powers of the mortgagee as landholder, and the mortgagor was not entitled to have the lease cancelled except on proof that it was granted fraudulently, collusively, or unreasonably, the onus of establishing these grounds for cancellation being on him. (*Hopkins, S. M. and Porter, J. M.*) MT. RAM DULARI v. BALAK RAM. L. R. 3 A. 313 (Rev.)

—S. 58—Proprietary rights—Simple mortgage—Subsequent usufructuary mortgage including *sir* land—Expropriatory rights in *sir*—Acquisition of.

Before the passing of the Agra Ten Act (II of 1901) a proprietor had executed a simple mortgage

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of his proprietary rights to A, and a subsequent usufructuary mortgage of proprietary rights and *Sir* to B. The proprietary rights were sold in execution of a decree on the simple mortgage after the passing of the Act and second mortgagee was at that time in possession of the *sir*. *Held* that the proprietor had not acquired expropriatory rights in the *sir* land and therefore that second mortgagee was liable to be ejected by the purchaser. (*Ferard, S. M. and Harrison, J. M.*) DEONATH SINGH v. BABU MADHORI DAS. L. R. 3 A. 305 (Rev.)

—Ss 58 and 177—Question as to proprietary title—Claim that land is *khudkhasht*.

Plaintiff sued as occupancy tenant-in-chief to eject S as his sub-tenant, S pleaded that he was not plaintiff's sub-tenant, that he had held the land direct under the superior landholder T, but had given it up and that it was now in the personal cultivation of T. T intervened and pleaded that the land was his *khudkhasht*. *Held* that a question of proprietary title was in issue both in the first Court and on appeal and that the appeal should be presented to the District Judge and not to the Commissioner. 12 A. L. J. 251: 16 A. L. J. 239 Rel. (*Ferard, S. M.*) TILAKDHARI SINGH v. RAMPHAL AHIR. L. R. 3 A. 300 (Rev.)

## —Ss. 59 and 60—Nature of proceedings under—Adjustment out of Court—Recognition of.

Although the proceedings under S. 59 of the Agra Ten. Act resemble those in execution and have to be instituted in the Court having power to execute the decree for arrears of rent, they are not proceedings in execution. Consequently it is open to the Assistant Collector to recognise a payment by the judgment debtor outside Court though not certified to the Court. (*Ferard, S. M. and Harrison, J. M.*) SAMBHAR SINGH v. MISIR PARAS RAM. L. R. 3 A. 297 (Rev.)

## —S. 59—Notice—Ejectment—Costs—Interest accruing after notice—Liability to pay. See AGRA TENANCY ACT, SS. 57 AND 59.

L. R. 3 A. 258 (Rev.)

## —S. 63 (2)—Suit in ejectment—Addition of party—Limitation.

The Agra Ten Act fixes the particular period within which a suit for ejectment may be filed for administrative convenience only and not lay down any period of limitation in the ordinary sense of the term. A suit for ejectment cannot fail by reason of not bringing on the record all the necessary parties before the date fixed for filing such a suit. (*Fremantle, J. M.*) PARSIDH NARAIN v. MT. SHER KHAN. L. R. 3 A. 392 (Rev.)

## —S. 65—Ejectment—Conditional order—Building on land by tenant.

A conditional order of ejectment under S. 65 of the Ten. Act should be based on an authoritative report and should be made after notice to the tenant. (*Hopkins, S. M. and Fremantle, J. M.*) MUSHTAQ v. HOLAS RAI. L. R. 3 A. 429 (Rev.)

## —S. 66—Benefit of the section—Right to.

Where immediately after obtaining the benefit of S. 66 of the Agra Ten. Act a tenant sublet the holding again, he could not get the benefit of

**AGRA TENANCY ACT, S. 79.**

S. 66 a second time. (*Hopkins, S. M.*) SARJU v. GAJPUT SINGH. L. R. 3 A. 435 (Rev).

—Ss. 79 and 87—Abandonment—Finding of Tahsildar—Subsequent suit for possession—Admissibility of previous finding.

A tahsildar's finding as to abandonment on an application under S. 87 of the Ten. Act is not admissible in evidence in a suit by the tenant on the ground of wrongful ejectment under S. 79 of the Act. (*Burn, S. M. and Pearson, J. M.*) RAMCHARAN v. ALI BAKSH. L. R. 3 A. 475 (Rev.)

—S. 79—Acquisition of exproprietary right—Definition of area—Limitation—Delay—Sufficient cause.

Until the area in which exproprietary rights were to be granted has been defined a suit under S. 79 would not lie for recovery of possession. But the time during which proceedings for specification of the exproprietary area were pending could be deducted in computing the term of 6 months provided by law. (*Hopkins, S. M. and Fremantle, J. M.*) MUSSAMMAT RACHALA KUAR v. SHEO GOBIND RAI. 4 U. P. L. R. (B. R.) 33.

—S. 79—Ejectment by landlord—Omission to recover possession within six months by tenant—Effect of.

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his rights also. 21 A. 301, 13 A.L.J. 295 Rel. (*Gokul Prasad, J.*) BHUKHARI SINGH v. JOKHAN. (1922) All. 124 : 4 U.P.L.R. (A) 104 : 66 I. C. 856.

—S. 79—"Grove" if a holding—Suit by grove holder for recovery of possession. See (1921) Dig. Col. 17. KESHO PRASAD SINGH v. SHEO PRAGASH OJHA. 44 A. 19 : 1922 All. 301 : 64 I. C. 248.

—S. 79—Jurisdiction—Civil and Revenue Court—Relief granted by Revenue Court.

It is not open to a party to evade the provisions of the Rent Act by bringing a suit so framed as to lie in the Civil Court the real object of which is to obtain a remedy which was obtainable in the Revenue Court. 27 A. 372 foll. (*Ryves and Stuart, JJ.*) PRAYAG AHIR v. MAHABIR AHIR. (1922) All. 317 : L. R. 3 A. 233 (Rev).

—S. 79—Transferee from occupancy tenant—Position of—Possessory right—Ejectment. See AGRA TENANCY ACT Ss. 20 AND 79.

L. R. 3 A. 285 (Rev.)

—S. 79—Wrongful dispossession of tenant—Omission to sue—Extinguishment of right.

Where a tenant is wrongfully dispossessed by his landholder and omits to sue within six months for recovery of possession his tenancy rights are extinguished. (*Hopkins, S. M. and Fremantle, J. M.*) RIAZ UD DIN v. SHIBBA SINGH. 4 U. P. L. R. 15 (Rev).

—S. 87—Absence of tenant—Acquiescence of Zemindar—Inference.

**AGRA TENANCY ACT, S. 95.**

During the absence of a tenant, the land was being cultivated by his cousin. The Zemindar took no steps under S. 87 to have the tenant's name removed, but acquiesced in the cultivation by the cousin.

Held, the cousin must be recognised as holding on behalf of the absent tenant. (*Burn, J. M.*) RAJA RAGHO PRASAD NARAIN SINGH v. BANKEY. L. R. 3 A. 226 (Rev) : 4 U. P. L. R. (B. R.) 58.

—S. 95—Applicability—Suit for declaration of adoption—If cognisable by a Revenue Court.

Where plaintiff sued in a Revenue Court for a declaration that he was the adopted son of the deceased occupancy tenant, and shared in the cultivation with him held, looking at the substance rather than the wording of the claim, it fell under S. 95 of the Agra Tenancy Act and as such was cognisable by a Revenue Court. (*Hopkins, S. M.*) GRIND SINGH v. RAM KUNWAR. L. R. 3 A. 5 (Rev.)

—Ss. 95 and 167—Civil and Revenue Court—Suit for declaration that deft. is only a tenant-at-will—Appeal.

Plffs were Zemindars of a village in which L. was an occupancy tenant of a holding. L. died and on his death the defts. applied for mutation of their names in the place of L. as being entitled to succeed to his occupancy holding. While those proceedings were pending a suit was brought by plff. in the Munsif's Court for a declaration that defendants were not the grandsons of L. and the defence was that the suit was not cognizable by the Civil Court. Held that the suit was not cognizable by the Civil Court. The appropriate suit for the plffs to have brought was for a declaration under S. 95 of the Tenancy Act. Taking the pleadings, it was admitted that the relationship of landlord subsisted between the parties and that the tenancy was still subsisting. The only dispute was as to the tenancy. Was it an occupancy tenancy as the defts. claimed or a non-occupancy tenancy from year to year as the plffs. asserted. Consequently S. 95 (a) and (b) of the Agra Tenancy Act applied to the case. An appeal in a suit under S. 95 of the Act lies to the Revenue Court and not to the District Judge. 36 A. 48 : 5 A. L. J. 374, 35 A. 299 Rel. (*Mears, C. J. and Ryves, J.*) JAGANNATH v. BALWANT SINGH. 20 A. L. J. 570 : L. R. 3 A. 235 (Rev) : (1922) All. 372 : 4 U. P. L. R. (A.) 194 : 44 All. 692 : 68 I. C. 247.

—S. 95—Jurisdiction—Civil and Revenue Court—Suit by recorded sub-tenant against landlord and recorded occupancy tenants.

It is open to a person recorded as sub-tenant of a holding to bring a suit in the Revenue Court against the landholder and the recorded occupancy tenant for a declaration that he is the tenant in chief and that the other defts. were wrongly recorded as occupancy tenants of the holding. (*Hopkins, S. M. and Fremantle, J. M.*) SUKHDEO HALWAI v. JAMNA PRASAD SAHU. L. R. 3 A. 363 (Rev.) : 4 U. P. L. R. 73 (B. R.)

—S. 95—Occupancy right—Registered lease for 7 years—Suit for declaration of right.

## AGRA TENANCY ACT, S. 95.

In a suit by certain tenants under S. 95 of the Agra Ten. Act for a declaration that they were occupancy tenants it was found that they were holding the lands in question under a registered lease for 7 years though they had previously acquired occupancy rights. Held that the suit was not premature and the plffs. were entitled to the declaration sought. (*Hopkins, S. M. and Burn, J. M.*) *NABHU v. MT RAM KUNWAR.*

L. R. 3 A. 86 (Rev.)

—S. 95—Revenue Court—Oral agreement for enhanced rent. If enforceable. See AGRA TENANCY ACT, SS. 41 AND 95.

L. R. 3 A. 132 (Rev.)

—S. 95—Right to sue—Tenant out of possession.

So long as the tenancy is not extinguished, a tenant can sue, whether he is in possession or not (*Hopkins, S. M. and Fremantle, J. M.*) *RIAZUD-DIN v. SHIBBA SINGH.*

4 U. P. L. R. 15 (Rev.)

—95 (a)—Suit for declaration as to land holder's name—Maintainability of.

A suit for a declaration as to the name of the land holder of a tenant is not maintainable under S. 95 (a) of the Agra Ten Act (*Pearson, J. M.*) *RAMADHIN RAM v. CHIKHURI.*

L. R. 3 A. 458 (Rev.)

—S. 97—Attestation—Registration—Time for.

Under S. 97 of the Agra Ten. Act attestation is in lieu of registration and under S. 23 of the Registration Act, registration must be effected within 4 months. Therefore attestation like registration, to be valid must be effected within 4 months after execution. (*Ferard, S. M.*) *MAHOMED IMTIAZ ALI KHAN v. KALLU.*

L. R. 3 A. 298 (Rev.)

—Ss. 102 and 167—Landlord and tenant—Rent payable in kind—Refusal of tenant to cultivate land—Suit for damages.

Where a landlord sues his tenant for damages on the ground that the tenant had wilfully neglected to cultivate the land as a consequence of which the landlord would be deprived of *batui* rent, the suit, is maintainable only in the Revenue Court by virtue of S. 167 of the Agra Ten. Act. (*Ryves, J.*) *RAJA NARENDRA BAHADUR PAL v. BAFATI.*

L. R. 3 A. 477 (Rev.)

20 A. L. J. 771 : 4 U. P. L. R. (A.) 206 :

68 I. C. 985,

—S. 106—Appraisal—Procedure illegal—Revision.

Where numerous cases of appraisal of crop were dealt with as one case without notice to the several parties and without appointing a person legally qualified as third assessor and without any inspection of the crop or a reasoned estimate of their produce or value, the procedure is entirely illegal and justifies the interference of the Board in revision. (*Hopkins, S. M. and Fremantle, J. M.*) *BHAI SINGH v. KUNWAR MAHOMAD ABDUL JALIL KHAN.*

L. R. 3 A. 49 (Rev.)

[In the last three reports the case name read as: *INDRPALE SINGH v. BAFATI.*]

## AGRA TENANCY ACT, S. 164.

—Ss. 150 and 151—Nankar land—If can be assessed.

Nankar land is reserved by the proprietor free of revenue on sale of his rights. is liable to assessment to revenue and the provisions of Chapter X of the Agra Tenancy Act apply thereto.

A covenant made with the purchaser of such land that the revenue thereon would be paid out of the other estate of the transferor is not binding on his successor in interest. (*Hopkins, S. M. and Fremantle, J. M.*) *NAWAB MUHAMMAD ABDUL MAJID v. AJODHYA KALWAR.*

4 U. P. L. R. 21 (Rev.)

—S. 157—Rent free grantee—Acquisition of occupancy rights—Calculation of the period.

An ex-rent free grantee should not be allowed to repudiate the rights which by his own action he had allowed his tenant to acquire. The grantee is to be deemed under S. 157 to have been a tenant from the date of the grant; and the class of his tenancy is to be determined in accordance with the provisions of the Act. He cannot count towards the period for the acquisition of occupancy rights any term during which the land has been sublet or otherwise transferred in contravention of Ss. 21 and 25. (*Hopkins, S. M. and Porter, J. M.*) *LALLI v. BANKEY LAL.*

L. R. 3 A. 321 (Rev.)

—S. 158—Land recorded as free of revenue—Nankar or Sankalp—Rent free holding.

In view of the fact that the land in question was recorded as *haqiat Mulafariga* and that it had never been called nankar or sankalp, there was a strong presumption that it was exempted from assessment on its own merits and that the land had not been granted by the zemindars during the period of British rule (*Fremantle, J. M.*) *KUMUDA PRASAD v. DEONANDAN SINGH.*

L. R. 3 A. 418 (Rev.)

—S. 158—Rent-free grant in favour of idol—Successors in office—Protest.

Where a rent free grant of land was made in favour of the idol of a certain shrine, and not in favour of the priest or manager of the shrine, successive priests in office of the shrine could not be deemed to be successors to the original grantee" within S. 158 of the Tenancy Act (*Piggott and Walsh, JJ.*) *MATHURA PRASAD v. RAMESHWAR.*

44 All. 169 : 19 A. L. J. 964 :

(1922) All. 312 : 65 I. C. 371.

—Ss. 163 and 164—Profits—Suit for—Limitation.

Under S. 164, Agra Tenancy Act, profits are payable when they are divisible under S. 163 and limitation begins to run from the date they are divisible. (*Ryves and Gokul Prasad, JJ.*) *HAKIM NAZIRUDDIN v. MUSSAMMAT ACHCHI BEGAM.*

(1922) All. 348 : 20 A. L. J. 95 :

L. R. 3 A. 20 (Rev.) : 64 I. C. 988,

—S. 164—Co-sharer—Lambardar—Collections—Suit and decrees for a portion of the rental—Decree for share of rent—Interest.

Where a lambardar realised in cash 76 p. c. of the rent and with regard to the rest he brought suits and obtained decrees against defaulting



## AGRA TENANCY ACT, S. 164.

tenants, there is no proof of negligence against him. The fact that some of the decrees cannot be realised is no fault of the lambardar nor can it be said to constitute negligence. Consequently a suit against such a lambardar for share of profits should be decreed only on the basis of actual collections. Interest at 12 p. c. should be allowed to the Co-sharer plaintiff till the date of the realisation of the decretal amount. (*Rafique and Lindsay, JJ.*) RAMCHANDRA SARUP v. KIRPA DEVI 65 I. C. 648 : 4 U. P. L. R. A. 33.

—S. 164—*Suit against lambardar for profits—Decree—Actual collections—Negligence.*

A co-sharer suing for his share of the profits under S. 161 of the Agra Ten. Act can only get a decree for his share of the actual collections unless the case comes within S. 164 (2) of the Agra Ten. Act so as to entitle him to a decree on gross rentals. Negligence on the part of the lambardar cannot be inferred from the mere fact that the rents for a particular year remained unpaid 43 A. 29 foll. (*Ryves and Gokul Prasad, JJ.*) JODHI RAM v. MT. KAUNSILLA.

20 A. L. J. 313 : L. R. 3 A. 205 (Rev) :  
4 U. P. L. R. (A.) 160 : (1922) All. 111 :  
67 I. C. 521.

—S. 164—*Suit for profits from lambardar—Jurisdiction—Civil and Revenue Court.*

A suit by a recorded co-sharer for arrears of profits from the lambardar is maintainable only in a revenue Court. The deft. is entitled to plead and prove if he can, that he owes nothing or is only partly liable. But the suit is not liable to be defeated *in limine* by producing in evidence the decree of a civil Court as regards the liability of the defendant. (*Ryves and Gokul Prasad, JJ.*) KUNJ BEHARI LAL v. GHANSHAM DAS

(1922) All. 397 : 4 U. P. L. R. (A) 3 :  
65 I. C. 530.

—Ss. 164 and 165—*Suit by cosharer for share of profits—Decree on actual collections—Previous arrears.*

In case, under S. 164 of the Agra Ten. Act a cosharer may either be given a decree on the basis of the gross rental or on the basis of actual collections, and if a decree is based on actual collections such collections include arrears of the previous years also. But this principle would not apply to a suit under S. 165 of the Act where it cannot be said that it was the duty of the defendants to make collections of the plff's. share also. The defendants can be held liable only if they have collected rents in excess of their own legitimate shares. (*Sulaiman, J.*) LALA DURGA PRASAD v. GANGA SARAN.

(1922) All. 501 : L. R. 3 A. 471 (Rev.)

—Ss. 165 and 10 (5)—*Purchaser of Kud-Kashi land—Rent*

In a suit for profits by the purchaser of Kud-Kashi land against the vendor the ex-proprietary tenant of the plots, the other cosharers in the village are not necessary parties. The suit is one for rent and is not governed by S. 165. But having regard to S. 10 (5) of the Agra Tenancy Act and S. 36 of the Land Revenue Act, as a preliminary step to such a suit it is necessary

## AGRA TENANCY ACT, S. 177.

first to have the rent assessed by the Collector. (*Ryves, J.*) KISHORI MAL v. PARASADI.  
(1922) All. 319.

—S. 165—*Suit for profits against lambardar—Liability for expropriatory rent.*

Where expropriatory rent has not been assessed under S. 36 of the U. P. Land Rev. Act, such rent cannot be taken into account in a suit for profits against the lambardar. (*Lindsay and Kanhaiya Lal, JJ.*) KUNJ BEHARI LAL v. ABDUL HADI.  
L. R. 3 A. 260 (Rev) :  
4 U. P. L. R. (A) 200.

—S. 165—*Suit for profits—Lambardar—Negligence—Second appeal.*

Where a lambardar is sued under S. 165 of the Agra Ten. Act for profits, the question of his negligence is one of mixed law and fact and is open to consideration on second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) KUNJ BEHARI LAL v. ABDUL HADI.  
4 U. P. L. R. (A) 200 :  
L. R. 3 A. 260 (Rev)

—S. 167—*Jurisdiction—Civil and Revenue Courts—Suit relating to possession of trees.*

A suit for a declaration of plaintiff's possession of certain trees in a grove does not turn on title to land and is cognisable by the Civil Courts alone. (*Mears, C. J. and Stuart, J.*) RAM PRASAD v. SUMER NATH PANDE, L. R. 3 A. 530 (Rev.)

—S. 167—*Suit for declaration that rent decree is fraudulent and for declaration of title—Civil Court—Jurisdiction.*

A suit for a declaration that plff. is entitled to proprietary possession of a holding and that a rent-decree was fraudulently obtained by the deft. and ejectment proceedings illegally instituted, is maintainable in a Civil Court. The decision of the Revenue court does not operate as res-judicata. 36 A. 492 foll. (i) A. 97 ; 43 A. 191 Ref. (*Walsh, J.*) RAM DHARI UPADHIA v. BABU LAL UPADHIA.  
3 U. P. L. R. A. 21 : 65 I. C. 101.

—S. 167—*Wilful neglect to cultivate—Damages—Suit for—Forum—Revenue court. See AGRA TENANCY ACT, Ss. 102 and 167.*

L. R. 3 A. 477 (Rev.)

—S. 175 and 179—*Ejectment—Death of decree-holder—Legal representative—Revival of proceedings—Abatement.*

Where a person died after obtaining a decree for ejectment and the Assistant Collector on the application of the legal representative revived the execution proceedings and ordered ejectment overruling the objections of the judgment debtor, Held that no appeal lay to the Commissioner from the order of the Assistant Collector. The legal representative having applied within a reasonable time to revive the proceedings there was no abatement. (*Hopkins S. M. and Freeman, J. M.*) THE NATH CHANDRAWAT KOHS TRUST v. CHANDRA BALI  
4 U. P. L. R. (B. R.) 103.

—S. 171—*Appeal—Ejectment—Question of proprietary title.*

In a suit to eject defendant as a sub-tenant, the latter pleaded that he held the land as proprietor.

## AGRA TENANCY ACT, S. 177.

Held that a question of proprietary title was involved in the original Court, but the question not having been raised before the Commissioner, he was competent to hear the appeal. (*Fremantle, J. M.*) JANGI v. RAM KALLA.

L. R. 3 A. 403 (Rev.)

—S. 177—Appeal—Valuation of suit—Principle guiding.

In a suit under S. 165 of the Tenancy Act the plaintiff claimed Rs. 70 and prayed that it anything more was due to her she should receive it. A decree for Rs. 158-5-1 was passed in her favour. In appeal by the defendant, the plea of the plaintiff was that no appeal lay under S. 177 Tenancy Act as the value of the suit was Rs. 70 only. Held that under the peculiar conditions of the Tenancy Act, it is obvious that in a case of this kind the valuation should be taken to be the value as found by the Court and therefore an appeal would lie. (*Stuart, J.*) MUSSAMAT UMME KHAIR v. AZIZ ALI. 1922 All. 47.

—S. 177—Claim to hold land as Khudkasht—Question of proprietary title—Appeal—Dist. Judge—Commissioner.

A plff. sued for a declaration that he was the occupancy tenant of certain land and the defence of the landholder was that the land was in his possession as Khudkasht. The issue was whether the plff. had retained possession of the land as his occupancy holding or whether the deft. on the extinction of the plff's occupancy right, had taken possession of the land and cultivated it and made it his Khudkasht. Held that a question of proprietary title was involved and an appeal lay to the District Judge. 12 A. L. J. 251 foll. (*Hopkins, S. M. and Fremantle, J. M.*) HAR DUTT SINGH v. BARSATI NADDAF.

L. R. 3 A. 265 (Rev.)

—S. 177—Jurisdiction—Civil and Revenue Court—Question of proprietary title.

It would be absurd to hold that the defts. in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the revenue to the Civil Court. 15 A. L. J. 319; 16 A. L. J. 500 Ref. Where there is a substantial plea of proprietary title raised by a party before the Revenue Court, it is the duty of the Commissioner to return the appeal for presentation to the District Judge. (*Ferard, S. M. and Hopkins, J. M.*) CHAUDHRI LACHMI NARAIN v. MT. SARDAR KUAR. L. R. 3 A. 274 (Rev.)

—S. 177—Jurisdiction—Proprietary title—Appeal forum.

Where the plea of proprietary title is a bona fide one and not put forward merely in order to change the forum of the appeal, appeal lies to the District Judge. (*Hopkins, S. M. and Fremantle, J. M.*) PHULWARI v. HEMRAJ.

L. R. 3 A. 228 (Rev.)

—S. 177—Order refusing restitution by Revenue Court—Not a decree and not appealable. The word 'decree' in S. 177, Agra Tenancy Act, does not include an order refusing restitution and as such no appeal lies against such an order.

## AGRA TENANCY ACT, S. 194.

28 All. 753 foll. (*Mears, C. J. and Banerjee J.*) KASHI PRASAD SINGH v. BALBHADHAR SINGH.

44 All. 283; 20 A. L. J. 133; (1922) A. 71; L. R. 3 A. 97 (Rev.); 65 I. C. 798

—S. 177—Question of proprietary title or issue—Appeal to whom lies—District Judge or Commissioner. See AGRA TENANCY ACT, Ss. 58 AND 177. L. R. 3 A. 300 (Rev.)

—S. 181—Appeal Commissioner's omission to consider evidence—Interference by Board.

Where the Collector has not applied his mind to the evidence, the Board is justified in varying his decision (*Burn S. M. and Pearson J. M.*) BAHORI LAL v. GOKULA.

L. R. 3 A. 500 (Rev.)

—S. 185—Revision—Failure to deal with plea—Interference.

A failure to deal with a plea that was expressly taken, is a material irregularity justifying interference in revision (*Hopkins, S. M. and Fremantle, J. M.*) KUNWAR MUHAMMAD KARAMAT ALI KHAN v. JUGLA. L. R. 3 A. 208 (Rev.)

—S. 194—Ejectment—Joint proprietors Agreement to collect rent separately—Effect.

Although joint proprietors may divide their rights and agree that each co-sharer shall collect his share of rent, the tenant who is thus divided can only be ejected by all proprietors acting jointly unless they have appointed an agent to act for them all. (*Burn, J. M.*) NAKKA v. MD. ISHAQ KHAN. L. R. 3 A. 221 (Rev.)

—S. 194—Ejectment suit—Co-sharer refusing to join—Effect.

If a co-sharer refuses to join the lambardar in a suit for ejectment the latter cannot proceed with the suit by making the co-sharer a defendant. (*Hopkins, S. M.*) BUDH SINGH v. KALKA PRASAD. L. R. 3 A. 229 (Rev.)

—S. 194—Ejectment suit—Parties—Mortgagee from cosharers.

A suit to eject a tenant was brought by the mortgagee of the interest of some only out of the several proprietors of a Zemindari share. On objection being taken on the ground of non-joinder, Held that the other cosharers were necessary parties to the suit and the suit was not maintainable. (*Hopkins, S. M.*) RAM YAD LAL v. KHEDU SINGH. L. R. 3 A. 253 (Rev.)

—S. 194—Lambardar—Power to collect rent of holdings.

A lambardar is the manager of the common land, entitled to collect the rents, settle tenants, eject them, procure enhancements of rent and do all necessary acts relating to the management of the estate for the common benefit. (*Hopkins, S. M. and Fremantle J. M.*) HANUMAN SINGH v. SYED AHMED ALI KHAN. L. R. 3 A. 369 (Rev.)

—S. 194—Lambardar—Powers of—granting of Kabuliats.

Where a kabuliati granted by the lambardar had been attested by some cosharers and the co-sharers had from time to time accepted it and realised rents on it, the Court might infer that the lambardar had implied authority from

## AGRA TENANCY ACT, S. 194.

the co sharers to grant the kabulyat *Pearson J. M.) BHAGWAN SINGH v. NABI BAKSH.*  
L. R. 3 A. 526 (Rev.)

—S. 194 (1)—Lambardar—Right to collect rents and eject tenant—Agreement—Custom.

The lambardar is not by virtue of his office entitled to collect rents with reference to S. 194 (1) of the Tenancy Act. If it is sought to show that the lambardar is entitled to collect the whole of the rent and thus to eject, either an agreement of the cosharers or a special custom must be proved. (*Burn, J. M.) BHOLANATH v. BABU RAM.*  
L. R. 3 A. 457 (Rev.)

—S. 194—Lease of land—Owners of entire Zemindari to join—Suit in ejectment by some—Effect of.

All the Zemindars or owners of the entire Zemindari should join together to grant a lease of land. It is open to some of the co-sharers Zemindars to sue to eject a trespasser in the Civil Court. (*Hopkins, S. M. and Fremantle, J. M.) MUSAI SINGH v. MATHURA DUBE.*  
L. R. 3 A. 445 (Rev.)

—Ss 196 and 197—Invalid lease—Ejectment—Appeal—Civil and Revenue Court—Procedure.

A Civil Court has no jurisdiction to try a suit for ejectment on the ground that the person granting the lease has no authority to give the same. If such a suit is brought in a Civil Court and an appeal is filed before the District Judge Ss. 196 and 197 of the Agra Tenancy Act cannot be invoked in favour of the appellant for the matter of the ejectment of a tenant is purely within the jurisdiction of a Revenue Court. (*Stuart, J.) LALA SUNDAR LAL v. KIFAYAT HASAN KHAN.*  
L. R. 3 A. 134 (Rev.)

—S. 196—Jurisdiction—Civil and Revenue Court—Objection on appeal.

Where an objection to jurisdiction of the Civil Court is not raised in the first Court it cannot be raised on appeal or second appeal by reason of S. 196 of the Agra Ten Act. But the fact that if the question of jurisdiction is not raised in the first Court the Appellate Court is to decide the suit as if it had been brought in the right court does not in any way warrant the conclusion that the limitation to be applied to that suit is not the one which would have applied if the suit had been brought in the right court but that some other rule of limitation is to be applied. (*Gokul Prasad, J.) BHIKHARI SINGH v. JOKIAN.*  
(1922) All. 124 : 4 U.P.L.R. (A) 104. 66 I.C. 856.

—Ss. 197 and 202—Procedure under S. 202 compulsory—Defendant's plea that he is a tenant of plaintiff and of others. [See (1921) Dig. Col. 20 BHAUNI v. RAM DAYAL.  
L. R. 3 A. 10 (Rev) : 64 I.C. 426.

—S. 197—Revenue Court—Suit for profits—Nazarana and Haqchaharam—Procedure.

In a suit for profits brought by a cosharer against a lambardar, the courts below held that as the lambardar was guilty of gross negligence the claim should be decreed on the demand and not on the collections. *Held*, that as regards the claim for haqui chaharun and nazrana, the Dis-

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trict judge was in error in holding that it could not be brought in the present, but he should have followed the procedure laid down in S. 19 of the Agra Ten. Act. (*Stuart, J.) LALMAN v. DIN DAYAL.*  
L. R. 3 A. 149 (Rev.)

—S. 197—Suit in Revenue Court—Cantonment land—Jurisdiction

Plff. sued in a Revenue Court for ejectment of del. from land to which the Agra Ten Act did not apply. The del. objected to the jurisdiction of the Court and asserted proprietary title. The court however decreed the suit.

*Held* that the District Court to which an appeal had been preferred against the decree, ought to dispose of the appeal on the merits, since the necessary materials for the decision of the case were on record. (*Stuart, J.) SECRETARY OF STATE v. MULLA.*  
(1922) All. 57 :  
L. R. 3 A. 169 Rev. 66 I.C. 582.

—Ss. 199, 200 and 201—Decision of Revenue Court—Ejectment in Civil Court—Effect of decision.

The decision of a Revenue Court cannot operate as res judicata in a Civil Court unless the case comes within the purview of Ss. 199 to 201 of the Agra Ten. Act. In other cases the question is not one of res judicata but whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the civil court having jurisdiction to decide it. 37 A. 41 foll. Where however the point under the Tenancy Act is itself within the jurisdiction of the Civil Court, it can decide it. (*Stuart, J.) SARABJIT MAL v. RAM KHELWAN MAL.*  
4 U.P.L.R. (A) 90.  
66 I.C. 714

—Ss. 199 and 201—Question of proprietary title—Decision of Revenue Court—Res-judicata.

Under Ss 199 and 201 of the Agra Tenancy Act special jurisdiction is conferred on Rent Courts to try and decide questions of title to property and the decision of the revenue court on a question of title is res judicata in a subsequent suit in the civil court of the same issue. (*Lindsay and Stuart, JJ.) MT. JHAMOLA KUNWAR v. HANWANT SINGH.*  
(1922) A. 129 :  
4 U. P. L. R. (A). 113

—S. 199—Suit for profits—Legal representatives—Disputes between Decision of title.

Where a suit by a person claiming as the legal representative of the deceased, for recovery of the profits due to his share is contested by persons denying plff's character as such legal representative, the Court ought under S. 199 of the Agra Tenancy Act, to decide the question of title or refer the parties to a Civil Court by an order in writing. (*Banerji, J.) SYED MADAD ALI v. SHEIKH SHAMSHER ALI.*  
4 U. P. L. R. (A). 9.

—S. 201—Evidence—Presumption—Alteration in record—Duty of Court trying rent suit.

If on the date of the institution of a suit for profits the plff's name stands in the Revenue Record as the proprietor of a certain share, the Revenue Courts are bound to presume the correctness of that entry and to frame a decree for profits

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accordingly in spite of the fact that during the pendency of the litigation (either in the Court or in a subsequent appeal, or in second appeal) there may have been an order of the Revenue Court altering the entry in question. When there has been an alteration in the Revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the court trying a suit for profits must be to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an 8 annas share of a mahal during the first year in respect of which profits were claimed and it were shown that after the close of that year he had been recorded as proprietor of a 4 annas share only, upon a finding that he had transferred his interest in the remaining 4 annas share after the close of the first year in suit, then the duty of the Court should be to give effect to the entries year by year calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however it is clear upon an examination of the order passed by the revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and it was not passed upon any alleged transfer having occurred during the years covered by the suit then the revenue Court is bound to give effect to the entries as it stood on the date of the institution of the suit. (*Piggott and Stuart, JJ.*) MUSSAMMAT MUBARAK FATIMA v. MAHOMED QULI KHAN.

20 A. L. J. 243 : L. R. 3 A. 140 Rev. :

44 All. 413 : (1922) All. 102 :

4 U. P. L. R. (A.) 188 : 66 I. C. 125.

—S. 201—Proprietary title—Decision of—Revenue Court—Effect of.

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Ten. Act operates as res-judicata and bars the trial of a subsequent suit in a Civil Court relating to the same proprietary right (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH v. MT. JHAMOLA KUNWAR.

20 A. L. J. 340 :

(1922) A. 95 : 66 I. C. 915.

—S. 201—Revenue Court—Suit for profits—Record of share in revenue papers—Binding nature of.

A revenue court must take the record in the revenue papers as final in a proper case to show the share of profits to which a party is entitled, but a Revenue Court is not debarred from going into the merits of the question as to whether a certain sharer is or is not holding *Sir or Khudkhast* in excess of his share. That is a point to be decided by the Revenue Court. Undoubtedly a sharer who holds *Sir or Khudkhast* in excess of his share must recoup a sharer who holds less than is due to him. There is no inflexible rule by which a man who owns a half share in the village is holding in excess if he is in possession of more than half of the *sir* or more than half of the *Khudkhast*. It is open to him to show that he does not hold in excess, (*Stuart, J.*) MSST SUGHRA BIBI v. SHAH FAIAZUL HASAN.

L. R. 3 A. 146 (Rev.)

## AJMERE REGULATION (III of 1877) S. 6

—Ss. 201 (3) and 184—Question of title—Decision of Civil Court pending appeal from a decree of Revenue Court—Duty of the latter.

Where during the pendency of an appeal from a decree in a suit for profits under S. 161 of the Agra Ten Act, the defendant obtained a decree of the Civil Court that plaintiff had no title it is the duty of the appellate court to give effect to the decision of the Civil Court and dismiss the suit (*Ryves and Gokul Prasad, JJ.*) SURJAN SINGH v. CHATURA KUNWAR 44 A. 250 : 20 A. L. J. 61 : (1922) A. 356 : L. R. 3 A. 17 (Rev.) : 64 I. C. 964.

—S. 202—Agricultural holding—Thekadar of large zemindari suit in Civil Court for possession of zemindari property including market groves and houses—Plea that deft. is thekadar on perpetual lease See (1921) DIG. COL. 21 RANI DHANDEI KUAR v. CHHOTU LAL.

L. R. 3 A. 144 (Rev.) : 64 I. C. 605 : (1922) All. 442.

—S. 202—Agricultural lease—Suit to set aside—Ejectment-jurisdiction—Civil and Revenue Court.

Where a defendant holds under a lease which is void *ab initio* his possession is that of a trespasser and if the plaintiff has not acknowledged the deft as tenant, a suit for ejecting the latter lies in the civil court. A lease for collection of rent and Zamindari dues is not a lease granted for agricultural purposes and S. 202 of the Agra Ten. Act does not apply to a suit to set aside the lease. (*Lindsay and Kanhaiya Lal, JJ.*) AMINA BIBI v. SAHYID YUSUF. (1922) All. 449 :

4 U. P. L. R. (A) 209 : 20 A. L. J. 731.

—S. 202—Applicability of—Suit in civil court for ejectment—Plea of sub tenancy

A suit was brought in a civil court for ejectment and the plea set up in defence was one of sub-tenancy.

Held, on the pleadings S. 202 applied and the procedure laid down therein should be followed (*Piggott and Walsh, JJ.*) SHEIKH MUHAMMAD YAKUB v. BECHU AHIR. L. R. 3 All. 21 Rev. :

65 I. C. 351.

—S. 202—Time granted for institution of suit in revenue Court—Extension of time.

Where a defendant has been ordered in writing to institute within three months a suit in the Revenue Court for the determination of the question of tenancy and fails to institute such a suit within three months of the order, the Court must decide the question against him. The Court has no authority to extend time. (*Stuart, J.*) RUP NARAIN v. PARTAB PATHAK.

64 I. C. 491.

## AJMERE COURTS REGULATION (I of 1877) S. 17

Reference to High Court—Reference to arbitration pending reference to High Court—Jurisdiction of Ajmere court—Separate suit for declaration that reference was without jurisdiction. See (1921) DIG. COL. 22 RAM. LAL v. DEO RAJ.

44 A. 91 : (1922) A. 173 : 64 I. C. 601.

## AJMERE REGULATION (III of 1877) Ss. 6 and 9—Pre-emption—Sale—What is—Right of pre-

emption in the absence of sale deed.

**AJMERE REGULATION (III of 1877) S 17.**

There is a right of pre-emption where the vendee pays the price and obtains possession of the property sold though no sale deed has been actually executed. The decision in 16 A 344 is applicable to cases arising in Ajmere Merwara (*Piggott and Walsh, JJ*) *RAM SUKH v. MRS L. E. O'NEAL*, 20 A. L. J. 59 :

L. R. 3 A 45 : 65 I. C. 103.

44 A. 239 : (1922) A. 46 :

—S. 17—Reference to High Court—Reference to arbitration pending reference to High Court—Jurisdiction of Ajmere Court—Separate suit for declaration that reference was without jurisdiction. See (1921) DIG. COL. 22 *RAM LAL v. DEORAJ*, 44 All. 91 : (1922) A. 173 : 64 I. C. 601.

**ALIYASANTHANA LAW**—Manager Ejman—Relinquishment of her position—Right of management—Execution of mortgage—See (1921) DIG. COL. 22, *KUNHANNA v. MANKU CHETTI*, 30 M. L. T. 25.

**ALLAHABAD HIGH COURT RULES CHAP. 21 R. 1—Costs—Pleader's fees—Certificate of fees.**

Letters of Administration to the estate of a minor were after contest granted to the Nazir of the Court, who was also awarded a sum for vakil's fees; the Nazir under the order raised the money and paid the fees to the pleader who filed his fees receipt.

*Held*, under Chap. XXI, R. 1 of the General Rules for Civil Courts (1911), fees can be allowed only if the Judge is satisfied of payment of fees before the hearing; it gives him no discretion to allow on taxation fees paid after the hearing (*Ryves and Gokul Prasad, JJ.*) *MAGAN LAL v. MUHAMMAD TIA-UD-DIN*, 61 I. C. 804

**ALLUVION AND DILUVION—"Gradual slow and imperceptible"—Principles how far applicable in India.**

The principle of English law is that an accretion must be formed by gradual, slow and imperceptible degrees. The words "slow" and "imperceptible" are only qualifications of the word "gradual" and the test laid down is relative to the conditions to which it is applied. The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India on account of the different conditions in India and in England. (*Lord Carson*.) *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJA OF VIZIANAGARAM*, 45 Mad. 207 :

42 M. L. J. 589 : 26 C. W. N. 348 : 15 L. W. 389 :

20 A. L. J. 438 : L. R. 3 P. C. 105 :

(1922) P. C. 105 : 35 C. L. J. 463 :

(1922) M. W. N. 381 : 67 I. C. 1 :

49 I. A. 67 (P. C.)

—Reformation in situ—Need not be slow and imperceptible.

If lands are reformations in situ the question whether the accretion was slow and imperceptible does not arise. (*Chatterjee and Pearson, JJ.*) *NAZIR AHAMAD CHOWDHURY v. THE SECRETARY OF STATE FOR INDIA*, 26 C. W. N. 913 : 35 C. L. J. 580 : (1922) Cal. 387 :

69 I. C. 74.

**APPELLATE COURT.**

See also under **BENGAL ALLUVION AND DILUVION REGULATIONS**.

**ANIMALS—Wild animals—Elephants—Property in—Capture—Escape—Effect of.**

When a wild animal, e. g., an elephant has escaped from captivity and pursuit of it has been given up, the property which a man may have formerly had in it ceases and it becomes open to any one else to reduce the animal to his possession, and then it will, for the time become his property. An animal which has gone away and may be supposed to be likely to return to a state of captivity ceases to be a wild animal. 35 C. 413 foll. (*Higginbotham, J.*) *MAUNG YAUNG SHWE v. MAUNG SIN*, 11 L. B. R. 71 : 64 I. C. 831.

**APPEAL**—Appeal to Privy Council—Suit against minors and others compromised—Order of High Court deciding validity of compromise whether appealable. See (1921) DIG. COL. 23. *RAJ KISHORE DAS v. RAM GHULAM SAHU*, 3 Pat. L. T. 61 : (1922) P. 256.

—Costs—Order as to—Appealable only when substantive order appealable. See C. P. CODE, O. 43, R. 1 (j). 20 A. L. J. 11.

—Forum—Execution proceedings—Suit for more than 5,000 Rupees.

Where a decree is passed by the High Court on a first appeal in a suit valued at more than Rs. 5,000, an appeal from an order in execution of such a decree lies to the High Court and not to the District Court and if the appeal is heard and decided by the District Judge the High Court will on second appeal set aside the order of the Dt. Judge and directed the appeal to be presented to itself, 16 C. I., J 77 Ref. (*Mookerjee and Panton, JJ.*) *KUMUDINI RAY v. KAMALA KANTO SEN*, 35 C. L. J. 106 : (1922) Cal. 247 : 68 I. C. 575 ;

—Right of—Person not adversely affected by the decree—Stakeholder.

A stakeholder who is not personally interested in the subject of the suit has no right of appeal from the decree passed therein in favour of one of the contending parties. (*Le Rossignol and Campbell, JJ*) *THE ALLAHABAD BANK, LTD. v. LENA MACDONALD OF DELHI*, 67 I. C. 868,

**APPELLATE COURT**—Decree of—Effect on decree of original court—Extension of time. See (1921) DIG. COL. 24 *RAJA SASI KANTA ACHARIYA BAHADUR v. SANDHYA MONI DASIA*, 26 C. W. N. 483 : 65 I. C. 4.

—Discretion—Exercise of by Court below—Interference.

An Appellate Court ought not to interfere with the discretion exercised by the Court below, because upon the materials before it, it might have arrived at a different conclusion. But when that discretion has not in fact been exercised at all it is certainly open to the party aggrieved to raise the question on appeal. 41 Mad. 412 (P. C.) Ref. (*Miller, C. J. and Coutts, J.*) *MD. ABDUL KASIM v. CHATURBHUI SAHAI* (1922) Pat. 20 : (1922) P. 47 : 64 I. C. 55.

## APPELLATE COURT.

## —Evidence—Whether allowed.

There is no precedent for allowing an appellant to lead evidence which could have been led in the Court below, in appeal. (*Macleod, C. J. and Kanga, J.*) *MOTI CHAND RAOJI v. MANEKCHAND RAMCHAND GOJAR.* (1922) Bom 147

## —Evidence—Appreciation of—Interference with findings of lower Court.

An Appellate Court ought not to differ from the trial court unless there are strong and weighty reasons for doing so. But the appellate court has certain responsibilities and is bound to examine the evidence with a view to see whether in giving judgment the trial judge did not misdirect himself. (*Das and Adami, JJ.*) *MUSSAMMAT CHANDRAMA KUER v. RAMGAYAN.*

67 I. C. 57 : (1922) P 111.

## —Evidence of—Witnesses—Credibility,

When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box by the manner in which he answers questions, and by how he seems to be affected by the questions that are put to him, and so on. No doubt there the trial judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of Appeal is really in just as good a situation as the judge of first instance. (*Lord Dunedin.*) *PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSHMAMMA.*

(1922) P. C. 315.

—Findings of fact—Examination of evidence—Duty of court. See (1921) DIG. COL. 25. *REES v. JHON YOUNG.* 66 I. C. 745.

—Finding of fact—Evidence—Appreciation of—Function of appellate court. See (1921) DIG. COL. 25. *PRASANNA MAYI DEBI v. BAIKUNTA NATH CHATTERJEE* 66 I. C. 782 : 49 Cal. 132 : (1922) Cal. 260.

## —Finding of fact by trial court—Appreciation of evidence—Credibility of witnesses.

In all cases where there is an appeal on questions of fact, it has been found that it is a good working rule that the appellate tribunal will not lightly interfere with the findings of fact of the court below and this rule applies most strongly where there has been a conflict of oral testimony and the judge has had the advantage of seeing the witnesses and of observing their demeanour, but there the application of the rule should stop. The rule should not be pressed too far, for there are many cases where there has been a conflict of evidence in the court below in which the court of appeal is bound to give effect to its own view if it differs from that of the lower court; as for instance where the probabilities of the case are so strongly against the view of the court below that the court of appeal disagrees with it or where there are documents consistent with the evidence for the appellant and inconsistent with the case of the respondent and in the view of the court of appeal, they are irreconcilable with the finding of the court below. The demeanour of witnesses is not invariably a safe guide to the truth of their

## APPROPRIATION.

evidence. (*Schwabe, C. J. and Krishnan, J.*) *ADAM HAJI PEERA MAHOMED ISHAK v. HUSSAIN AKBARI.* 43 M. L. J. 199 : (1922) M. W. N. 434 : 31 M. L. T. 40 (H. C.)

—Judgment—Silence regarding ground specifically raised—Presumption. See EVIDENCE ACT S. 114. 68 I. C. 740.

## —New case—Not to be allowed in appeal.

Where the members of a Hindu family put forward a claim to certain property on the ground that it belonged to them by partition, and therefore not liable to attachment in execution and that plea was found against, they cannot on appeal put forward the plea that the decree was obtained against the manager in his individual capacity and therefore not executable against the family properties. (*Leslie Jones and Broadway JJ.*) *RAM CHAND v. RAMA NAND*

3 Lah. L. J. 392 : 68 I. C. 227.

## —New plea—Question of fact.

A plea that the land in suit had not been demarcated or defined would not be entertained for the first time on appeal. (*Hopkins, S. M.*) *MT. SRIMATI AUSANBATI DEBI v. RAM JAS.*

4 U. P. L. R. (B. R.) 9.

—New plea—Not to be allowed when it requires fresh evidence. See PRACTICE, APPELLATE COURT 64 I. C. 952.

—New plea—Finding of fact not challenged on appeal—Appellate Court—If can reverse finding. See (1921) DIG. COL. 26. *JIWAN SINGH v. MT. FATEH BIBI.* 67 I. C. 44.

## —New plea—Questions of fact.

A plea involving questions of fact not raised or tried in the trial Court cannot be allowed to be raised on appeal for the first time. (*Simpson, J.*) *MOHKAM v. BANSIDHAR.* 9 O. L. J. 350 : 4 U. P. L. R. (O. C.) 93 : 68 I. C. 972.

## —New point—Question of law.

Where a new point, raised before the appellate court is one of law to be decided without any further evidence it is the duty of the appellate court to entertain it. (*Broadway, J.*) *YAKUB KHAN v. KARMAN.* 66 I. C. 466.

—New point—Subrogation—Not to be allowed for the first time on appeal. See T. P. ACT, S. 101. 64 I. C. 266.

—Powers of—Amendment of ground of appeal. See C. P. CODE O. 6 R. 17. 3 Lah. 382.

—Powers of—Objections as to admissibility of documents not raised in Court below—Effect of. See EVIDENCE ACT, Ss. 58, 63, 65.

3 Pat. L. T. 397.

APPROPRIATION—Debt carrying interest—Moneys received without definite appropriation—Creditor to appropriate first towards interest. See (1921) DIG. COL. 26. *MEKA VENKATADRI APPA RAO v. RAJA PARTHASARATHY APPA RAO.* (1922) P. C. 233 : 30 M. L. T. (P. C.) 36.

—Part payment of decree debt—Money to be credited to interest first and balance to principal. See CONTRACT ACT, Ss. 59 AND 61.

(1922) P. C. 66.

## APPROVER.

**APPROVER**—Corroboration of statement—Confession of co-accused. See EVIDENCE ACT, S. 114.  
65 I. C. 622.

—Uncorroborated evidence, value. See CRIMINAL TRIAL. 68 I. C. 821 : 4 U.P.L.R. (L) 110.

**ARBITRATION AND AWARD**—*Abortive award if prevents fresh reference—Court's power to decide if there was a valid contract.*

According to a contract between the parties all disputes were to be referred to arbitration, one arbitrator to be appointed by each party within a certain time. Disputes having arisen the vendors appointed an arbitrator and gave notice to the vendees to do the same. The latter refused and an award was made, which however was set aside by Court, as it was completed within the period of time allowed to the other side to nominate an arbitrator.

The vendors again referred the matter to a fresh arbitration and on an application being made to enforce it, the other party objected that the prior reference having proved ineffective, the arbitration clause had spent itself.

*Held*, the fact that the prior proceedings had proved ineffectual, did not stand in the way of a proper arbitration proceeding.

Per *Walsh, J.* Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. (*Piggott and Walsh, JJ.*) SUSHIL CHANDRA DAS v. SUKAMAL BANSIDHAR

20 A. L. J. 377 : L. R. 3 A. 277 : 44 All. 472 :  
(1922) All. 219 : 4 U. P. L. R. (A) 69 :  
67 I. C. 487.

—*Agreement making it obligatory to refer claims within a fixed time—Failure to do so—Effect—Court's function.*

Where parties had contracted to refer all disputes to arbitration, and also not to recognise any claim or dispute that had not been made in writing in 60 days, the failure to do the latter disentitled the party in default to any relief from the arbitrators.

When a Court is asked to file an award, it is not sitting as a Court of appeal from the arbitrators; but the Court can certainly decide if the award sought to be filed is the production of a tribunal duly constituted under the terms of a contract binding on both parties.

Per *Walsh, J.* An arbitrator cannot give himself jurisdiction by arriving at a conclusion when there is no evidence to support it or when the parties had contracted themselves out of all reliefs under certain circumstances. (*Piggott and Walsh, JJ.*) KEDAR NATH MOTI LAL v. SUKAMAL BANSIDHAR.

44 A. 481 :  
20 A. L. J. 385 : L. R. 3 A. 289 :  
4 U. P. L. R. (A) 64 : 66 I. C. 691.

—*Decree based on award—Fresh suit within twelve years if lies—Proper remedy whether by execution of the decree on award or suit—Suit barred.*

A decree under S. 526 of the old C. P. Code has the same effect as regards execution as a decree under S. 522. Consequently a decree upon an award stands precisely in the same position with regard to its execution as any other decree of Court. A fresh suit does not lie on the same cause of action, 21 W. R. 248 followed.

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A decree made upon an award filed according to the provisions of section 327 (Act VIII of 1859) must stand precisely in the same position with regard to its execution as any other decree of a Court. (*Woodroffe and Ghose, JJ.*) LALIT MOHAN MOITRA v. RAJA SASI SEKHARESWAR.  
(1922) Cal. 73.

—*Law governing—Dispute between parties to be referred to arbitration in London—Objections to award to be preferred—Irregularity if can be pleaded in defence.*

According to the agreement between parties all disputes were to be referred to arbitration in London, to the parties appointing an arbitrator each, and in pursuance thereof when a dispute arose, plaintiff nominated an arbitrator and called upon the defendant to do the same—this was not however done, and as a result the plaintiff's arbitrator gave an award—In proceedings taken to enforce the award objections were raised relating to misconduct and irregularities on the part of the arbitrator.

*Held* (1) As the arbitration was to take place in London in the usual manner, the English Law was to govern the same.

(2) According to that law, any objection to an award on the ground of misconduct or irregularity has to be taken by way of motion to set aside or remit the award and if not so taken could not be pleaded in answer to an action on the award; and hence any irregularity not appearing on the face of the record was excluded by English Law. (*Viscount Cave.*) OPPENHEIM AND CO. v. HAJEE MAHOMED HANEE SAHIB.

26 C. W. N. 642 :  
43 M. L. J. 422 : 24 Bom. L. R. 1245 :  
45 Mad 496 : 16 L. W. 33 : 36 C. L. J. 444 :  
(1922) M. W. N. 396 : 4 U. P. L. R. (P. C.) 36 :  
L. R. 3 (P. C.) 185 : (1922) (P. C.) 120 :  
30 M. L. T. (P. C.) 291 : 49 I. A. 174 (P. C.).

—*Legality and binding nature of award—Opportunity to prove case to be given to the parties.*

Before a party can be held bound by an award it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that the arbitrator had given full opportunities to both parties to appear and represent their case to him. (*Broadway and Moti Sagar, JJ.*) FIRM OF MANSA RAM GORDHAN DAS v. FIRM OF MANGAL SAIN DUNI CHAND.

(1922) Lah. 149 : 65 I. C. 497.

—*Legality of award—Award made on grounds some of which are bad. See (1921) DIG. COL. 27. HURMUKHROY RAMCHUNDER v. THE JAPAN COTTON TRADING CO., LTD.*  
(1922) Cal. 399 : 66 I. C. 342.

—*Legality of award—Cancellation of reference*

Where the court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate court to look into the award or treat it

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as if it were the report of a commissioner  
(*Chevis, A. C. J.*) ARUR CHAND v. AHMAD,  
(1922) Lah. 194 : 4 Lah. L. J. 48.

———*Legality of award—Notice not given.*

Where an award is given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute, the award is illegal (*Scott Smith and Abdul Qadir, JJ.*) RAJA RAM PUNAM CHAND v. JOGAL KISHORE RAM RICHPAL.

L. R. 3 A, 81 (Rev) : 65 I. C. 577.

———*Legality of award—Notice not given—Request to appoint arbitrator* See (1921) DIG. COL. 28, MOHIDIN SAHIB v. RAMASWAMI CHETTY.  
65 I. C. 676.

———*Maintainability—Transferee of tenancy*

The transferee of a tenancy interest can maintain an appeal against a decree passed against his transferor, when the legality of his purchase has been questioned, (*Mookerjee and Chotzner, JJ.*) RAGHUPATHI CHATTERJEE v. NRISINGHA HARI DAS.  
36 C. L. J. 491.

———*Misconduct of Arbitrator—What constitutes—Observance of forms and rules of common justice essential—Private information not to be used—Misconduct—Remitting of award.* See (1921) DIG. COL. 28 HARI SINGH NEHAL CHAND v. KANKINARAH CO., LTD. 66 I. C. 389

———*Power of appointment and supersession—Pleader—Powers of.*

Where a litigant has himself appointed an arbitrator, his pleader has no power to substitute another or others in their place or to revoke the appointment of one or more of them without the knowledge of or instructions from his client. Power to make an appointment in the first instance in the absence of instructions to the contrary is one thing and power to undo the appointment made by his client is another thing. (*Kotwal, A. J. C.*) KASHIRAM v. MT. GUDDOO.  
(1922) Nag. 39 : 5 N. L. J. 229 : 18 N. L. E. 140 :  
65 I. C. 879.

———*Principles guiding—Legal flaw—Party securing flaw, if can take advantage of it.*

General principles of law must be applied to arbitration matters as to all others. The failure of an arbitrator to sign the award is a legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw. (*Walsh and Stuart, JJ.*) RAM SUNDER TEWARI v. MT. KULWANTI 20 A. L. J. 392 :  
L. R. 3 A 299 : (1922) All. 233 (b) :  
66 I. C. 499

———*Private reference—Power of Court to issue commission for the examination of witnesses.* See ARBITRATION ACT, Ss. 10 AND 12.  
24 Bom. L. E. 853.

———*Reference—Validity of—Dispute—Existence of, essential.*

The existence of a "dispute" is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involved the assertion of a right by one party and its denial by the

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other. Where the parties do not reach that stage and the vendors merely refuse to comply with the request of the buyer prior to the sale regarding incidental matters, there is no "dispute" within the meaning of the arbitration clause in the contract. (*Mookerjee and Fletcher, JJ.*) CHANDMULL GONESHMULL v. NIPPON MUKKWA KARBUSHIKI.  
64 I. C. 798.

———*Supersession of award—Conduct of parties—Application to court to appoint fresh arbitrators—Effect of.* See C. P. CODE O. 23, C. 3.  
24 Bom. L. E. 361.

———*Remission to arbitrators—Grounds for—Error of law, when sufficient.* See ARBITRATION ACT, S. 10.  
49 Cal. 646.

———*Time for filing award—Extension by arbitrators themselves—Legality of—Umpire—Ex parte procedure—Misconduct—Remission of award—Discretion—Arbitration Act, S. 12.*

Where the time fixed for the passing of an award has expired the court alone has the power to extend the time and not the arbitrators themselves. An award passed after the expiry of the time prescribed is bad. When certain arbitrators had proceeded with the arbitration without requiring one of the parties to attend inasmuch as they had repudiated the contract to refer to arbitration altogether, an umpire cannot adopt the same *ex parte* procedure without calling upon that party to attend at the hearing. Where an award is bad for legal misconduct it is open to the court to set aside the award or remit it to the umpire and an appellate court will not lightly interfere with the discretion of the trial judge. But where no grounds are shown for not remitting the award to the umpire, the appellate court might exercise its own discretion and remit the award. (*Schwabe, C. J. and Wallace, J.*) LOUIS DREUFUS CO. v. RAJAGOPALAN & BROS.  
16 L. W. 657.

———*Umpire—Powers of—Finality of award—Award—Construction—Extrinsic evidence.*

Whenever there is a difference of opinion between the parties as to the authority conferred on an umpire under an agreed submission, the decision is ultimately with the court and not with the umpire (1916) A. C. 314 Ref. It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding contrary to the fact that the matter, which he affects to decide, is within the submission of the parties. In considering the question whether an umpire has included in his report any items not within the terms of the agreement of reference, it must be borne in mind that the report is a written document which speaks for itself and which cannot be interpreted, or varied or contradicted, by extrinsic evidence. If there is any doubt as to the subject matter over which the umpire was purporting to exercise jurisdiction evidence may be given showing what was the subject matter into which he was enquiring, in order to enable the court to determine whether he has exceeded the limits of his jurisdiction. Such evidence may be given by the umpire himself or by any other competent



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witness; but it should be limited to the issue of fact and is not admissible to explain or add much less to attempt to contradict what is to be found on the face of the written instrument itself. *Buckley v. Metropolitan Board of Works*. (1871) 5 H. L. 418 Ref.

In a submission, in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final the courts will not enquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or on some document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states that he has made a mistake of law or fact, leaving it to the court to review his decision.

(1891) A. C. 31; (1912) A. C. 673 Rel.

The umpire is entitled to form his own opinion in respect of all matters submitted from his own knowledge, inspection or examination or from such other source as he may deem proper. It may not be possible for the Court to have before it all the materials on which the umpire based his decision and even if the court should remit the report it could have no effective control over the ultimate decision. (*Lord Parmoor, J.*) *THE ATTORNEY GENERAL OF MANITOBA v. KELLEY*.

31 M. L. T. 238 (P.C.)

——— *Validity of award—Decision of majority—Refusal by arbitrators to act.*

Where a reference to arbitration by four named persons without the intervention of court provides for a decision by all the arbitrators and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration invalidates the award. The submission to arbitration no longer remains in force and cannot be pleaded as a bar to a suit with reference to the subject matter of the arbitration. (*Daniels, J. C.*) *LACHMAN PRASAD v. PRAN NATH*.

(1922) Oudh, 108 : 65 I.C. 339.

——— *Validity of award—Institution of suit—Effect of—Arbitrators functus officio—Remedy of defendant—Application for stay of suit. See C. P. CODE, SCH. II, PARAS. 18 AND 20.*

35 C. L. J. 482.

ARBITRATION ACT—*Applicability.*

The Indian Arbitration Act does not apply to arbitrations in the course of litigation. (*Rankin, J.*) *AMAR CHAND CHAMARIA v. BANWARI LALL RAKSHIT*.

(1922) Cal. 404 : 49 Cal. 608.

ARBITRATION ACT, S. 9 (b)—*Different intention—What is.*

Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time, the chairman of the Trade Association was to appoint one on behalf of the defaulter, held that S. 9 (b) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties, was without jurisdiction. (*Viscount Cave*). *SASSOON AND CO. v. RAMDUTT RAMKISSEN DAS*.

49 I. A. 366. (P. C.)

## ARBITRATION ACT, S. 14.

——— *Ss. 10 and 12—Private arbitration—Power of court to order examination of witnesses on commission.*

In an arbitration without the intervention of the court, it is not competent to the court to order the examination of witnesses on commission. Where however the reference has been made through Court, the court has power to issue the same processes to the parties and witnesses whom the arbitrators desire to examine as the court might issue in suits tried before it. 7 Bom. L. R. 560; 21 Bom. L. R. 308; 22 Bom. L. R. 842 Ref. (*Marten, J.*) *JAMES MACKINTOSH AND COMPANY v. THE INDIA STEAM NAVIGATION CO., LTD*. 24 Bom. L. R. 853.

——— *S. 10—Submission to arbitration—Award—Error or mistake—When a ground for remitting the award.*

It is necessary that Courts should be very cautious in interfering with awards and the grounds on which the Court will remit the matter for reconsideration are:—(1) that the award is bad on the face of it (2) that there has been misconduct on the part of the arbitrator (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him (4) where additional evidence has been discovered after the making of the award. Mere errors in law unless distinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. 1893 1 Q. B. 405; (1898) 78 L. T. 406; (1905) 2 K. B. 184; (1912) A. C. 673 Rel. (*Sanderson, C. J. and Richardson, J.*) *U. M. CHOWDHURY & CO., v. JIBAN KRISHNA GHOSE*.

(1922) Cal. 447 : 49 Cal. 646.

——— *S. 11—Jurisdiction—Award—Application to file—Sale of goods.*

Where a Cawnpore firm sold to a Karachi firm some bags of linseed on "Karachi Pass Terms" under which the goods were to be delivered at Cawnpore Ry. Station and a receipt obtained in the name of the buyers and the goods were subject to inspection at Karachi and to rejection on certain terms if not according to the contract. The sellers having failed to make any delivery the buyers sought an arbitration and applied to file the award in the Karachi Court. Held that the Karachi Court had jurisdiction to entertain the application. 5 S. L. R. 97 doubted. (*Kemp, A. J. C.*) *C. H. PENNY v. ATRAUSS & CO.*

15 S. L. R. 74 : 64 I. C. 674.

——— *S. 12—Extension of time—Power rests with the court and not with the arbitrators themselves. See ARBITRATION, AWARD.*

16 L. W. 657.

——— *S. 14—Arbitration—Contract for reference—Stay of suit—Discretion.*

Where parties have agreed that disputes between them shall be tried by another tribunal the Court will take into consideration all those grounds which it would consider were there an application before it to stay the suit on the ground that the parties had made a submission to arbitra-

**ARBITRATION ACT, S. 14.**

tion. A clause in a bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. Where the plaintiff's residence was in Karachi, the contract had been made in Karachi and the ship had been inspected in Karachi, there are no grounds for staying the suit or refusing to entertain it. (*Couch, A. J. C.*) **KURESHI & SONS v. SOOMAR HAJI.** 15 S. L. R. 88.

—S. 14—Award—Reference outside Court—Award not filed in court—Suit in Civil Court for declaration that the award is not binding on one of the parties—Maintainability of. See **SPECIFIC RELIEF ACT, S. 42.**

4 Lah. L. J. 12.

—S. 14—Suit to set aside award—If barred.

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion to set aside the award; but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. (*Viscount Cave*) **SASSOON AND CO v. RAMDUTT RAMKISSEN DAS** 49 I. A. 366. (P. C.)

—S. 15—Award—Filing of—Effect of.

Though the filing of an award is the act of the arbitrators the award does not become enforceable as if it were a decree of the court immediately on presentation to the court. The court allows an opportunity to the parties adversely affected by it to move to have it set aside or remitted to the arbitrators, and if, within the period allowed, no application is made to the court for either of these purposes, the award is enforceable as if it were a decree of the court. The objections to an award cannot be dissociated from the petition to file the award. (*Raymond, A. J. C.*) **FIRM OF JAI NARAIN BABU LAL IN THE MATTER OF,** (1922) S. 6 : 66 I. C. 796

—S. 15—Scope of—Execution of award—If bars suit.

The fact that an award has been enforced by execution under S. 15 does not bar a suit to have it declared void and for consequential relief. S. 15 does not enact that the award, when filed is to be deemed a decree of Court, but only that it is to be enforceable as if it were a decree. (*Viscount Cave*.) **SASSOON AND CO. v. RAMDUTT RAMKISSEN DAS.** 49 I. A. 366 (P. C.)

—S. 19—Agreement to refer disputes to arbitration—Reference by one—Subsequent filing of suit by the other—No application for staying suit—Validity of award.

Parties had agreed to refer all disputes arising under a contract to arbitration and in pursuance thereof one of the parties referred the matter to arbitration, while the other subsequently filed a suit. No application was made under S. 19 of Indian Arbitration Act to have the suit stayed.

Held, the arbitration proceedings were invalid and the award must be set aside, as by refusing to utilise the machinery provided by S. 19, a waiver of the right to arbitration must be implied. 47 Cal. 75 and 41 Mad. 115 doubted. (*Piggott and*

**ARMS ACT, S. 19.**

*Walsh, J.J.*) **CHIMMAN LAL POSTI MAL v. PHOOL CHAND FATEH CHAND.** 44 All. 292 :

(1922) A. 48 : 20 A. L. J. 128 :  
L. R. 3 A. 96 : 65 I. C. 795.

—S. 19—Agreement to refer to arbitration—Omission to plead in bar of trial—Effect of.

Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the court and allows the trial to proceed he cannot afterwards raise the plea. (*Piggott and Walsh, J.J.*) **KHARIDAR KAPRA CO. v. RUKMANAND RAMDEO.** 20 A. L. J. 975.

—Ss. 19 and 4 (a)—Duty of Court—Where pending suit reference to arbitration—Order staying suit—If the order stays suit absolutely and not temporarily—Court—Whether a court other than the District Court can pass such order. See (1921) DIG. COL. 34. **SITARAM NATHMAL v. SUSHIL CHANDRA DAS.**

64 I. C. 706.

—S. 19—Reference to arbitration—Institution of suit thereafter by one of the parties—Omission to apply for stay of suit—Waiver of right to arbitration. See C. P. CODE, SCH. II PARA. 18.

L. R. 3 A. 96.

—S. 19—Stay of Suit—Matter agreed to be referred. See (1921) DIG. COL. 35. **JNANENDRA KRISHNA BOSE v. SINCLAIR MURRAY AND CO.**

66 I. C. 741.

—Sch. I, Cl. (3)—Reference—Notice calling on arbitrator to proceed with trial—Delay—Award—Validity.

Where the arbitrators delivered an award more than three months after the date of a notice calling on them to act but within three months of the day when they began to hear the reference, the award is perfectly valid. (1899) 2 Ch 80 : L. R. 2 Q. B. 523 Ref. (*Piggott and Walsh, J.J.*) **FIRM OF SARDAR MAL HARDAT RAI v. SHEO BAKSH RAI SRI NARAIN.** 44 All 432 :

1922 A. 106 : 66 I. C. 907 : 20 A. L. J. 272 :  
L. R. 3 A. 227

**ARMS ACT, (XI of 1878), S. 4—Arms—Test of.**

To find out if a certain object is an "arm", the test is to see the purpose for which it is intended—If it is for domestic or agricultural purpose it does not fall within the section. (*Duckworth, J.*) **PO ME v. EMPEROR.**

11 L. B. R. 340 : 23 Cr. L. J. 594 : 68 I. C. 818.

—Ss. 19 and 18—Licence—Breach of—Carrying a gun in procession.

The accused who was a cousin of the licensee of a gun borrowed the gun and carried it in a marriage procession when he fired some shots and wounded some people accidentally.

The licensee was forbidden under the terms of his license from taking the gun to a public assemblage. Held that the accused was guilty of an offence under S. 19 of the Arms Act.

When a marriage procession emerged from private premises and goes down the public street, then it is open to the public to join the procession and the marriage procession becomes a public

## ARMS ACT, S. 19.

assemblage. (*Macleod, C. J. and Shah. J.*) *EMPEROR v. KALYANCHAND GOPAL CHAND.*

24 Bom L. R. 587 : 22 Cr. L. J. 450 :  
67 I. C. 722.

—S. 19—License for a weapon—Necessity for carrying it with the weapon. See (1921) DIG COL., 36 *EMPEROR v. MAHOMED IBRAHIM,*

64 I. C. 275 : 22 Cr. L. J. 755.

—S. 19—Sword—Kirpan—Carrying of—*Punjab Government Notification.*

The question whether a sword carried by the accused is a Kirpan and therefore exempt from the Arms Act under the Punjab Government Notification, depends on the circumstances of his case. The burden is upon the accused to prove that lethal weapon carried by him is a Kirpan within the meaning of the exemption. A sword 31 inches long with a blade length of 22 inches in a simple scabbard was held not to be proved to be a Kirpan. (*Le Rossignol, J.*) *BACHITTAR SINGH v. EMPEROR.* (1922) Lah. 141 :

65 I. C. 430 : 23 Cr. L. J. 78.

—S. 19 (f)—Possession of arms—Joint possession—Conviction.

Where it was found that the two accused were found lying on a bed in the house of another and in the bedding a chavi was found wrapped in a cloth, held, that it was impossible to say which of the two was actually in possession even if it was proved that the owner of the house was not the owner and therefore that the conviction of the accused was illegal. (*Harrison, J.*) *NARINJAN SINGH v. EMPEROR.* 65 I. C. 447 :  
23 Cr. L. J. 95.

—S. 20—Arms—Meaning of—Dang with detachable blade.

Appellant was found carrying a bamboo dang 5 feet 7 inches long which had an iron attachment at the thick end, and hidden in the folds of his loin cloth, was a blade 8 inches long which fitted the end of the dang.

Held, that taking into consideration the nature of the instrument, the fact that the blade could be readily slipped on and off the stick, and the fact that it was found detached from the stick and hidden in the appellant's loin cloth shewed that it was possessed by him, not for ordinary domestic purposes but for purposes of offence or defence and that it was therefore included in the term "arms" used in the Arms Act. Whether or not any particular instrument is included in the expression "arms" used in the Arms Act depends on the circumstances of the case. 16 P. R. (Cr.) 1900, 32 P. R. (Cr.) 1918, cited. (*Wilberforce and Martineau, JJ.*) *MANGAL SINGH v. EMPEROR.*

12 P. L. R. 1922 : (1922) Lah. 138 :

2 Lah. 201 : 64 I. C. 847 : 23 Cr. L. J. 63.

—S. 20—Concealment of arms—Test.

Each case of concealment of arms must be decided on its own facts and it must be shown that the concealment was made so that the possession might not be known to the police. (*Abdul Qadir J.*) *SHER ALI v. EMPEROR*

68 I. C. 833 : 23 Cr. L. J. 609.

## ASSAM LAND AND REV. REGULATION, S. 97.

—S. 20—Carrying chhavi—Maximum sentence. See (1921) DIG, COL. 36 *FAQIRIA v. EMPEROR.* 23 Cr. L. J. 339 : 66 I. C. 995.

—S. 27—Possession of servant—Pistol found in accused's shop.

Discovery of a pistol in the floor of the shop of the accused while he had been away from the shop and while his servant was in possession of the shop and its contents, does not render the accused guilty of an offence under the Arms Act. (*Ryves, J.*) *CHHOTY v. EMPEROR*

20 A. L. J. 855 : L. R. 3 A. 171 (Cr.)

ASSAM LAND AND REVENUE REGULATION (I of 1886) S. 86—Purchase by a member of a joint Hindu family with family funds—Suit against purchaser.

The application of S. 86 of the Assam Land and Revenue Regulation must be restricted to a suit brought in a Civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person and not on behalf of the certified purchaser. The provisions of the section do not affect the rights of the members of a joint Hindu family who are entitled by operation of law and not by virtue of a contract, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds. (*Mookerjee, A. C. J. and Fletcher, J.*) *PHAINDHAR SARMA v. JIBAKRISTA SARMA.*

64 I. C. 260.

—S. 97—Partition of estate—Lands joint with those of other estates—Jurisdiction of Revenue court—Imperfect partition—Modus operandi of partition.

Plffs. brought a suit for a declaration that the order for the partition of an estate made by the revenue authorities was without jurisdiction and was consequently inoperative in law on the ground that some of the lands of the estate sought to be partitioned were joint with the lands of other estates, and the revenue authorities were not competent under the Assam Land and Revenue Regulation, 1886, to effect a partition of lands included in several estates.

Held, that S. 97 of the Regulation confers upon every recorded proprietor of a permanently settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under S. 97. The first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an ancillary measure, namely, to effect a partition of the joint lands of the several estates and thereby to ascertain the lands which belong to the estate under partition. It is a well known rule of interpretation of statutes that where a statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures and employ such means, as

**ASSAM LAND AND REV. REGULATION, S. 79.**

are essentially necessary to its execution. 23 C. 514 and 24 C. 751 ref. 46 C. 256 ref.

It cannot be maintained that the joint lands should first be divided by a Civil Court, as then the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under S. 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by S. 154 (1) (f) of the Regulation. 32 C. 1036 dist. (*Mookerjee and Pantan, JJ.*) *YASIN ALI MIRDHA v. RADHAGOBINDA CHOWDHURY.* 26 C. W. N. 381. (1922) Cal. 118

———S. 97—Partition of portion of estate—  
Application for—Maintainability—Revenue court.

A Revenue court alone has jurisdiction to entertain an application for partition of a portion of a revenue paying estate, when the applicant has no interest in the remainder. S. 97 of Regulation does not require that the applicant should be in actual physical possession. The provisions of the section are sufficiently complied with if at the time of the application, the interest of the applicant had not been transferred or otherwise lost. (*Woodroffe and Walmsley, JJ.*) *BIRENDRA KISHORE MANIKYA v. KRISHNA CHANDRA DEB,* 65 I. C. 83.

**ATTESTATION**—Effect of—Not an estoppel—Independent evidence of consent essential. See EVIDENCE ACT, S. 115. 26 C. W. N. 201.

———Sub-Registrar endorsing admission of execution—If can be considered an attester. See SUCCESSION ACT, S. 50. 1 Pat. 300.

**AUCTION** — Bids — Nature of—Withdrawal of bid before property is knocked down — Effect of. See CONTRACT ACT, S. 2. 43 M. L. J. 132.

**BENAMI—Burden of proof.**

The burden of proving that a grant made in terms to a certain person was made benami for another lies as the person alleging it. (*Lord Atkinson.*) *ARAB ALI KHAN v. MOHMUD ALI KHAN.* 43 M. L. J. 104; 20 A. L. J. 545; 35 C. L. J. 554; 24 Bom. L. R. 951; (1922) P. C. 84; 67 I. C. 444; 31 M. L. T. 94 (P. C.)

———Burden of Proof — Evidence — Suspicion—Surrounding circumstances.

The burden of proving that a certain conveyance standing in the name of one person is benami for another under whom a third person claims, lies on the person who so raises the plea of benami. The court must however rest its decision not on suspicion but on legal evidence though it need not approach the transaction with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. The most important test to find out the beneficiary is the source whence the consideration came. In addition to this the court should take into consideration the question of possession and the surrounding circumstances; 25 C. L. J. 581; 23 C. W. N. 321, 43 C. 606.

**BENAMI.**

37 A. 557; 18 C. W. N. 428; 3 M. I. A. 229; 6 M. I. A. 53, 21 C. W. N. 280 Rel. (*Mookerjee and Cuming, J.*) *JASODA LAL PAL CHAUDHURI v. BALARAM PODDAR.*

35 C. L. J. 589; 69 I. C. 67.

———Evidence of—Source of purchase money—Old transaction—Evidence of possession.

Benami transactions are familiar in India and even a slight quantity of evidence to show that a transaction is benami may suffice. But the person who impugns the apparent character of a transaction must not rely solely on probabilities, but must show something definite to establish that it was a sham transaction, on the principle that the burden of proof lies on the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test in these cases is the source whence the consideration came. Where however from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on the reasonable probabilities and legal inferences arising from proved or admitted facts. Cases reviewed. (*Mookerjee and Chotsner, JJ.*) *PROMODE KUMAR ROY v. MADAN MOHAN SAHA.* 36 C. L. J. 396.

———Intention to defeat—Fraud carried out—Effect.

Where an intended fraud has been carried into effect, a court will not aid a fraudulent grantor to reclaim or recover from his transferee the property transferred in fraud of creditors. The object is not to protect the grantee but to protect society, though the latter may involve an indirect help of the grantee also. But this principle does not apply when a defendant grantor who is in possession seeks to show the benami nature of the grant in order to defend his possession. Development of the law of fraudulent conveyances referred to and case law discussed. (*Mookerjee and Chotsner, JJ.*) *RAGHUPATI CHATTERJEE v. NRISINGHA HARI DAS.* 36 C. L. J. 491.

———Nature of transaction—Suit for declaration that a portion of a transaction is genuine and the rest benami. See (1921) DIG. COL. 38. *APPA DHOND SAVANT v. BABAJI KRISHNAJI GHOGLE.* 46 Bom. 85; 64 I. C. 364; (1922) B. 107.

———Presumption—Advancement—Principle not applicable to India—Englishman domiciled in India—Purchase by husband in the name of wife, See (1921) DIG. COL. 38 *KERWICK v. KERWICK.* 1 Bur. L. J. 4 (P. C.).

———Proof of—Suspicion—Not sufficient.

To prove a benami purchase there must be affirmative evidence in the case and mere suspicion is insufficient. (*Lord Pillimore.*) *RAI RADHA KRISHNA v. BISHESHWAR SAHAY.* 18 L. W. 190; 3 Pat. L. T. 529; 31 M. L. T. 209. (P. C.) (1922) P. C. 336; 67 I. C. 914; 49 I. A. 312 (P. C.)

———Tests of—Source of purchase money—Possession—Other evidence.

**BENAMI.**

In the case of benami transactions in India the court need not approach them with that scrupulous rigour which in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. 23 C. W. N. 321 Ref. In addition to considering the source from which the purchase money came and the person in possession, the court may also take into consideration the surrounding circumstances. 43 C. 660; 37 A. 557. Ref. (*Mookerjee and Chotzner, JJ.*) **LALIT MOHAN SEN v. MANORANJAN GHOSH CHAUDHURI.** 36 C. L. J. 208.

— — — *Transfer—Right of transferor to recover—Fraudulent intent—Evasion of rules for the conduct of Government servants.*

Where a person acquired property *benami* in the name of another with a view to evade the rules prescribed by Govt. regarding the acquisition of property by Govt. servants, his conduct does not amount to fraud. He is not thereafter precluded from recovering the property (*Mookerjee and Chotzner, JJ.*) **DHIRENDA KUMAR BOSE v. CHANDRA KANTA ROY.**

36 C. L. J. 82; 68 I. C. 648.

**BENAMIDAR**—Lease in favour of—Liability of real owner. See (1921) DIG. COL. 39. **TAHARAT KARIM v. BAL KAUR.** 64 I. C. 515.

— — — *Rights of—Relation to real owner—Enforceability of benami transactions.*

It is clear that a benamidar can sue. 46 C. 566; 42 M. 348; 13 C. P. L. R. 33 Ref.

This system under which property is acquired and held in names other than those of the real owner is a common practice in this country and if a *benami* transaction does not contravene the provisions of law, courts are bound to give effect to it. It has been held that a *benamidar*, though he has no beneficial interest in the property, represents in fact the real owner and as far as their relative position is concerned is a mere trustee for him. (*Prideaux, A. J. C.*) **BALKRISHNA v. LAKHU.**

(1922) Nag 239; 68 I. C. 191.

— — — *Right to sue.* See (1921) DIG. COL. 34. **BHANA MAL v. BELI RAM.** 4 Lah. L. J. 378.

— — — *Right to sue—Obstruction to light and air.*

A suit by a benamidar for the removal of an obstruction to access of light and air in a house, is maintainable. 46 Cal. 566 Ref. (*Mookerjee and Panton, JJ.*) **PANCHU GOPAL CHATTERJEE v. MATANGINI DEBI.** 35 C. L. J. 48; 64 I. C. 581.

— — — *Right to sue for possession.*

It is open to a benamidar to sue for possession on the strength of his purchase. 46 C. 566 foll. (*Newbold, J.*) **MAFIZUDDIN HOWLADAR v. MAHOMED ISLAM CHOWDHURY.** 67 I. C. 741.

**BENGAL ALLUVION AND DILUVION ACT (IX of 1847), ss. 3 and 6—Assessment of revenue—Special surveys if necessary.**

S. 6 of Bengal Act IX of 1847 does not require that before an assessment of revenue is made

**BENG. ALL. AND DIL. ACT, S. 6.**

under the Act, there must be a special survey carried out under S. 3. The result of a survey made for the purposes of settlement under the B T Act could be utilised for the purposes of an assessment under Bengal Act IX of 1847, 32 C. L. J. 402 Ref. (*Mookerjee, A. C. J., and Fletcher, J.*) **SOUDAMINI DASYA CHAUDHURANI v. SECRETARY OF STATE.** 65 I. C. 76.

— — — *S. 4 (3)—Churs in rivers—Title—When vest in Government.*

Before applying S. 4 (3) of Alluvion and Diluvion Regulation the Court must determine whether the chur or island has been thrown up in a large navigable river the bed whereof is not the property of an individual. Unless it is established that the bed of the river is not the property of an individual title cannot vest in Government; in other words, title vests in Government. The bed of the large navigable river is public domain. The rights of the parties must be determined with reference to the condition of things at the time when the chur was first formed. 17 W.R. 25 (F. B. followed. (*Mookerjee, A. C. J., and Fletcher, J.*) **SOURENDA NATH MITTER v. SECRETARY OF STATE FOR INDIA IN COUNCIL.** 35 C. L. J. 196.

— — — *S. 6—Additional assessment—Newly added lands—Burden of proof on the Crown—Revenue and thak maps—Evidentiary value of.*

The object of Bengal Act IX of 1847 was to enable the Crown to impose assessment on lands gained from the sea or by alluvion or dereliction from the rivers. The expression "any such new map" in S. 6 of the Act refers to the new map according to the new survey contemplated by S. 3. The object of the new survey is to ascertain the change that it may have taken place since the date of the last previous survey that is changes by alluvion or dereliction (not changes by possession) 5 Pat L. J. 681 Ref. S. 6 imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to government. There must consequently be a comparison between two maps, made at an interval of not less than 10 years and each showing the revenue paying estate concerned. That estate must accordingly, be in existence as a revenue paying estate, if not before, at least on the date of the first of the two maps taken as the basis for comparison. (*Mookerjee and Chotzner, JJ.*) **RAJA SREENATH ROY v. SECRETARY OF STATE FOR INDIA.**

36 C. L. J. 345.

— — — *S. 6—Churs in non-Navigable river—Permanently settled estate—If assessable to public revenue. See BENGAL PERMANENT SETTLEMENT REGULATION.* 49 Cal 103 (P. C.)

— — — *S. 6—Notice—Amendment of.*

Notice served for the purposes of assessment under S. 7 of Act IX of 1847 can be amended. (*Mookerjee, A. J. C., and Fletcher, J.*) **SOUDAMINI DASYA CHAUDHURANI v. SECRETARY OF STATE.**

65 I. C. 76.

— — — *S. 6—Power to impose assessment.*

To entitle the Crown to impose an assessment under Bengal Act IX of 1847 it must be shown

**BENG ALLN. AND DILN REGULATION, S. 4.**

that the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of S. 6 (i.e.) lands not included in the original assessment (*Mookerjee and Cumming, JJ.*) SECRETARY OF STATE FOR INDIA v. UPENDRA NARAIN ROY.

36 C. L. J. 336

**BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825), S. 4—Gradual accession—Increment of tenure—Assertion of title by subordinate tenure holder—Lease of accretion by landlord.** See (1921) DIG. COL. 39 KARIM SHEIKH v. AFAJUDDI SHEIKH.

64 I. C. 805,

**BENGAL CESS ACT (IX of 1880) Ss. 5, 41, 52 and 61—Arrears of cess—Sale of holding—Effect of prior encumbrances—Rent free tenure—Liability to pay cess—Notice—Presumption**

Where a holding is sold in execution of a decree for cess the purchaser obtains only the right, title and interest of the tenant. The purchaser does not hold the property free of encumbrances created by the tenant prior to the sale nor could he annul the encumbrance. 25 C 179 ref. The liability to pay road cess does not by itself create a charge on the property. It is a personal liability enforceable under the Public Demands Recovery Act by the sale of the judgment debtor's interest. 30 Cal 778 foll.

In the case of a rent free tenure the liability to pay cess to the superior landlord arises only when the requirements of Chapt. IV of the Act are complied with by the publication of the extract from the valuation roll. There is no presumption under S. 114 illustration of the Evidence Act with respect to notices prescribed by S. 52 of the Cess Act. The onus is on the person claiming the right to the payment of the cess to prove that the formalities prescribed by the Act have been complied with. 13 Cal 19; 25 Cal. 727; 15 Cal. 327 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHURY v. RAHMAT ALI. 3 Pat. L. T. 282.

(1922) Pat. 167: 65 I. C. 138:

1 Pat. 218: (1922) P. 303.

—S. 20—Road cess return—Right of landlord to recover rent at a higher rate—B. T. Act, Ss. 105 and 109 A.

S. 20 of the Cess Act, 1880, is not a bar to the landlord recovering rent at the rate settled in a proceeding under S. 106 of the Bengal Tenancy Act 1885, when the road cess return showing a lesser rate was filed prior to such proceeding. (*Coutts and Ross, JJ.*) NAZIR RAI v. MAHARAJA KESHO PRASAD SINGH BAHADUR. 6 Pat. L. J. 622:

(1922) Pat. 57: 3 Pat. L. T. 141:

(1922) P. 55; 4 U. P. L. B. (Pat.) 23:

65 I. C. 3.

—S. 41—Contract to pay cess—Enforceability.

Neither S. 41 nor any other section of the Act prohibits or renders illegal a contract to pay cess. 3 C. L. J. 337 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBAR CHOWDHURY v. RAHMAT ALI.

3 Pat. L. T. 232: (1922) Pat. 167:

65 I. C. 138: 1 Pat. 218: (1922) P. 303.

—S. 41—Lands held on payment of rent and—Liability to pay cess.

**BENG. LAND REGISTRATION ACT, S. 42.**

Irrespective of whether rent is payable in cash or in kind, cess is payable in respect of all lands held by a cultivating raiyat. (*Brett, J.*) JOGESH CHANDRA ROY v. ANNADA CHARAN CHOWDHURY. 26 C. W. N. 368: 68 I. C. 662.

—S. 41—Patni lease—Rights of parties.

It is open to the parties to a patni lease to contract themselves out of the provisions of S. 41 of the cess Act. (*Richardson and Suhrwardy, JJ.*) RAJA BHUPENDRA NARAYAN SINHA v. MIDNAPORE ZEMINDARI COY.

(1922) Cal. 300: 68 I. C. 937.

**BENGAL CIVIL COURTS ACT (XII of 1887) See UNDER BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT,**

**BENGAL ESTATES PARTITION ACT (V of 1899) S. 99—Applicability of—Grant of tenure right—Private partition—Partition under the Act.**

The private arrangement described in S. 7 of the Bengal Estates Partition Act is not necessarily the same private arrangement that would prevent the application of S. 99. The main test of the applicability of S. 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under S. 7. (*Newbould and Pantou, JJ.*) PROSANNA KUMAR BEDANTA v. MADHU BADYA.

68 I. C. 500.

—Ss. 119 and 49—Suit for possession in Civil Court—Maintainability of.

When the Survey Record of Rights showed the pliffs, as in possession of the purchased holding under S. 22 (2) of the B. T. Act, and the batwara khatian, which was based upon it under S. 49 of the Estates Partition Act, also showed them as in possession, but the possession of the lands having been delivered over to the defendants and an order under S. 144, Cr. P. Code, having also been passed against the pliffs, they brought the present suit.

Held, that S. 119 of the Estates Partition Act was not a bar to the maintainability of the suit.

3 P. L. W. 226 dist. (*Jwala Prasad, A. J. C., and Das, J.*) NANDKISHORE SINGH v. MATHURA SAHU.

3 P. L. T. 13: 65 I. C. 586:

(1922) P. 193.

**BENGAL LAND REGISTRATION ACT (VII of 1876) Ss. 42 and 52—Scope of—Powers of Collector to register.**

Reading Ss. 42 and 52 together, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists; but in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied first, that the succession or transfer has taken place and secondly that the applicant has acquired possession in accordance with such succession or transfer. Where each of the parties claims to have assumed charge the only question is whether

**BENG. LAND REGISTRATION ACT, S. 52.**

Land Registration Deputy Collector has to determine if possession exists in favour of either of the applicants. (*Das and Bucknill, J.*) **SYED ALI ZAMIN v. NAWAB SYED MAHOMED AKBAR ALI.**

1 Pat 68 : 3 Pat. L. T. 406

— **S. 52—Scope of—Powers of collector under. See BENGAL LAND REGIS. ACT Ss. 42 AND 52,**

3 Pat. L. T. 406.

— **S. 55—Summary determination—Right to refer to Civil Court—When arises.**

The jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute (*Das and Bucknill, J.J.*) **SYED ALI ZAMIN v. NAWAB SYED MAHOMED AKBAR ALI**

3 Pat. L. T. 406 :

1 Pat 68.

— **S. 78—Registration—Effect of—Right to collect rent—Proof of proprietary interest—If necessary—Change in law—Bengal Tenancy Act, Ss. 60 and 149 scope of See (1921) DIG. COL. 42, MT. NAND KUER v. JODHAN MAHTON.**

6 Pat. L. J. 658.

— **S. 81—Applicability of—Party a vendee of one of the contracting parties See (1921) DIG. COL. 43 MESBAHUDDIN AHMED CHOWDHURY v. ABDUL BARKAT AHMADULLA.**

65 I. C. 839.

— **S. 81—Co-sharer landlord—Contract with one cosharer—Suit for rent by him alone if maintainable.**

Where one of two co-sharer landlords granted a lease of a portion of the estate to a tenant who executed a registered *kabuliyat* in his name agreeing to pay a fixed sum as rent it is open to that cosharer landlord or his heirs alone to bring a suit for rent without joining the other cosharers though the latter were registered in respect of their share, 24 Ind. Cas. 866. foll. (*N. R. Chatterjee and Suhrawardy, J.J.*) **PROBODH CHANDRA MITTER v. HARISH CHANDRA NASKAR.**

48 Cal. 1078 : 64 I. C. 58.

— **S. 119—Order of Commissioner under S. 82—If can be altered by Civil Court—Limitation. See (1921) DIG. COL. 42. JITABANDHAN SINGH v. MT. SUDHA KUER.**

6 Pat. L. J. 689.

**BENGAL LANDLORD AND TENANT PROCEDURE ACT, S. 65—Non transferable occupancy holding—Sale of, by landlord. See (1921) DIG. COL. 42. NRIPENDRA KUMAR DUTTA v. NADIR KHAN.**

66 I. C. 46.

**BENGAL LAND REV. SALES ACT XI of 1859—Revenue sale—What passes under—Rights of purchaser—Adverse Possession See (1921) DIG. COL. 43 SECRETARY OF STATE FOR INDIA v. WAZED ALI KHAN,**

65 I. C. 866.

**BENG. LAND REV. SALES ACT, S. 37**

— **Ss. 2 and 3—Revenue sale—Tenuris in Dihl Panchannogram—Board's Notification regarding time for sale—Sale for arrears of revenue when premature and ultra vires—Date of payment of revenue.**

The effect of the Notification of the Board of Revenue, dated the 6th October 1871 is that no holding can be sold till after the 28th June next after the first day of the month following the month in which the revenue or rent should have been paid.

The date on which the revenue is payable depends primarily not on general or administrative considerations such as the course of business in the Collectorate or the mode in which the accounts are kept but on the contract between the parties.

Where a tenure was held under a *kabuliat*, dated the 10th November 1862, containing a stipulation to pay rent year by year in Dihl Panchannogram to which by virtue of Bengal Act VII of 1868, Act XI of 1859 was applicable and the tenure was sold for arrears of revenue of 1914 and 1915 on the 17th May 1915, it was held that the sale was premature and *ultra vires* and conferred no title on the purchaser as the current demand for 1914-1915 was not payable till the 10th November 1914, so that the tenure could be sold before the 28th June 1915. 16 C. W. N. 842 (P. C.) foll. (*Richardson and Greaves, J.J.*) **MANMOTHO NATH MULLICK v. MAHOMED SOLEMAN**

26 C. W. N. 140 : 68 I. C. 491.

— **Ss. 33 and 58—Revenue sale—Notices of—Signature by sub Deputy Collector—Validity of—Binding by Collector—Illegality or irregularity.**

Where in a revenue sale, the Collector's servant formally opened the bidding with an offer of Re. 1 but the Collector himself never entered into competition, made no further bid and the sale was conducted fairly and there were several independent bidders Held, that the Collector was not precluded by the initial bidding of Re. 1 from taking over the estate under S. 58 of the Revenue sale law. A sale held under the Revenue Sale Law is not invalid on account of the notices under Ss. 6 and 7 of the Act having been signed by a sub-Deputy Collector instead of by the Collector or other officer authorised to hold the sale under the Act. To set aside a sale held under the Revenue Sale Law the party must show either want of jurisdiction or material irregularity which was resulted in substantial injury. (*Woodroffe, Chetty and Hudu, J.J.*) **AMRITA LAL ROY v. SECRETARY OF STATE**

35 C. L. J. 221.

— **S. 37—Patni—Creation of, by auction purchaser—Annulment of under-tenures.**

Where an auction purchaser at a revenue sale creates a *patni* that by itself is not an intimation to the undertenure holders that the under-tenures have been annulled. (*Greaves and Ghose, J.J.*) **KULA MIAH v. NANU MIAH,**

68 I. C. 448.

**BENG LAND REV. SALES ACT, S. 37.**

———S 37—*Proviso—Revenue sale—Purchaser of entire estate—Right of occupancy.*

Where at a revenue sale under Act XI of 1859 a person purchases an entire estate is entitled thereafter to eject under-tenants with the exception of raiyats with rights of occupancy at fixed rents or at rents assessable according to fixed rules under the laws in force. The "right of occupancy" in S. 37 proviso might be acquired under laws promulgated since 1859 and is not limited to the right under the Rent Recovery Act. (*Mitra and Geidt, JJ*) SARAT CHANDRA ROY CHOWDHURY v. ASMAM BIBI. 35 C. L. J. 212.

———S. 37 — Settlement — Contract with Government Bajepati taluq. See (1921) DIG. COL. 44. MOKBUL ALI SADAGAR v. BASARAT ALI. 66 I. C. 911.

———S. 58—*Defaulting proprietor—Purchase by—Effect.*

When a defaulting proprietor purchases at a sale under Act XI of 1859, he acquires under S. 53 the estate subject to all its incumbrances existing at the time of sale and does not acquire any rights in respect to under-tenants or raiyats which were not possessed by the previous proprietor at the time of the sale. (*Mookerjee, A. C. J. and Fletcher, J*) SATYENDRANATH BANERJEE v. KRISHNASAKHA KAR 35 C. L. J. 185. (1922) Cal. 193 : 69 I. C. 7.

**BENGAL LOCAL SELF GOVERNMENT ACT (III of 1885) Ss. 78, 139 and 140—District Board Encroachment on road—Penalty for—Power of District Board to frame bye-laws.**

The District Board has impliedly, if not expressly, power to provide for, by its bye-laws, the punishment of encroachments over its roads, in order to carry out the provisions of S. 78 of the Act viz., to provide for the repairs and maintenance of its roads, etc. S. 139 of the Act empowers the District Board to make bye-laws and S. 140 empowers it to impose punishment for the breach of bye-laws. (*Jwala Prasad and Adami, JJ*) MAHESH SHAH v. DARBARI HUSSAIN.

3 Pat. L. T. 464 : 1 Pat. 251 : (1922) P. 545 : 65 I. C. 571 : 23 Cr. L. J. 139

**BENGAL MUNICIPAL ACT (III of 1884) S. 15—Person—Right to vote—Member of a joint Hindu family.**

The members of a joint Hindu family are persons within the meaning of S. 15 of the Bengal Municipal Act 1884. Where "a person is otherwise qualified to vote for a municipal election under S. 15 of the Bengal Municipal Act he is not disqualified from voting merely because he is a member of a joint Hindu family. The right to vote conferred on every person who is qualified to vote under S. 15 of the Act cannot be cut down (*N. R. Chatterjee, and Suhrawardy, JJ*) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF Dacca v. KRISHNA DAS NAG. 36 C. L. J. 189 : 64 I. C. 168.

———S. 15 (2)—*Right to vote—Assessment of income tax on joint income of father and son as members of joint family—Rights of father and son.*

**BENG. MUNICIPAL ACT. S. 85.**

The income of a father and his son as members of a joint Hindu family were jointly assessed for purposes of income tax. The son brought a suit for declaration that he was a qualified voter under S. 15 (2) of the Beng. Mun. Act because he was assessed to income tax and under cl. (3) because he was a graduate and occupied a holding along with his father. Held, that the income of both the father and the son having been assessed, both of them were qualified to claim to be voters under S. 15 (2). 38 C. 501 D'st.

From the mere fact of a person living with another individual occupying by reason of some connection with or relation to him such as son or servant, he cannot be considered to be a person occupying a holding within the section. Hence the son was not qualified to be a voter under Cl. (3) of the Section. 2 C. W. N. 689 foll : 15 C. L. J. 689 Ref. (*Shamsul Huda, J*) CHARU CHANDRA MAZUMDAR v. CHAIRMAN OF THE FARIDPUR MUNICIPALITY. 26 C. W. N. 412.

———S. 30—*Levy of rent or toll—Goods placed on the road—Right of Municipality.*

In the absence of a contract creating the relation of landlord and tenant, the Municipality is not entitled to levy a tax from any person.

The property in the road has been vested in the commissioners by S. 30 of the Act and the municipality can use the road as owner of it for the purposes of the Act. (*Jwala Prasad, J*) DHUNMUN CHOWDHURY v. EMPEROR 3 Pat. L. T. 339 : (1922) P. 286.

———Ss. 29, 34, 37—*Execution of deed by municipal council—Formalities for—Deed signed by chairman alone—Effect of*

The expression "signed" in S. 37 of the Bengal Mun. Act implies that the signature must be affixed for purposes of execution of the document and the insertion of a name, in any part of the writing, in a manner to authenticate the instrument, is sufficient. But if the name occurs in a document, not as authenticating the whole, but only for a particular purpose or only with reference to a part, it is not an effective signature. (*Mookerjee and Chotzner, JJ*) J. D. EZEKIEL v. ANNADA CHARAN SEN. 36 C. L. J. 109.

———S. 45—*Refusal of license—Application not disposed of within thirty days—Licensed ware-house and Fire Brigade Act, Ss. 7 and 15—Order by Vice Chairman if legal.* See (1921) DIG. COL. 45 SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v. J. S. MULL. 66 I. C. 423 : 23 Cr. L. J. 284.

———S. 54—*Encumbrance—Meaning of—Lease to collect rent.* See (1921) DIG. COL. 44, MT. SHAHZADI BEGAM v. KOKILA. 1 Pat. 38 : (1922) P. 389 : 3 Pat. L. T. 816.

———Ss. 85 (a) and 87—"Circumstances and property"—Several persons—Liability of each—Other person in joint occupation—Defects in assessment list. See (1921) DIG. COL. 46. CHAIRMAN, JALAPAIGURI MUNICIPALITY v. JALAPAIGURI TEA COMPANY, LTD. 26 C. W. N. 311 : (1922) Cal. 46 : 64 I. C. 643.



## BENG. MUNICIPAL ACT, S. 101.

—S. 101—*Machinery—Waterworks—Storage and balancing tank—Liability to tax.*

The Corporation of Calcutta owned a reservoir and pumps for the supply of water to Calcutta. They erected a large tank called a balancing tank supported on columns so as to give it elevation. This tank could be filled by pumping from the reservoir, and when desired water could be released from it into the main supply pipe nearer Calcutta than the reservoir. The water so released flowed through the pipe by force of gravity; it not only increased the supply by its own volume, but also accelerated the velocity of the whole body of water passing through the supply pipe. The tank enabled the appellants to increase the supply during part of the day when the hourly consumption exceeded the capacity of the reservoir and pumps:—*Held*, that balancing tank was not "machinery" within S. 101 of the Bengal Municipal Act, (*Lord Atkinson*). CORPORATION OF CALCUTTA v. COSSIPORE AND CHITPORE MUNICIPALITY. 49 Cal. 190: 26 C. W. N. 761: (1922) P. C. 27. 67 I. C. 928: 15 L. W. 253: 43 I. A. 435 (P. C.)

—Ss. 178 and 271—*Objections to notice—Disposal of—Prosecution when justifiable.*

Where a notice is served on a person to remove a latrine under the Bengal Municipal Act, he is allowed to file an objection which has to be disposed of under S. 178—If the objection is allowed the original order is cancelled thereby; if not, a fresh period of time is to be given to comply with the requisit on.

Where therefore an objection petition was filed, but that was not legally disposed of, and no fresh period of time was mentioned for removing the latrine *Held*, a prosecution under S. 271 was illegal. (*Jwala Prasad, J.*) RAMPARTAP LAL v. BARH MUNICIPALITY. 3 Pat. L. T. 301: (1922) P. 183: 66 I. C. 417: 23 Cr. L. J. 273.

—S. 234—*Scope of.*

S. 234 of the Bengal Municipal Act is an emergency section whereby a person who wants to use a road is temporarily allowed to deposit any moveable property on it, on payment of reasonable fees to the municipality. But under the section, the municipality is not entitled to lease out its right for carrying on trade, etc. (*Jwala Prasad, J.*) DHUNMUN CHOWDHURY v. EMPEROR. 3 Pat. L. T. 339: (1922) P. 286.

—S. 234—*Scope of Rights of Municipality to lease out rights for keeping shop, etc. See BENGAL MUNICIPAL ACT, Ss. 30 AND 234.*

3 Pat. L. T. 339.

—Ss. 237, 238, 239, 240 and 241—*Material alteration—Enlargement of building—Bye-law prohibiting creation of building. See (1921) DIG. COL. 47 BASANT KUMAR BOSE v. THE CHAIRMAN OF GRIDITH MUNICIPALITY.*

1 Pat. 44.

3 Pat. L. T. 143: (1922) P. 56.

—S. 237—*Rules not framed by the Municipality under S. 241—Conditional sanction. See (1921) DIG. COL. 47. BRIJ BEHARI LAL v. THE CHAIRMAN OF DALTONGANJ MUNICIPALITY.*

3 Pat. L. T. 236: 1 Pat. 16: (1922) P. 118

## BENG. MUNICIPAL ACT, S. 356.

—S. 238—*Notice under—Calculation of a time of service.*

There is nothing in S. 238 of Bengal Municipal Act to suggest that the period of 15 days should run from the date on which the Commissioners have knowledge of the building. The period should run from the date of the commencement of the erection of the building (*Coutts and Macpherson, JJ.*) RAMDHANI LAL v. CHAIRMAN OF PATNA MUNICIPALITY. 1 Pat. 42: (1922) P. 484: 3 Pat. L. T. 779.

—S. 261—*Scope of—Place of business—Offence and unwholesome if affected by the section.*

S. 261 of the Beng. Mun. Act covers a case of a manufactory or place of business from which offensive or un-wholesome smells may arise. The section covers not only cases which are *per se* offensive or noxious but also a manufactory or place of business from which offensive or un-wholesome smells may arise (*Chatterjee and Panton, JJ.*) GOBIND CHANDRA MULLICK v. THE CHAIRMAN OF THE HOOGLY AND CHINCHURA MUNICIPALITY. 26 C. W. N. 994: (1922) Cal. 99: 65 I. C. 518.

—S. 271—*Prosecution under—Order for removing latrine—Objection against not legally disposed of—Effect. See BENGAL MUNICIPAL ACT, Ss. 178 AND 271.*

3 Pat. L. T. 301.

—Ss. 261 and 273 (2)—*Using a place as a kiln for making bricks—Country panjas or clamps, if within the prohibition.*

A "Kiln" within the meaning of S. 273 (2) of the Bengal Municipal Act is a structure of a permanent nature. Making bricks by panjas or clamps as is done in the country side does not amount to using the place as a kiln and no offence is committed thereby under S. 273 of the Beng. Mun. Act (*Sanderson, C. J. and Panton, J.*) SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS, BENGAL v. TRAILOKHYA NATH CHATTERJEE. 26 C. W. N. 926: 36 C. L. J. 168: (1922) Cal. 194.

—Ss. 279 and 310—*Lighting and water rates—Holding in joint occupation of two tenants—Onus.*

The Bengal Municipal Act provides that where there is more than one tenant the owner shall be liable for the Municipal rates for water and lighting, unless the tenants jointly hold the holding. The status of the tenants and their relationship, to each other and the extent of their holding are facts peculiarly within the knowledge of the landlord and it is for him to prove that the tenants are in joint occupation of the whole holding. (*Cuming, J.*) BISHNUPADA DEY v. CHAIRMAN OF THE MANIKTOLLA MUNICIPALITY. 64 I. C. 351

—S. 356—*Distress warrant—Service of—Non mention of date of return.*

Under S. 356 of the Beng. Mun. Act every notice, summons, or other demand under the Act may be served personally on or presented to the person to whom the same is addressed or may be left at his usual place of abode with some

**BENG. MUNICIPAL ACT, s. 363.**

adult male member or servant of his family. The mere fact that the date of return is not mentioned in a distress warrant does not render the distress illegal. (*Miller, C. J. and Ross, J.*) **GOVERNMENT ADVOCATE OF BIHAR AND ORISSA v. GANGA PRASAD.** 1 Pat. 423. 3 Pat. L. T. 559: (1922) P. 532.

—S. 363—*Suit by municipal servant against chairman for salary—Limitation.*

A suit by a municipal servant for recovery of money due to him under a contract with the municipality is one for breach of contract and is not governed by S. 363 of the Bengal Municipal Act. It is only in cases where plaintiff claims damages or compensation for a wrongful act committed by the Commissioners or their servants in the exercise of their statutory powers that S. 363 applies. 6 C. 8 foll. 3 C. L. J. 376 ref. (*Richardson, J.*) **PANCHANAN CHATTERJEE v. SANTOSH KUMAR BOSE.** 65 I. C. 105.

**BENGAL MUNICIPAL ELECTION RULES, Rr. 4, 7 and 29—Application for removal of name of a voter from register—Application by the voter for inclusion of his name in the register—Powers of District Magistrate**

A certain name was entered in the Register of voters prepared under R. 4 of the Bengal Municipal Election Rules. Several applications were made to the Chairman of the Municipality under R. 7 for removal of his name and the said voter too made an application under R. 6 for inclusion of his name in the Register. All these applications were disposed of by the Chairman on the same date. He allowed the applications under R. 7, and directed the name of the said voter to be removed from the register. The said voter thereupon applied to the District Magistrate under R. 10 who restored his name in the register. On appeal it was contended that R. 10 was inapplicable because the name of the said voter was already on the register when he made the application under R. 6, for inclusion of his name therein.

*Held*, that the Chairman could not have dealt with the application of the voter in question before he had decided the applications under S. 7, and he had not rejected the application of the said voter as premature. In these circumstances the application might well be regarded as having been presented on the day and after the application under S. 7 were disposed of although it was on the record even before. In that view the Magistrate had power under R. 10 to make an order for the insertion of the name in the register. Besides R. 29 gives a general power to the Magistrate to decide all disputes arising under the rules; so the Magistrate had power to decide the point under R. 29 (*Chatterjee and Newbould, JJ.*) **SYAM CHAND BASAK v. NARENDRA NATH BASAK.** 26 C. W. N. 147

**BENGAL N. W. PROVINCES AND ASSAM CIVIL COURTS ACT (XII of 1887), s. 21—Forum of appeal—Exaggerated valuation—Effect of.** See (1921) DIG. COL. 49 **BABAR SHAH v. MAHOMED RAFIQ.** R. L. 3 A. 15.

—S. 13 (2)—*Transfer of business—Assignment of business within local limits of one*

**BENG. P. S. REGULATION.**

Subordinate Court to another by District judge—Effect of. See C. P. CODE, S. 150.

26 C. W. N. 216.

**BENGAL PATNI REGULATION (VIII of 1819) S. 3—Kabuliyat providing for delivery of ghee and kuli—Nature of provision—Abwab—Effect on Reg. 5 of 1812, S. 3.**

Where a kabuliyat contained a stipulation that the tenant was to pay one seer of ghee and one kuli every year.

*Held*, under the circumstances it was of the nature of an *abwab* and hence not recoverable.

The general law against *abwabs* as embodied in S. 3 of Reg. V. of 1812 is not intended to be restricted by the Patni Regulation. (*Suhrawardy and Cumming, JJ.*) **RAM TARAN TEWARY v. SM. KUMEDA DASSEE** 26 C. W. N. 634:

(1922) Cal. 80: 68 I. C. 161.

—S. 11—*Khudkhasht raiyat—Protection from ejection—Extent of.*

Under S. 11 of the Bengal Patni Sale Regulation a person who is a *khudkasht raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates. *Khudkasht raiyats* are *raiya*s cultivating lands in their own village or in the village in which they are residing. (*Newbould, J.*) **KRISHNA PRAMADA DAS v. RASH BEHARI DAS.** 67 I. C. 709.

—Ss. 14 and 17—*Patni sale—Deposit—Withdrawn by holder of decree against Patnidar—Purchaser's right to recover—Attachment.* See (1921) DIG. COL. 52, **MAHARAJA BAHADUR SINGH v. ABDUL RAHIM.** 1 Pat. 5: 3 Pat. L. T. 37: (1922) P. 394.

**BENGAL PERMANENT SETTLEMENT REGULATION (I of 1793) Bengal Regulations (XIX of 1793 and II of 1818)—Permanently settled estate—Churs formed subsequent to settlement—Liability to assessment—Non-navigable river—Ownership of the bed—Bengal Alluvion and Diluvion Act (IX of 1847) S. 6.**

Land whether cultivated or waste at the time of the settlement, but included in a permanently settled estate, are exempt from further assessment under Bengal Regulation I of 1793. But this protection extends only to lands actually in existence at the time of the settlement and specifically included in the estate as settled.

Churs formed after the decennial settlement within the limits of the *zemindari* are to be treated as unsettled under Bengal Regulation II of 1890, even though the river bed from which the churs have been thrown up was the property of the *zemindar* at the time of the settlement and the *jumma* was imposed on the *zemindar* as a whole. It is therefore competent to the Government to assess to public revenue under Bengal Act IX of 1847, Churs formed in a non-navigable river both where it flows through a permanently settled *zemindari* and within the middle line of the river where it is the boundary of the *zemindari*. The fact that the whole or half of the river bed, as the case may be was part of the permanently settled estate does not affect the right of the Government to assess the churs in question. I. L. R. 17 Cal. 590 distinguished. (*Viscount*

**BENG. P. S. REGULATION.**

*Cave.)* SECRETARY OF STATE FOR INDIA IN COUNCIL 7. MAHARAJA OF BURDWAN.

49 Cal. 103 . 42 M. L. J. 61 : 26 C. W. N. 619 :  
4 U. P. L. R. (P. C.) I : 35 C. L. J. 92 :  
(1922) P. C. 6 : 67 I. C. 835 . 43 I. A. 565 (P. C.)

———*River bed—Inclusion in thak boundaries of estate—Effect of.*

From the fact that the bed of a large navigable river is shown to be included within the thak boundaries of a particular estate, it does not follow that the bed was settled with the zemindar at the time of the permanent settlement. (*Mookerjee, A. C. J. and Fletcher, J.*) SOUDAMINI DASIA CHOWDHURANY v. SECRETARY OF STATE.

65 I. C. 76.

**BENG. POLICE ACT, Ss. 30 and 32**—Processions and assemblies—Notification requiring a license for—Power of District Superintendent of Police to issue notification—Legality of general notification. See PENAL CODE Ss. 141 and 145.

3 Pat. L. T. 585.

**BENGAL PUBLIC DEMANDS RECOVERY ACT, S.**

4—*Public demand—What is—Certificate, issue of*

The 'Public demand' mentioned in S. 4 of the Public Demands Recovery Act includes a demand payable to the Collector by a person holding any interest in land, when such demand is a condition of the use and enjoyment of the land. S. 4 should not be so interpreted as to authorise the issue of more than one certificate in the prescribed form with regard to a single demand broken up into fragments. (*Mookerjee and Cumming, JJ.*) PRATAB CHANDRA JANA v. SECRETARY OF STATE  
35 C. L. J. 304 : (1922) Cal. 101 : 67 I. C. 375.

———**S. 37—Unauthorised action of revenue authorities—Civil courts if can interfere.**

When the action of the revenue authority is wholly unauthorised. S. 37 of the Public Demands Recovery Act does not oust the jurisdiction of the (Civil Courts to make a declaration, issue an injunction or to grant other adequate relief. *Mookerjee and Cumming, JJ.*) PRATAB CHANDRA JANA v. SECRETARY OF STATE. 35 C. L. J. 304 : (1922) Cal. 101 : 67 I. C. 375

———(I of 1893) **S. 10—Notice—Omission to serve—Sale a nullity—Bengal Act I of 1913—Effect of.**

Under S. 10 of the Bengal Public Demands Recovery Act the omission to serve a notice under S. 10 makes the sale a nullity. In such a case the plaintiff need not apply to set aside the sale but can sue for possession on the footing that the sale has not affected his title. The suit would be governed by art 142 of the Lim. Act. (*Mookerjee and Cholsner, JJ.*) LALIT MOHAN SEN v. MANORANJAN GHOSH CHAUDHURI.

36 C. L. J. 203.

———**Ss. 10 and 31—Notice—Service of—Dealt of one sharer before notice—Effect.**

The words "and also in some conspicuous part of the land" in S. 31 refer only to cases in which the service is effected by fixing a copy in same conspicuous place in the office of the certificate officer and not to cases in which the

**BENG. REGULATION (XVII of 1806)**

notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business.

Where the judgment-debtor could not be found at home nor could service be effected on any adult male member and the only information which could be obtained was that the persons on whom notice was to be served were in some distant town, the only alternative left is to serve by fixing the copy on the outer door of the house.

Where one of the sharers was dead prior to the serving of the notice, the sale is not wholly void. (*Coutts and Ross, JJ.*) BENI ROY v. BABUI BACHA KUER.

1 Pat. 273 : (1922) P. 546.

———**S. 31—"And also in some conspicuous part of the land"—Meaning of—See BENGAL PUBLIC DEMANDS RECOVERY ACT, Ss. 10, 31.**

1 Pat. 273.

———(III of 1913) **Ss. 3 (1) 36 and 37—Not retrospective—Cause of action accruing under S. 10 of Act I of 1895.**

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895. S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the Act bars the jurisdiction of the civil court only where the question relates to the making execution, discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside or a sale held in execution of such certificate. (*Mookerjee and Cholsner, JJ.*) LALIT MOHAN SEN v. MANORANJAN GHOSH CHOWDHURY.

36 C. L. J. 208.

**BENGAL PUBLIC GAMBLING ACT (II of 1867)**

**Ss. 11 and 11 (a)—Game of skill—Game of chance—"Ring game"—Finding of fact.**

In considering the question as to whether a game is one of skill or of chance, the Court must have regard to the fact whether the preponderating element is one of skill or of chance. It is a question of fact and of degree in each case and in the absence of grave error, the High Court will not interfere in revision with the finding of the Magistrate. (*Jwala Prasad, J.*) DAMRI MIAN v. EMPEROR. 22 Cr. L. J. 390 : 61 I. C. 518.

**BENGAL REGULATION (XVII of 1806)—Foreclosure—Delivery of possession by mortgagor to mortgagee—Surrender—Act X of 1877.**

A mortgagee of the year 1875 provided that on default of payment of the money due within 2 years the mortgage would operate as a sale. After the expiry of the period the mortgagee applied for foreclosure under Bengal Regn. 17 of 1806 and a notice was issued under S. 82 of Act X of 1877. After the expiry of the period of one year's grace, the case was consigned to the records. Thereafter the mortgagor delivered possession of the property to the mortgagee without process of Court and the mortgagee remained in possession. Held that the delivery of possession by the mortgagor and the mutation of names in favour of the mortgagee operated as a surrender of the equity of redemption on foot of the foreclosure proceedings. Since the mortgagee's possession is in pursuance of the foreclosure

## BENGAL REGULATION (V of 1812).

proceedings and not as purchaser the surrender did not require registration under Act X. of 1877. (*Kanhaya Lal, J. C.*) *BASHIR HUSAIN v. CHANDRA PAL SINGH.* 25 O. C. 83 (1922) Oudh 133 : 68 I. C. 223.

——— (V of 1812) (Beng Land Rev Sales) S 3—Law relating to abwab—If affected by the Bengal Patni Regulation See BENGAL PATNI REGULATION, S. 3.

26 C. W. N. 634.

——— (XI of 1819)—*Resumption—Malikanadari—Settlement holder—Arrangement between*

A person claiming *malikanadari* right as against another with whom the settlement was made under Regn XI of 1819 must prove that he received a rent free tenure by a private arrangement with the settlement holder. (*Mr Ameer Ali.*) *JAGDEO NARAIN SINGH v. BALDEO SINGH.* 3 Pat. L. T. 605 : (1922) P. C. 272 : 36 C. L. J. 499 : 49 I. A. 399 (P. C.)

——— (VII of 1822) (Beng. Land Rev Settlement) S. 9—*Churlands—Temporary Settlement—Enhancement of rents of tenants.*

In the case of temporary settled estates such as is chur land, it would always be open to the revenue authorities to reassess the revenue and resettle the estate with effect from the expiry of a previous term of settlement. To enhance the rents of the tenants proceedings under Part II of Ch. X of the B. T. Act or S. 52 of the B. T. Act should be taken. (*Richardson and Suhrwardy, JJ.*) *ASHUTOSH CHAKRABARTY v. DWARIKA NATH MOTA.* 36 C. L. J. 192 : 27 C. W. N. 121

——— (XI of 1825) (Beng Land Rev. Settlement) S. 4 (1)—*Accretion—Tenants' holding—Bed of the river forming property of landlord—Right to accretion.*

*Per Dawson Miller, C. J. and Jwala Prasad, J* The first clause of S 4 of Bengal Regulation XI of 1825 applies clearly both to the case of a superior landlord, who holds from the Crown and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown and is limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what in effect, would be confiscation of another man's land. This consideration does not apply where the claim is by a tenant against land of his landlord, a claim which by the proviso to cl. (1) of S. 4 is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which by the same proviso carries with it the liability to pay an increase of rent. 13 M. I. A. 467 Rel. 1 P. L. J. 536 : 1 P. L. T. 229 dist.

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*Per Mullick, J :* Bengal Regn. XI of 1825 does not provide for lands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual. The Regulation is not exhaustive. It is subject to rules of equity and justice. Therefore land gained from the river bed by reformation *in situ* or otherwise will if it can be identified belong to the owner of the bed, except when otherwise expressly provided by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river bed which was not the property of his landlord before emergence. 2 C. L. J. 185 : 11 W. R. 115 Ref. (*Miller, C. J. and Mullick and Jwala Prasad, JJ.*) *KHUBI MAHTON v. LECHMI DAS.*

3 Pat. L. T. 513 : (1922) Pat. 258 :

67 I. C. 642 (F. B.)

BENGAL REVENUE FREE GRANTS REGN. (37 of 1793) S. 15—*Otherwise expressed in the grant—Scope.*

The words "otherwise expressed in the grant" in S. 15 of Regn. 37 of 1793 include a grant made to a person and his heirs. (*Das and Adami, JJ.*) *GOLAM NABI v. CHOWDHURI BASUDEB DAS.*

1 Pat. 201. (1922) P. 411.

BENGAL SURVEY ACT, S. 41—*Collector—Assistant Settlement Officer—Delegation of functions.*

Where a Revenue Officer is appointed with the additional designation of a Settlement officer he is vested with the powers of a superintendent of Survey under the Bengal Survey Act, and he can delegate his functions under S. 41 to an Assistant Settlement Officer. (*Coutts and Ross, JJ.*) *BABU BALGOBIND RAI v. BEHARI LAL.* (1922) Pat. 114.

3 Pat. L. T. 617 : 66 I. C. 471.

BENGAL TENANCY ACT (VIII of 1885)—*Applicability of—Suit in ejectment—Under-tenancy.*

A suit to eject an undertenant of a tenancy consisting of homestead and agricultural land at its inception, is governed by the B. T. Act and not by the T. P. Act. (*Newbould, J.*) *ABHAIPADA SIRCAR v. ATOR DOME.* 67 I. C. 66.

——— *Landlord and tenant—Interest of an under-ryayat in Bengal—Whether heritable.*

The interest of an under-ryayat in Bengal is not heritable. 31 Cal. 757 (F. B.) Referred to. (*Newbould and Panton, JJ.*) *SUTU BIBI v. JAMINI SUNDARI GUHA.* 1922 Cal. 85.

——— *Non-transferable occupancy holding—Sale of the holding in execution of the money decree against the holder—Consent of the landlord*

The decree holder, not being the landlord of the holding can, against the will of the judgment debtor and without the express consent of the landlord cause a portion of the judgment debtor's occupancy holding to be sold in execution of a money decree, there being local custom of transferability. (*Dawson Miller C. J. Das and Adami JJ.*) *SUNDAR MOHAN v. GHANA RAUT.*

3 Pat. L. T. 205 : 1922 P. 114.

——— S. 3—*Landlord and tenant—Grant of waste land for purposes of cultivation—No rent reserved till land cultivated—Effect.*

## BENG. TENANCY ACT (1885), S. 3.

The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the B. T. Act which prevents such an arrangement. (*Miller C. J. and Mullick, J.*) RANI CHATER KUMARI DEBI *v.* PRATAPDHUJ SINGH.

67 I. C. 839.

—Ss. 3 (3) and 4—Scope of—Lessee of private land—Status of.

Ss. 3 (3) and 4 of the B.T. Act do not separately or conjointly create or confer upon any one any status or right. They are mere definition sections specifying the classes of tenants to which the Act applies. A lessee of Zerai land is a tenant under S. 3 (3) only during the continuance of the term on the expiry of which he becomes a trespasser (*Sir John Edge.*) MAHANTH JAGARNATH DAS *v.* JANKI SINGH.

43 M. L. J. 55 :

26 C. W. N. 833 : 35 C. L. J. 506 :

(1922) M. W. N. 410 : 1 Pat. 340

31 M. L. T. 231 (P. C.) : (1922) P. C. 142 :

66 I. C. 377 : 3 Pat. L. T. 197 :

49 I. A. 81 (P. C.)

—S. 5—Ejectment—Homestead land in Municipal limits—Non-transferable holding—Sale of for residential purposes—Recognition by landlord on payment of enhanced rent—Effect of.

Where a raiyat occupying his homestead within the residential suburb of the Naraingunj Municipality as part of his non transferable occupancy holding first sold the rest of the holding to a certain person, and next sold his homestead to the defendant, a pleader who purchased it for the purpose of his residence and for carrying on his profession as a pleader in the local Civil Courts, was recognised by the plaintiffs landlords, on payment of salami and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a kasht holding, while the rent previously paid was now quadrupled.

*Held*, in a suit brought by the plaintiff for ejectment of the defendant after service of six month's notice to quit terminating with the end of a year of the tenancy that the defendant's contention that his tenancy was in continuation of the old tenancy of the out going raiyat was not maintainable, that the tenancy originated in a fresh settlement with the plaintiffs and that in view of the purpose of which the new tenancy was created it was governed by the provisions of the T. P. Act, 16 C. 652 ; 19 C. 489 ; 27 C. 205 *ref.* (*Tennon and Abdul Majid, JJ.*) HARENDRA-KUMAR ROY CHOWDHURY *v.* HARAKISHORE PAL.

26 C. W. N. 389 : 1922 Cal. 201.

—S. 5—Land let out for cultivation—Lessee whether tenure holder—Presumption under S. 5 (5) whether applicable.

S. 5 (5) has no application to the case of a person who does not hold more than one hundred standard bighas of land there will be no presumption as to his being a tenure holder. The true scope and meaning of S. 5 are that, where the purpose for which the tenancy was originally created is known and clearly proved, no other

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presumption as to the tenancy being otherwise than what the original purpose is, is admissible. If land is expressly leased out to a person for the purpose of cultivation and he was prohibited from making settlement of it with any other person, or granting *Shikmi patti* thereof, or using the land in any way which would interfere with cultivable nature thereof, the lessee is only a *Shikmidar* and not a tenure holder under S. 5 (*Jwahi Prasad and Bucknill, JJ.*) BENI CHAUDHURI *v.* TRILOKE NATH TEWARI. 1922 P. 425.

—S. 5 (5)—Tenureholder—Raiyat—Reference to mode of use—Engagement between Government and settlement holder.

Where a person occupies alluvial accretion without entering into an engagement with the collector before taking possession, but he is allowed to remain in possession on payment of rent, he is a tenant—17 C. L. J. 431, 22 C. L. J. 132 *Ref.* The Revenue authorities are competent to make a *malikana* settlement of the lands with a third person. 34 C. L. J. 779 *Ref.* (*Mookerjee and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI *v.* THE MIDNAPUR ZAMINDARI COMPANY.

35 C. L. J. 493.

—S. 7—Enhancement of rent—Right of landlord—Question not to be raised on second appeal.

Where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is, whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. Where none of these matters had been investigated in the Court of first instance nor raised there, the question could not be raised on appeal. (*Mookerjee and Cuming, JJ.*) THE MIDNAPUR ZEMINDARY CO. LTD. *v.* SRIDHAR MAHATA. 49 Cal. 866 :

36 C. L. J. 96 : (1922) Cal. 151 : 67 I. C. 775.

—S. 12—Landlord—Right to sue for rent—Usufructuary mortgage from tenant.

The landlord of a tenure can sue for rent the usufructuary mortgagee of his tenant if the said mortgagee having taken possession of the mortgaged property, 12 C. 185 10 C. 443 *Rel.* (*Tennon and Newbould, JJ.*) NITYANANDA SARKAR *v.* HARI MOHAN SARKAR. 64 I. C. 750.

—S. 16—Applicability of—Purchaser from tenure-holder. See (1921) DIG. COL. 66 MESBA-HUDDIN AHMED CHOWDHURY *v.* ABDUL BOKAT. 65 I. C. 839.

—S. 18 B—Documents—Recitals relating to tenure—Admissibility against landlord.

Recitals in a deed of gift to which the landlord is not a party and relating to the incidents of tenure are not admissible in evidence against the landlord under S. 18 Bengal Tenancy Act. (*Mookerjee A. C. J. and Fletcher J.*) UJIR ALI SARDAR *v.* SHADHAI BEHARA. 35 C. L. J. 132 :

(1922) Cal. 185 : 68 I. C. 1633.

## BENG. TENANCY ACT (1885), S. 20.

—Ss. 20, 21, 160 (d) and 167—Ejectment—Raiyat holding at fixed rate—If can acquire right of occupancy See (1921) DIG. COL. 56 SARBESWAR PATRA v. MAHARAJ SIR BEJOY CHAND MOHAPAT. (1922) Cal. 237.

—S. 22—Amendment (I of 1907) not retrospective.

The amending Act (I of 1907) has no retrospective effect. Where a tenure holder brought the subordinate raiyat interest before the amendment of S. 22 of the B. T. Act in 1907, the subordinate right does not lose its separate existence and merge in the superior right after the amending Act of 1907 came into force 15 I. C. 705; 38 I. C. 534 Ref. (*Suhrawardy and Cuming, JJ.* ABDUL REKIB KHAN v. JALAL AHMED 65 I. C. 584

—S. 22—Collectorate partition—Effect of—Possession.

In all cases where there is a Collectorate partition between co-proprietors if the lands are merely the *bakshi* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those *takhta* the particular lands in question fall. The only exceptions are those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. (*Miller, C. J. and Adams, J.*) QYAMUDDIN KHAN v. RAMYAD SINGH.

3 Pat. L. T. 419: (1922) P. 354. 67 I. C. 530.

—S. 22 (2)—Co sharer landlord—Purchase of holding—Collectorate partition—Effect of holding allotted to another co-sharer—Continuance of tenancy.

When a co sharer purchases the holding of an occupancy raiyat, and upon a Collectorate partition the holding is allotted to the share of another co-sharer, the tenancy right continues and the holding does not cease to exist. Under S. 22 (2) of the B. T. Act of 1885 the occupancy right only ceased to exist but not the holding itself. 24 Cal. 143: 32 Cal. 386 foll.

*Quære*:—What will be the position under the Amending Act of 1907? (*Das and Adams, JJ.*) BASUDEO NARAIN v. RADHA KISHUN.

3 P. L. T. 22: (1922) Pat. 55: (1922) P. 62: 65 I. C. 281.

—S. 22 (2)—Occupancy holding—Purchase by co-sharer landlord—Partition by Collector—Allotment to another sharer—Effect of.

A co-sharer landlord, who purchases an occupancy holding and becomes liable to pay proportionate rent to the other co-sharers under S. 22 (2) of the B. T. Act, cannot be ejected from the purchased holding, when it is, upon a subsequent Collectorate partition, allotted to the *takhta* of another co-proprietor, 2 P. L. T. 163 appr. The terms '*kasht*' or '*Bakshi*' are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants. (*Jwala Prasad, A. C. J. and Das, J.*) NANDKISHORE SINGH v. MATHURA SAHU.

3 Pat. L. T. 13: (1922) P. 193: 65 I. C. 586.

## BENG. TENANCY ACT (1885), S. 20.

—S. 22, Sub S. (2)—Occupancy holding—Purchase by part proprietor—Effect of.

Under S. 22, sub S. (2) of the B. T. Act on a transfer of an occupancy the holding disappears, and the purchaser holds the land as a joint proprietor or joint tenure-holder, as the case may be. To put the matter briefly, the purchaser enjoys the land in his character of proprietor or tenure-holder and not as a raiyat. But as upon the disappearance of the tenant right, all the holders of the superior interest would *prima facie* be entitled to possession, that one amongst them who is allowed to keep exclusive possession of the land is made to pay his co-sharers a fair and equitable sum for such use and occupation. The co-sharers, who are deprived of the rent they had previously realised from the occupancy raiyat, are in this manner compensated for their loss. (*Mookerjee and Chotner, JJ.*) PURNA CHANDRA ROY v. MATHURA MOHAN SAHA. 36 C. L. J. 89.

—Ss. 23—Rights of tenants.

Tenants are entitled under S. 23 to use the land for any purpose consistent with the provisions of the section. (*Miller, C. J. and Adams, J.*) GRANT v. EKLAL JHA. 3 Pat. L. T. 387 (1922) P. 171: 67 I. C. 49.

—Ss. 23, 86, 87—Occupancy holding held in shares by several tenants—Transfer of undivided share—Subsequent surrender—If amount to abandonment—Separate portion of a holding—Not separate holding under the Act. See (1921) DIG. COL. 58 KARIM CHAKLADAR v. SHIMATI SAPORANNESSA BIBI. 64 I. C. 330.

—Ss. 23 and 90—Raiyat—Lease of fishery—Occupancy right.

A raiyat taking a lease of fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which portions are under water then his right to the acquisition of occupancy rights in the entire holding inclusive of the portion which forms the bed of the water cannot be defeated, the landlord may reserve the right of fishery when letting out the land. (*Mullick and Ross JJ.*) HENRY HILL & Co. v. SHEORAJ RAI.

3 Pat. L. T. 53: (1922) P. 9: 64 I. C. 346.

—S. 29—Applicability of—Increased rent—Increased area—"Specially" meaning of.

S. 29 has no application to an increase in the amount of rent by reason of an increase in area. It applies only to an increase in the rate of rent.

The word "specially" in the section has no reference to the quantum of the reduction of rent allowed for the consideration there mentioned but merely required that owing to special circumstances the rent is lower than it otherwise would have been. Mere proof that rent was a low rent would not be sufficient, unless it is also proved that the low rate was arrived at for a particular consideration. Conditions for bringing an enhancement within the proviso (iii) to S. 29 considered. (*Miller, C. J. and Adams, J.*) GRANT v. EKLAL JHA. 3 Pat. L. T. 387: (1922) P. 171: 67 I. C. 49.

[On appeal from.

64 I. C. 332.]

—Ss. 29—Suit for rent—Defence—S. 29 When available.

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Where a tenant omitted to raise a defence under S. 29 of the B. T. Act in a prior suit for rent he is not estopped from taking it in a subsequent suit. (*Sukrawardy and Cuming, JJ.*) *NAFAR CHANDRA PAL CHOWDHURY v. BHUSI MOLLA* 65 I. C. 581.

—S. 29 (1)—Scope of—Continuous period of three years—Meaning of.

The words "continuous period of not less than three years immediately preceding the period for which the rent is claimed" in S. 29 (1) of the Bengal Tenancy Act do not mean the period for which rents are claimed collectively in the suit, but mean the period in respect of which the rent is payable as a separate cause of action. (*Buckland and Cuming JJ.*) *JOGENDRA NATH MAITRA v. GOPAL CHUNDRA SAHA.* 64 I. C. 188.

—S. 29 (3)—Enhancement of rent—Right of landlord.

To entitle a landlord to enhance rent under S. 29 (3) of the B. T. Act he must prove three things:—(i) that the raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord; (ii) that he is released from the obligation of cultivating the crops; and (iii) that he deems the rent which he agreed to pay fair and equitable.

S. 29 (3) of the B. T. Act applies where the purpose of the tenancy is the growing of a particular crop and, in consideration of that the rent is not merely a low rent but a rent specially low on that account (*Ross, J.*) *EKLAL JHA v. WILLIAM MELING GRANT.* 64 I. C. 332.

See On appeal. 67 I. C. 49; 3 Pat. L. T. 387; (1922) P. 171.

—S. 29 (b)—Enhancement of rent—Proof of previous rent by tenant—Onus on plaintiff landlord to justify enhancement.

Where in a suit for arrears of rent at an enhanced rate by the landlord, the tenant proved the previous rent and also that the enhancement was in excess of two annas in the rupee, the onus is upon the plff, landlord to justify the enhancement which was in excess of that allowed by S. 29 (b) of the B. T. Act 36 C. 604 foll. (*Mookerjee and Cuming, JJ.*) *RAJENDRA NARAIN MAZUMDAR v. SHEIK KALIM.* 49 Cal. 875; 26 C. W. N. 758; 67 I. C. 813.

—Ss 30, 105 and 188—Enhancement of rent—Co-sharer landlord—Receiver appointed not mad: a party.

In a proceeding for enhancement of rent the co-sharer landlords shown by the record of rights to be entitled to the lands were made parties. A receiver, who had been appointed in respect of the share of one of the co-sharer landlords at the instance of a mortgagee of that share was not impleaded as a party to the proceeding. Held, that the omission to join the receiver as a party did not vitiate the proceeding though his joinder would have been proper. (*Adamu and Bucknill, JJ.*) *MADHEYA SURENDRA SAHAI v. AWADH MISSEER.* 3 Pat. L. T. 316; 65 I. C. 349.

—Ss. 30 (b) and 35—Grounds on which enhancement under S. 35 may be refused as inequitable. See (1921) DIG. COL. 60 *ISHANCHANDRA DASI v. RAM PRASAD AICH.* 65 I. C. 656.

**BENG. TENANCY ACT (1885), S. 46.**

—S. 30—Suit for enhancement of rent and determination of fair and equitable rent—Distinction—Fair rent. See (1921) DIG. COL. 60 *GOBIND LAL v. RAM SARAN LAL* 68 I. C. 433.

—Ss. 30 (b) and 182—Homestead land—Enhancement of rent—Money rent—Occupancy raiyat.

There is nothing in S. 30 of the B. T. Act to restrict it to the land actually used for cultivation. To attract the operation of the section it is sufficient that the land in question is a holding held at a money rent by an occupancy raiyat. Nor would S. 182 remove homestead lands from the operation of S. 30. It would no doubt be open to the tenant to prove that the rent of homestead land by custom or local usage is not liable to be enhanced under S. 30 (b) but failing the proof of any such custom or usage homestead land would come within the operation of S. 30 (b). As to whether in any particular case an enhancement should be granted would depend on the circumstances of the case (*Cuming and Pearson, JJ.*) *RAJA RESHEE CASE LAW v. CHINTAMONI DALAI.* 36 C. L. J. 305.

—S. 31—Rent—Enhancement of—Sublease by occupancy raiyat not a ground for enhancing rent.

The mere fact that an occupancy raiyat has sublet part of his holding is not a sufficient reason for refusing his landlord an enhancement of rent under the provisions of the Act. (*Wulmsley, J.*) *BASIRUDDIN SARKAR v. JOGENDRA MOHAN DAS.* 64 I. C. 182.

—Ss. 38 and 52 (b)—Tenant if can plead deterioration of land and abatement of rent in landlord's suit for rent—Bengal Rent Act, S. 18 See (1921) DIG. COL. 60 *SUKHRAJ RAI v. GANGA DAYAL SINGH.* 6 Pat. L. J. 665; (1922) P. 169; (1922) Pat. 132.

—S. 40—Agreement to pay rent in kind or in default fixed sum—No occupancy rights in raiyats—Right of Settlement officer to commute—Legality of Order—Civil Courts if can question See (1921) DIG. COL. 60 *MOHESH DUTTA SUKLA v. HURMAT.* 67 I. C. 946.

—S. 44—Homestead land—User for agricultural purpose—Ejectment—Urban holdings—Occupancy right.

Where homestead land ceases to be such and is let out for cultivation and both cereals and vegetables are grown upon it, the land is governed by the provisions of the B. T. Act and a lessee is a non-occupancy raiyat liable to be ejected only on any one of the grounds specified in S. 44 of the B. T. Act.

Quære Whether the B. T. Act applies to urban holdings as for instance in the city of Patna? (*Chamier C. J. and Sharfuddin, J.*) *MT. WAJIBUNNISSA BEGAM v. FAKIRA MAHTON.*

3 Pat. L. T. 621.

—S. 46—Suit for ejectment—Refusal to agree to enhancement of rent—Mode of service—Service on son if sufficient—C.P. Code, O. 5, R. 5.

S. 46 of the Bengal Tenancy Act provides that a non-occupancy ryot shall not be ejected by suit for refusal to agree to an enhancement of rent,



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unless the agreement for enhancement is tendered to the raiyat, and the rules framed by the Government prescribe the provisions of the C. P. Code relating to service of summons as applicable to the mode of service.

In a case where the agreement was served on the son of the raiyat, and there was nothing to show either that the raiyat could not be found or that the son was an adult male member of the family residing with him held the service on the son was not a proper compliance with the provisions of O. 5. R. 15 C. P. Code. (*Mookerjee A. C. J. and Fletcher, J.*) BHARAM CHAND GUIN v. KANAK SARKAR, 26 C. W. N. 359 : 35 C. L. J. 203 : 68 I. C. 991.

—S. 48 (a)—Scope of—Not applicable to case of rent in kind—Eviction by title paramount—If a good defence to suit for rent.

S. 48 (a) does not apply to cases where the rent fixed in the *kabuliyat* is rent in kind and not in cash, 29 C. L. J. 284 reld to,

Eviction by title paramount is a good defence to a suit for rent if the party evicted has a good title, (*N. R. Chatterjee and Newbould, JJ.*) KRISHNA KUMAR SHAHA ROY v. PIRU FAKIR, (1922) Cal. 273 : 35 C. L. J. 159.

—S. 49—Ejectment—Homestead—Occupancy right in

A settled raiyat of the village holding a homestead, though as an under-raiyat, or under a raiyat, acquires a raiyati right in that homestead, 43 C. 195 Ref. (*Suhrawardy and Cumming, JJ.*) ISAP ALI v. SATIS CHANDRA ROY, 65 I. C. 504.

—S. 49 (b)—Ejectment—Permanent lease by raiyat—Lessee if an under raiyat—Adverse possession.

Where a raiyat grants a permanent lease without the consent of the tenure-holder and the lessee and his heirs remain in possession for more than 12 years their status is not that of under-raiyat and they cannot be ejected by the service of a notice to quit under S. 49 (b) of the B. T. Act, 28 C. 205, 17 C. W. N. 860 Rel. (*Teunon, J.*) PURNA CHANDRA DAS v. JOY LAL PAYADA, 64 I. C. 756.

—S. 49 (b)—Permanent sub lease by raiyat to under raiyat—If operative against—Grantor—Termination of under raiyati tenancy, See (1921) DIG. COL. 61, CHANDRA KANTA NATH v. AMJAD ALI HAJI, 48 Cal. 783.

—S. 50—Continuity of tenure—Variation of rent—Sub-division—Effect of.

A sub-division of a tenure does not deprive the tenant of the benefit of S. 50 of the B. T. Act, nor does it affect the continuity of the tenure. A slight variation in rent, though unexplained, does not deprive the tenant of the benefit of the presumption under S. 50 of the B. T. Act (*Mookerjee and Chotzner, JJ.*) TARAKUMAR GHOSE v. KUMAR ARUN CHANDRA SINGH, 36 C. L. J. 389.

—Ss. 50, 105 and 105 A.—Lease for 3 years—Holding over—Rent—Presumption—Settlement of enhanced rent.

A *kabuliat* dated 1282 B. S. for 3 years in favour of certain tenants contained the following clause "After the termination of the period of settlement we shall take a fresh settlement on a

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proper rent." It was further stated in the *kabuliyat* that "we shall enjoy the tenancy for a fixed term under the conditions stated above and to this effect we execute this *raiyaati kabuliyat* for a fixed period." The landlords did not exercise their right to take possession of the tenure or to alter the rent after the expiration of the term of the *kabuliyats*. On an application made before the Settlement Officer for settlement of fair and equitable rents on the grounds of excess area and that the rate of rent is lower than the prevailing rate and also on account of rise of prices of staple food crops. Held (1) the *Kabuliyats* were executed before the B. T. Act came into operation and the term mentioned therein also expired before that date and (2) there was nothing to prevent the landlords from enforcing the terms of the *kabuliyat* after the expiration of the year 1284 B. S. and the fact that they did not take possession or otherwise after any of the terms of the previous tenancy gave rise to the inference that a new tenancy commenced from after that date upon the same terms as regards payment of rent and other stipulations except the stipulation with regard to the period of the settlement, That being so the origin of the present tenancy should be considered to be from the year 1285 B. S. and the presumption under S. 50 of the B. T. Act was rebutted in the case. (*Suhrawardy and Ghose, JJ.*) UDOY CHANDRA BASU v. MAHOMED ALI BEPARI, 65 I. C. 589.

—S. 50—Presumption—Rebuttal—Contract of tenancy subsequently entered into between the parties.

Where there is a uniform payment of rent for 20 years, it is open to the landlords to rebut the presumption arising in favour of the tenants by a contract of new tenancy entered into subsequently which entitles the landlords to claim rent from the tenants after the expiry of the term of the lease at the rate of rent payable for the cultivated lands of the village. (*Mookerjee and Cumming, JJ.*) SARAT CHANDRA DE DAS v. TARAPRASANNA BHATTA CHARYYA, 36 C. L. J. 333.

—Ss. 50 and 115—Record of Rights—Publication of—Presumption.

After the publication of the Record of Rights in respect of a tenancy under Chap. X of the B. T. Act, the tenant is precluded by S. 115 from claiming the presumption under S. 50 of the Act. (*N. R. Chatterjee and Panlon, JJ.*) RAMANANDAS BIDYASAGAR BHATTACHARYA v. SADBHU MAJHI, 26 C. W. N. 945 : 64 I. C. 445.

—S. 50—Rent—Enhancement—Presumption—uniform rate—Long period.

A suit to enhance rent proceeds on the presumption that a Zemindar holding under the Permanent Settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his Zemindari, according to the *perganah* or current rates, unless either he is precluded from the exercise of that right by a contract binding on him or the lands in question can be brought within one of the exemptions recognised by Reg. VIII of 1793. Consequently, in each of these cases, the nature of the lease



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and the conditions under which it is held is the primary question to be determined with reference to the documents and circumstances disclosed therein (*Mookerjee and Chatterjee, JJ.*) **ABINAS CHANDRA DAS v. MAJUB ALI CHOWDHURY** (1922) Cal. 461 : 36 C. L. J. 196.

**S. 50—Rent—Partly payable in kind and partly in cash—Fixed Rent—Produce rent.**

Rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. It is in this sense that the expression "rent" is used in S. 50 of the B. T. Act. The substantive rule enunciated in S. 50 (1) and the presumption embodied in S. 50 (2) of the B. T. Act do not become inapplicable because a tenure holder or raiyat holds at a rent payable partly in cash and partly in kind or entirely in kind. 12 W. R. 14, 14 W. R. 338; 15 W. R. 479 Rel. (*Mookerjee and Chatterjee, JJ.*) **DINA NATH PAL v. RAJA SATI PRASAD GARGA BAHADUR.** 27 C. W. N. 115 : 36 C. L. J. 220.

**S. 50—Sub division—Amalgamation—continuity of tenure if affected.**

S. 50 (3) of the B. T. Act was inserted for the benefit of the ryots and not with a design to prejudice tenure holders. The operation of S. 50 (1) and (2) is not excluded in the case of tenures merely by reason of sub-division or amalgamation. 36 C. 287 not foll.

S. 50 (1) of the B. T. Act contains the substantive rule on the subject of protection from enhancement. The Subdivision of a tenure does not work a breach in the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equal the original rent. (*Mookerjee and Rankin, JJ.*) **KRISHNA KAMINI DAS v. NILMADHAB SAHA.** 36 C. L. J. 332

**S. 50 (1 & 2)—Applicability of—Permanent Settlement—Presumption**

The words "permanent settlement" in S. 50 Sub. S. (1) of the B. T. Act relate to the Permanent Settlement of 1793. The presumption of S. 50 Sub. S. (2) of the Act applies even if the rent was permanently settled at a later date than 1793. To gain the advantage of S. 50 the defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. Even if S. 50 of the B. T. Act does not apply, the fact that uniform rent has been paid for a period of 20 years might give rise to a presumption in favour of the defendant. 13 C. L. J. 415. Rel. (*Graves and Panton, JJ.*) **OSMAN MANDAL v. RADHIKA MOHAN ROY.** 67 I. C. 294.

**Ss. 50 (2) and 115—Final Publication of record of rights—Tenants' plea of status of fixed rate—How far barred—Defence by tenant in landlord's suit—Non-cultivation.** See (1921) Dig. Col. 62. (*GOBIND LAL v. RAM SARAN LAL.*) 68 I. C. 433

**S. 50 (2)—Presumption—When arises.**

*Per Teunon, J.*—Mere demand on the part of the landlord for an enhanced rent and refusal to receive or acknowledge the old rent does not enable him to deprive the tenant of the benefit of the provisions of S. 50. The rent at which a

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tenancy is held continues until a change has actually been effected. Such change can be affected only by consent or by proceedings in Court.

The special Judges finding that the tenants have held at rents which have not been obtained for the twenty years preceding the suit and that the presumption thus arising has not been rebutted was affirmed in the absence of majority of *kabuliya*s.

*Per Hulla, J.*—The presumption under subsection 2 of S. 50 can only arise when the tenant proves affirmatively that he has held at rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. These words place on the tenant the burden of proving either that he has actually paid rent at a uniform rate for twenty years or that if not actually paid there has been at any rate an agreement between him and his landlord that he should hold at the old rate. Where the holding of uniform rate since the time of the permanent settlement has not been proved, the landlord has a right to demand an increase and in any case to refuse to receive rent at the old rate in order to prevent the presumption under sub section 2 of section 50 arising against him. (*Teunon and Hulla, JJ.*) **MOHINI KANTA SAHA CHOWDHURY v. PREONATH NEOGY** (1922 Cal. 143.

See on Letters Patent Appeal, 49 Cal. 661 : 35 C. L. J. 309.

**S. 50 (2)—Presumption under—When arises.**

Under S. 50 (2) of the B. T. Act, the tenant is not required to establish actual payment of rent during the twenty years at a uniform rent, he is to establish that he and his predecessors in interest have held at rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. This involves a real distinction for a person may hold as a tenant though he does not actually pay the rent agreed upon to his landlord.

When the evidence showed that rent was paid at a uniform rate from 1845-1897, but for 17 years afterwards there was no payment of rent though it had not been altered by mutual agreement or decree of court.

Held the presumption under S. 50 (2) arose. (*Mookerjee, Newbould and Pearson, JJ.*) **MOHINI KANTA SAHA CHOWDHURY v. PREONATH NEOGY.** 49 Cal. 661 : (1922) Cal. 141 : 67 I. C. 381 : 35 C. L. J. 309.

**Ss. 52 and 105—Claim for excess rent for additional area—Enhancement of rent—Question as to.**

The plaintiff applied for additional rent for additional area and also for enhancement of rent. When the matter came up before the Assistant Settlement Officer, the latter claim was abandoned. There was no issue as to enhancement of rent. The Settlement Officer eventually settled a rent. On appeal to the Additional Special Judge he was of opinion that the obvious course was to fix the rent on the principles of S. 7 of the B. T. Act and he held that an additional sum should be paid as rent. Held that the Judge was

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wrong in enhancing the rent with reference to the provisions of S. 7 of the B. T. Act as the question whether rent should be enhanced or not, was not gone into by the Court of first instance. The Special Judge should have confined himself to the question of fair and equitable rent in view of S. 52 of the B. T. Act. (*Chatterjea and Pearson, JJ.*) *RAM RENU ROY v. MIDNAPUR ZEMINDARI CO., LTD.* 67 I. C. 1001.

## —S. 52—Enhancement of rent—Excess area—Proof of—Nature of the suit.

In a suit for additional rent on account of excess area, the landlord's case does not depend on his being able to prove what happened at the inception of the tenancy. If the landlord can show that since the creation of the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land to which no rent was assessed at the time then the landlord is entitled to increase of rent. The court must find whether or not there has ever been assessment of rent on the basis of area and if so, whether that area is less than the land now found to be held by the tenants. (*Newbould and Pearson, JJ.*) *JOGEDRA KISHORE ROY v. SHEIKH AKTAR.* 67 I. C. 998.

—S. 52—Suit for additional rent—Excess area—Onus. See (1921) DIG. COL. 63, *INDU BHUJAN SARKAR v. JATA MULLICK*, 35 C. L. J. 161.

## —S. 52 (a)—Enhancement of rent on account of excess area—Claim by landlord—Onus of proof—Existence of prior settlement.

The tenant's liability to pay additional rent is not limited to cases where the area is in excess of that comprised in the settlement at its inception. It extends to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him under the last settlement. The settlement and record of rights defines the relationship between landlord and tenant in various respects including the area of the holdings for which rent is paid and is presumed to represent what is the relationship between them until the contrary is proved. The effect of such a settlement would be to throw the onus upon the party questioning it, to show that it did not accurately represent the true state of affairs. Where the subsequent settlement shows an area to be in excess of that under the settlement of 1898, the landlord has a right to claim enhancement of rent. (*Miller C. J. and Adami, J.*) *BISHAN PRAGASH NARAYAN SINGH v. ACHAI B DUSADI.* (1922) P. 215 : 1 Pat. 459 : 3 Pat. L. T. 807 : 66 I. C. 82.

—Ss. 52 (1) (b) and 179—Deficiency in area of tenure—Statutory right to reduction of rent—Contract to the contrary—Land in Sunderbunds—Permanently settled area. See (1921) DIG. COL. 63 *KHETRAMONI DASSI v. JIBAN KRISHNA KUNDU.* 30 M. L. T. 196.

## —S. 52 (1) (b)—Patni lease—Lessee not put in possession of all lands—Mistake—Abatement of rent.

A lessee under a patni lease did not get possession of all the lands comprised in the lease

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and in a suit for rent he contended that until an enquiry had been made as to the amount of reduction upon a proper apportionment, he was not liable for the rent. *Held* that it was open to the court in the suit itself to enquire as to what deduction of rent should be made upon a proper apportionment having regard to the deficiency in area. (*Sanderson, C. J. and Chotzner, J.*) *BENI MADHAB ROY v. KRISHNA KAMINI GUPTA.* 36 C. L. J. 121.

## —S. 60—Scope of—Payment of rent to transferee for a long time—Effect of—Registered proprietors—Rights of.

Where the plaintiff is a registered proprietor the defendant cannot plead discharge of the rent by payment to a third person. Payment to such third person for a long time is no answer to the claim for rent. (*Coults and Das, JJ.*) *MR. ADAYABATI v. JANARDHAN THAKUR.* 3 Pat. L. T. 756 : 68 I. C. 288.

—Ss. 61 and 62—Single tenancy—Deposits for three tenancies—Deposits accepted by court—Landlord if can question their validity. See (1921) DIG. COL. 64 *SATISCHANDRA DAS v. UMESH NARAIN CHOWDHURY.* 64 I. C. 696.

## —S. 65—Scope of—Rent sale—Enforcement of charge.

S. 65 of the B. T. Act intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chap. XIV, namely that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case, the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by S. 65 cannot be enforced in any other way. 22 Cal. 364 ref. (*Mookerjee and Pantun, JJ.*) *SITAL CHANDRA MAJAI v. PARBATI CHARAN CHAKRABARTI.* (1922) Cal. 32 : 35 C. L. J. 1.

## —S. 66—Interest—Higher rate if barred.

If the rent fell into arrears, the *Kabuliyat* provided "that the tenant should pay interest at six pies per rupee per mensem on the cash rent and one cotta per rupee per month on the rent payable as paddy." The landlord on the ground that the tenants were holding over since the first term of *kabuliyat* had expired, the rent having fallen in arrears, demanded higher rate of interest on the ground that a new contract might be deemed to have been entered into by the holding over of the tenants. *Held* : No higher rate of interest could be allowed and S. 178 does not help the appellant on the ground that there was a fresh contract. S. 67 is not limited in its application where rent is payable quarterly. There is no reason why S. 67 should not be applicable to interests on arrears of paddy rent paid annually, because the definition of arrears of rent in S. 54 cl. 3 is not confined to money rent. (*Newbould and Pantun, JJ.*) *ABRAHAMOYI v. SOMARALI.* (1922) Cal. 77 : 68 I. C. 1009.

—S. 67—Agricultural lease—Expiry of before the passing of the Act—Holding over—Interest on arrears of rent. See (1921) DIG. COL. 65. *CHANDRA NATH SARMA MOTAYED v. SHANKH INAMDIL.* 64 I. C. 118.

## BENG. TENANCY ACT (1885), S. 72.

—S. 72—Scope of—Transferee—Right to rent.

S. 72 of the B. T. Act applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer. (*Coutt, and Das, JJ.*) *MT ADITYA-BATI v. JANARDAN THAKUR* 68 I. C. 288 : 3 Pat. L. T. 756.

—Ss. 76 and 182—Homestead land—Building of permanent house by raiyat—Propriety of.

It is competent to an occupancy tenant to erect a pucca house on homestead land not held as part of the occupancy holding in the absence of a local custom or usage to the contrary. S. 76 of the B. T. Act does not prohibit the tenant from so building. (*Mookerjee, A. C. J. and Fletcher, J.*) *SURENDRA NATH SAHU v. NAKOOR CHANDRA CHAKRAVARTHI.* 64 I. C. 716.

—S. 86 (b)—Surrender—Transfer of interest by way of mortgage—Effect of—Subsequent surrender.

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the transfer. (*Chatterjee and Pearson, JJ.*) *AMIRUDDIN MAHAMAD v. SANKAR BORMAN.* (1922) Cal. 56 : 67 I. C. 91.

—Ss. 93, 95 and 98—Common manager—Appointment by Dt. Judge—Resignation—Appointment of successor—Inherent power.

When a common manager appointed under the Bengal Tenancy Act has been removed or has resigned or has died, the District Judge has inherent power to make a proper order for the appointment of a successor for the benefit of the estate. 10 C. W. N. 437 d'ss. (*Mookerjee and Panton, JJ.*) *BRINDABON CHANDRA CHAKRAVARTY v. JHANENDRA NATH.* 35 C. L. J. 75 : 64 I. C. 819.

—S. 103—Record of Rights—Entry in—Effect on prior decisions inter parties. See (1921) DIG. COL. 68. *JALADHAR BHOWMIC v. BIRENDRA NATH RAI CHAUDHURI.* 35 C. L. J. 200.

—S. 103 A—Presumption—Record of right—Khasra papers.

The inference under S. 103 A of the Tenancy Act can only be drawn from the finally published Record of Rights and not from the khasra papers upon which the finally settled Record of Rights is founded. (*Greaves and Panton, JJ.*) *ALTAP ALI CHAUDHURY v. SRIMATHI JARINA BIBI.* 67 I. C. 871.

—S. 103 B, Sub. S. 3—Record of Rights—Entry in—presumption—Non-agricultural land. See (1921) DIG. COL. 68 *RAJA SASI KANTA ACHARYA BHADUR v. SANDHYA MONI DASYA.* 26 C. W. N. 483 : 65 I. C. 4.

—S. 103 (b)—Record of rights—Presumption of correctness—Rebuttal.

The presumption of correctness attaching to an

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entry in the Record of Rights cannot merely be rebutted by showing that it is opposed to the general law. Where the question related to the ownership of trees the general law vesting the ownership of trees in the landlord was held not to rebut the entry in the record of rights which vested the right in the tenants. (*Dawson Miller, C. J. and Bucknill, J.*) *BISHUN P-AGASH NARAIN SINGH v. SHEOSARAN TELI.* (1922) P. 497 : 3 Pat. L. T. 818 : 1 Pat. 368.

—S. 103 (b)—Survey—Entry as to malikana or rent free land—Burden of proof

Under S. 103 (B) of the B. T. Act a presumption arises in favour of an entry in the Survey as to malikana or rent free lands. If however the landlord proves that the land which is sought to be held rent free lies within his regularly assessed estate or mahal, the onus is shifted and it lies upon those who claim to hold the lands free of the obligation to payment to prove by reliable evidence that they have been relieved of this obligation either by Contract or under a grant recognised by Government. (*Mr. Amcer Ali*) *JAGDEO NARAIN SINGH v. BALDEO SINGH.* 3 Pat. L. T. 605 : (1922) (P. C.) 272 : 36 C. L. J. 499 : 49 I. A. 399 (P. C.)

—S. 103 (3)—Landlord and tenant—Patni lease—Land if included in patni—Submergence—Entry in finally published record of rights—Incorrectness—Onus. See (1921) DIG. COL. 68 *JOGENDRA NATH SAHA CHOUHURY v. JOGEDINDRA NATH ROY BHADUR.* 67 I. C. 170.

—S. 104—Effect of entry in Record of Rights.

An entry in a Record of Rights is conclusive unless altered by means of a suit instituted under S. 104 (2) B. T. Act within 6 months from the date of the certificate of final publication of the Record of Rights or if an appeal has been presented to a revenue authority under S. 104 then within 6 months of the disposal of such appeal. (*Mookerjee and Cuming, JJ.*) *PRATAB CHANDRA v. SECRETARY OF STATE* (1922) Cal. 101 : 35 C. L. J. 304 : 67 I. C. 375.

—S. 104—Presumption under—Record of rights

Though there is an irrebutable presumption in favour of an entry in the record of rights under S. 104 of the B. T. Act the presumption does not apply where the proceedings of the Settlement officer were carried on without jurisdiction. 17 C. W. N. 155; 23 C. W. N. 516; 46 C. 90. 23 C. W. N. 860 Rel. (*Mookerjee and Chotzner, JJ.*) *JYOTI PRAKAS CHATTORAJ v. BAGALA KANTA CHOWDHURI.* (1922) Cal. 274 : 36 C. L. J. 124

—Ss. 104 H and 111 A—Suit under—Maintainability.

A suit under S. 111 A can be maintained although the claim under S. 104 H may be barred by limitation. 45 C. 645, 651 foll. (*Chatterjee and Panton, JJ.*) *PALAN MEAH v. THE SECY. OF STATE FOR INDIA.* 65 I. C. 669.

—Ss. 105 and 109 A—Rent settled in a proceeding under S. 105—Road cess return showing

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lesser rate filed prior to such proceeding—Effect of, *See* BENG. CFSS ACT, S. 20. 6 Pat. L. J. 663

———**S. 105—Settlement of fair and equitable rent—Second appeal.**

The decision of a special Judge settling a fair and equitable rent under S. 105 of the B. T. Act is not open to second appeal but if he decides that the proceedings are maintainable under S. 105 then his decision would be open to second appeal (*Adami and Bucknill, JJ*) MADHEVA SURENDRA SAHI v. AWADH MISSEER. 3 Pat. L. T. 316 : 65 I. C. 349.

———**S. 105—Settlement of fair rent—No retrospective effect**

The settlement of fair rent under S. 105 of the B. T. Act has no retrospective effect on the liability for rent incurred in respect of a period prior to the decision under the section. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAIN MAZUMDAR v. SHEIK KALIM. 26 C. W. N. 758 : 49 Cal. 875 : 67 I. C. 813.

———**Ss. 105 and 109—Settlement of rent—Matters not raised nor decided—Not res judicata**

It cannot be held on the analogy of the doctrine of constructive res judicata that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105 A of the B. T. Act, 44 C 783 Rel. (*Das, J*) MAHARAJA BAHADUR KESHO PRASAD SINGH v. BHAGWAT SARAN PANDE. 67 I. C. 710.

———**Ss. 105, 108 and 109—Suit for rent—Compromise—Different rate entered in record of rights—Suit for rent on basis of record of rights—Res judicata.**

Where in accordance with a compromise in a proceeding under S. 105 of the Bengal Tenancy Act, the rate of rent has been fixed and in a subsequent suit for recovery of rent a lesser rate is decreed on the basis of an entry in the record of rights, the decision in that suit does not operate as res judicata having regard to S. 109 of the Act. (*Coutts and Ross, JJ.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR v. YOUNUS MOMIN. 3 Pat. L. T. 130 : (1922) Pat. 68 : 65 I. C. 474 : 6 P. L. J. 588.

———**S. 106—Entry in record of rights—Suit for amending—Questions of possession and title.**

Where a suit is instituted under S. 106, Bengal Tenancy Act, for amending an entry in the Record of Rights as regards the possession of a parcel of land, the only matter involved in the decision is the question of possession and not of title. (*Mookerjee A. C. J. and Fletcher, J.*) GOBINDA RANI DASIA v. MOHIM CHANDDA ROY. 35 C. L. J. 195.

———**S. 106—Old tenancy—Enhancement of rent—Right of landlord.**

On an application for enhancement of rent the facts were found to be these. At the time of which any historical knowledge was available, the tenure in question was created the lands were not all cultivable and had to be reclaimed. The rent was therefore fixed not on the quantity of the lands left out but on the quantity of land that could be brought under cultivation by the

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Talukdar. It was specifically mentioned in the Kabuliats of 1223 (B.S.) that the rent payable at the time was to be paid on the quantity of the land under cultivation until there was a measurement. A later document of 1249 contained no terms as regards enhancement. *Held*, that the document of 1249 was merely a recognition of the original tenancy created in 1223 and the rent could be increased according to the terms embodied in the Kabuhats of 1223. (*Shurawardy and Cuming, JJ*) JOY CHANDRA CHAKRABORTHY v. SRIJUT KUMAR ARUNCHANDRA SINHA. 67 I. C. 241.

———**Ss. 106 and 109—Record of rights—Suit for correction after declaration of rent free title—Suit filed in Revenue Court and dismissed for default—Subsequent suit in civil court—Bar.**

Where a suit by the plaintiff under S. 106 of the B. T. Act for the correction of an entry in the Record of Rights after establishment of plaintiff's rent free title is dismissed for default by a revenue court, a subsequent suit in a civil court for declaration of plaintiff's rent free title is barred. (*Walmsley and Greaves, JJ.*) APURBA KRISHNA ROY v. ARMANI DAS. 64 I. C. 889.

———**Ss. 106 and 109—Suit withdrawn with liberty to sue afresh—Effect of.**

A suit under S. 106 of the B. T. Act, allowed to be withdrawn with liberty to bring a fresh one, is to be treated as one never instituted and S. 109 is no bar to the institution of suit : 33 C. L. J. 304; 40 Cal. 428 : 28 C. L. J. 254 Ref. (*N. R. Chatter-jia and Suhrawardy, JJ.*) SOROJ KUMAR ACHARJ, v. UMED ALI. (1922) Cal. 251 : 35 C. L. J. 19.

———**S. 109—Bar of suit—suit withdrawn with liberty to sue afresh—Effect.** *See* BENGAL TENANCY ACT Ss. 106 AND 109. 35 C. L. J. 19.

———**S. 109—Decision merely settling rent—Decision as to extent of area and liability to enhancement—Second appeal.**

Where the decision of the special Judge involved a determination of two fundamental questions in connection with the tenancy held by the defendant, viz, the extent of area and their liability to enhancement it is not a decision merely settling rent within S. 109 A of the B. T. Act and a second appeal lies therefrom. (*Mookerjee and Cuming, JJ.*) THE MIDNAPUR ZEMINDARY CO. LTD. v. SRIDHARI MAHATA. 67 I. C. 775 : (1922) Cal. 151 : 49 Cal. 866 : 36 C. L. J. 26.

———**S. 109—Scope of—No bar to entertainment of defence.**

Under S. 109 of the Bengal Tenancy Act what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. (*Mookerjee and Cuming, JJ.*) RAJENDRA NARAIN MAZUMDAR v. SHEIK KALIM. 49 Cal. 875 : 67 I. C. 813 : 26 C. W. N. 758.

———**S. 109—Second appeal—Status of tenant—Decision of special Judge.**

The decision of a special Judge is substantially a decision on the question of the status of a tenant and is open to second appeal 43 C. 603 Ref. (*Mookerjee and Cuming, JJ*) SARAT CHANDRA DAS v. TARAPRASANNA BHUTTACHARYA. 36 C. L. J. 389.

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—S. 111 A—Suit under—Maintainability—claim under S. 104 H barred by limitation. *See* BENGAL TENANCY ACT, Ss. 104 H and 111 A.

65 I. C. 669.

—S. 115—Rebuttal of presumption under S. 50—Publication of Record of Right—Tenant if precluded. *See* BENGAL TENANCY ACT, Ss. 50 AND 115.

64 I. C. 445.

—Ss. 115 and 50—Record of rights—Finality of—Enhancement of rent—Presumption.

Once the record of right becomes final a tenant cannot in view of the provisions of S. 115 of the B. T. Act claim the presumption under S. 50 of that Act. In S. 115 the "expression" "thereafter" means after the particulars have been finally recorded after recourse to all the provisions contained in Ch. X for the attainment of finality in this respect. 37 C. 30 foll. 45 C. 930 : 51 I. C. 552 Ref. 12 C. W. N. 904 not foll. (*Mookerjee and Cuming, JJ.*) PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABARTY. 26 C. W. N. 947 :

36 C. L. J. 291 : (1922) Cal. 146.

—S. 120—Zerai Land—Survey record—Presumption.

A description of a land as Zerai in a lease will not be any evidence to show that the land was really zerai for there must be evidence under S. 120 to show either that the land was held in the seer cultivation of the landlord for 12 continuous years immediately before the passing of the Act or that it was recognised by village usage as proprietor's Khumar, Zerai, Seer Nig Jote or Kamat.

Clause 2 of S. 120 allows the evidence of the land being specifically let as proprietor's private land, before the 2nd of March 1883. The presumption afforded by the survey of record of rights is a rebuttable one (*Jwala Prasad and Bucknill, JJ.*) BENI CHOUDHURI *v.* TRILOKENATH TEWARI (1922) P. 425.

—S. 147 A—Scope of.

S. 147 A of the Bengal Tenancy Act gives effect to the whole scheme of the Act viz. to prevent the landlord from circumventing the provisions of the Act to the detriment of the illiterate tenant (*Suhrawardy and Cuming, JJ.*) NAFAR CHANDRA PAL CHOWDHURY *v.* BHASI MOLAX. 65 I. C. 581.

—Ss. 148 A and 188—Cosharer landlords—Suit for rent—Maintainability

Where a tenant makes a contract by which he is liable to pay rent to several cosharers jointly, one cosharer cannot maintain a suit for the whole rent. S. 188 of the B. T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one cosharer from bringing a suit for the whole rent after making the cosharers who refuse to join as plaintiffs, defendants in the suit. 35 C. 331 Ref. Again if a cosharer can prove that there is a contract express or implied by which a tenant is liable to pay him his share of the rent separately, then he may bring a suit for that part of the rent without joining his cosharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, not with

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standing such arrangement for separate collection all the cosharers may sue jointly for the whole rent.

To further facilitate the recovery of arrears of rent due to a cosharer who is in dispute with his tenants or with his fellow landlords, the legislature enacted S. 148 A of the Bengal. Ten. Act. The section requires firstly, that the cosharer shall sue to recover the rent due to all the cosharer landlords in respect of the entire holding, secondly, that he must make all the remaining co-sharers parties to the suit, and thirdly, that he must state that he is unable to ascertain what rent is due for the whole tenure or holding or whether the rent due to either cosharer landlords has been paid, owing to the refusal or neglect of the tenant or of the cosharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff cosharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the cosharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L. J. 500 Ref. (*Miller C. J. and Mullick J.*) RAJGIRI SINGH *v.* JADUNATH SINGH. (1922) Pat. 355.

—Ss. 148 A, 158 B and 169—Rent sale—Occupancy holding—Auction purchaser of an interest—Cosharer landlord suing for his share of rent—Entire body of landlords suing for rent—Auction purchaser of share not made a party—Effect of.

Co sharer landlords having separate realisation of rents in respect of their shares, are entitled to realise their share of rent separately. But such an arrangement expressed or implied merely affects the right to sue separately and in no other respect modifies the terms of the holding and the rights to bring the tenure to sale for arrears of rent remains intact. 35 Cal. 331 Ref.

In the absence of any sub-division of the occupancy holding with the consent of all the landlords the right of the entire body of landlords to put up the entire holding to sale is not affected by the purchase of the holding at the sale held in execution of the decree obtained by some of the cosharer landlords for their shares of rents.

A purchaser of a share of an occupancy holding in execution of a decree for rent obtained by some of the cosharer landlords, is in the position of an unregistered transferee. 9 C. W. N. 134 Ref. He is not a necessary party to a suit brought by the entire body of landlords for entire rent.

S. 148 A of the Bengal Tenancy Act is an enabling section. A co-sharer landlord is given the right to proceed with the suit for his share only of the rent where he is unable to ascertain whether any amount is due to the other co-sharer. A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords. 35 Cal. 331 (344, 345) ref. It is only in a case so framed that the decree has the effect of a rent decree.

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The mere fact that something was claimed that was not properly due will not make the decree any the less a rent decree; 8 C. W. N. 172 Ref. (*Chatterjee and Pearson, JJ.*) SASTI CHARAN CHAKRABARTY v. AKUBJAN BIBI.

26 C. W. N. 639 : 35 C. L. J. 30 : 64 I. C. 591 : (1922) Cal. 243

## S. 148 (a)—Suit for rent—Decree—Impleading cosharers.

The essential principles underlying S. 148 B T. Act are that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears and the whole body of landlords should be impleaded with the allegation that the plff. has not been able to ascertain what if any, rents are due to the former. In such cases the whole rent due must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and decide on the accuracy of that belief, if and when the impleaded cosharers appear and claim any arrears as due to themselves. 27 C. L. J. 101 diss. 4 Pat. L. J. 500 foll. (*Jwala Prasad and Bucknill, JJ.*) MAULAVI MASUD AHMAD v. JAGAN SINGH.

3 Pat. L. T. 439 : (1922) P. 560 : 68 I. C. 625,

## S. 148 A—Suit for recovery of arrears of rent—Limitation See (1921) DIG. COL. 73

FULLA CHANDRA v. GHOSE BABURAM MANDAL.

65 I. C. 1.

## S. 153—Decision as to amount of rent—Decree on admission of defendant.

In a suit for rent the deft did not admit the plaintiff's claim but alleged some other amount to be the rent payable. The court however without deciding the rate of rent gave a decree for a lump sum on the defendant's admission. Held there was no decision as to the amount of rent within s. 153 of the B T. Act. 1 C. W. N. 711 Ref. (*Miller, C.J. and Mullick, J.*) RAJGIRY SINGH v. JADUNATH RAY.

(1922) Pat. 355.

## S. 153—Rent suit—Relationship of landlord and tenant—Appeal, See (1921) DIG. COL. 74

SUDHANYA SANTRA v. BASANTA KUMAR SIRCAR.

49 Cal. 538 : (1922) Cal. 417 : 64 I. C. 733

## S. 153—Explanation—Appeal when lies.

Where there are both fraud and irregularity established, the fact that they are coupled together does not exclude an appeal. Unless there is irregularity alone and irregularity untainted by fraud an appeal lies. 19 C. W. N. 953 followed. (*Greaves, J.*) JAIRAM GAYAN DAS v. DINO NATH-SAMANTHA.

(1922) Cal. 163.

## Ss. 154 and 158—suit for enhancement of rent—Parties—suit by one co-sharer landlord—severance of tenancy—Evidence of.

It is not competent to one of several co-sharer landlords to sue for enhancement of rent or for additional rent in respect of additional area alleged to be comprised in a jote. The mere fact that a tenant agrees to pay a rent to one of the co-sharer landlords separately does not constitute a severance of the tenancy. If, however, there is a separate kabuliyat in favour of one of the co-sharer landlords it is evidence of a separate

## BENG. TENANCY ACT (1885), S. 161.

tenancy, (*N. R. Chatterjee and Newbould, JJ.*) MONMOTHA PAUL CHAUDHURY v. MOHENDRA NATH BOSE.

(1922) Cal. 284 : 65 I. C. 469.

## S. 155—Ejectment—Compensation—Misuse of tenancy—Notice—Contents of.

Where a notice of ejectment for alleged misuse of the tenancy which was capable of remedy to the knowledge of the landlord, did not ask the tenant to remedy the misuse, the notice is bad and neither ejectment nor compensation could be claimed on its basis. (*Woodroffe and Ghose, JJ.*) SHIB CHARAN CHAKRABURTHY v. BEPIN BEHARY CHAKRABURTHY.

27 C. W. N. 144.

## Ss. 159, 161 and 167—"Incumbrance"—Adverse possession of a part of lands of defaulting tenure.

The word "incumbrance" as used in Ss. 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in S. 167. (*Mookerjee and Panton, JJ.*) ISAN CHANDRA v. SEFATULLA.

26 C. W. N. 703 : 35 C. L. J. 36 :

(1922) Cal. 331 : 68 I. C. 219.

## S. 159—Sale for arrears of rent—What passes.

When in execution of a decree for arrears of rent a tenure is sold, the tenure is not extinguished there is a transmission and not an extinction of interest. The purchaser takes the existing tenure subject to protected interests, but with power to annul incumbrances thereon by recourse to the prescribed procedure. (*Mookerjee, Newbould and Pearson, JJ.*) UDAI KUMAR DAS v. KATYAYINI DEBI.

35 C. L. J. 292 : (1922) Cal. 87 :

169 I. C. 126.

## S. 160 (b)—Auction purchase at a rent sale—Howladar and tenants—Annulment of incumbrances—Suit for recovery of possession.

Where it was contended relying on the entries in the settlement Khatian that the howladars are protected by virtue of the provisions of S. 160 (b), Held reliance cannot be placed on the entry in the record of rights. The sale having been made, notices issued to annul the incumbrances, and the suit commenced before the record of rights was published, the entries made in the record of rights cannot affect the rights of the auction purchaser purporting to have been acquired by virtue of the annulment made by the notices. (*Greaves and Ghose JJ.*) SRIMATO JOHARA BANGO v. GANGA CHANDRA CHOUDHURY.

(1922) Cal. 222.

## S. 161—Incumbrance—Meaning of—What it includes—See B. T. ACT Ss. 159, 161 AND 167.

26 C. W. N. 703.

Ss. 161 and 167—Patni taluk—Rent sale Incumbrances—Duty to avoid—Onus on plff.—Tenants claim to hold as lakhiraj land—Notice to avoid incumbrance—Limitation essence of issue—Decision on probabilities. See (1921) DIG. COL.

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76, BIPRADAS PAL CHOWDHURY v. KAMINI KUMAR LAHIRI. 49 Cal 27 : 26 C. W. N. 465 : (1922) P. C. 48 : 30 M.L.T. 138. 15 L. W. 180 : 4 U. P. L. R. (P. C.) 53 : 66 I. C. 674. (P. C.)

—S. 167—Incumbrance—Annulment of—Mortgage—Landlord purchaser and mortgagee purchaser—Rights of—Mortgage not annulled—Effect of—Mortgage of part of occupancy holding—Sale for arrears of rent

A sale for arrears of rent does not *ipso facto* cancel a mortgage on the holding, being an incumbrance. 24 Cal. 746 Rel. The procedure provided by S. 167 of the B. T. Act is the only mode of annulling the incumbrance, and the purchaser must have recourse to the prescribed mode within the specified period, if he desires to annul the incumbrance. 22 Cal. 364 foll.

A landlord purchaser, at a rent sale is, like any other purchaser, bound to follow the provisions of S. 167. If the mortgage is not annulled on the expiry of one year from the date of the rent sale or from the date when the landlord has notice of the incumbrance, the holding in the hands of the landlord-purchaser remains subject to the mortgage no longer liable to be impeached or extinguished : 24 C. W. N. 961 Ref.

The relative rights of the purchaser at the rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale. If the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within the prescribed period, he holds the property subject to the mortgage and is entitled to redeem. The mortgagee purchasing the property in execution of a decree obtained by him in the suit instituted on the mortgage in which the landlord-purchaser was not made a party, does not lose his right to be redeemed by the purchaser at rent sale. 14 M. I. A. 144 Ref. (*Mookerjee and Panton, JJ.*) SITAL CHANDRA MAJHI v. PARBATI CHARAN CHAKRABARTI. 35 C. L. J. 1 : (1922) Cal. 32.

—S. 167—Incumbrance annulment of—Meaning of—Purchaser of a holding in execution of a mortgage decree. See (1921) Dig. Col. 76. SABJAN MANDAL v. HAIPADA SAHA. 66 I. C. 103.

—S. 167 —Incumbrances—Annulment of—Procedure. See B. T. ACT Ss. 159, 161 AND 167. 26 C. W. N. 703.

—S. 169 (C)—Patnidar—Right to rent—Sale of *darpatni*.

In execution of a decree for rent due to a patnidar a *darpatni* interest was sold in execution and the decree was satisfied by the proceeds of the sale. Subsequently, the patnidars applied for payment to them of the rent which had fallen due after the date of the suit and till the date of the confirmation of the execution sale from one of the surplus sale proceeds. *Held*, that the patnidars were entitled to rent only up to the date of the sale and could be paid only the amount of rent due up to that date. Under S. 54 rent becomes an arrear as soon as it falls due and under S. 57 it carries interest thereafter. Consequently, interest on an arrear of rent becomes part of the rent and a decree holder should recover the rent and interest together without the necessity of a fresh suit for

## BENG. TENANCY ACT (1885), S. 178.

interest. 11 C. W. N. 1106 ; 22 C. W. N. 523 ref. (*Chatterjee and Duval, JJ.*) RAM LAL DAS v. BANDIRAM MUKHOPADHYA. 26 C. W. N. 511

—S. 170 (3)—Right to make a deposit—Execution of decree against Hindu widow—Right of reversioner to make a deposit.

The words "an interest in the tenure or holding voidable on the sale" in S. 170 (3) of the Bengal Tenancy Act mean "an interest which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one."

Where a decree for rent put into execution was one obtained against a Hindu widow, the reversionary heir expectant of her husband on her death did not have an interest in the tenure or holding voidable on the sale within the meaning of S. 170 of the Bengal Tenancy Act (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH v. BAIDYA NATH TRIPATHI. 26 C. W. N. 167 : (1922) Cal. 95.

—S. 171—Payment into Court—Meaning of—Payment to party under order of court.

Where a person applying under S. 171 of the B. T. Act asked permission to deposit the money in court but the court instead of granting that permission allowed the applicant to pay the money directly to the respondent and this was done. *Held* that the payment was tantamount to a payment into court under S. 171 of the B. T. Act. (*Coutts and Das, JJ.*) MASAFIR LAL DAS v. GANESH JHA. (1922) Pat. 347.

—S. 173—Civil Procedure Code, O. 21, R. 90—Sale—Setting aside of.

Where the sale to the auction-purchaser of a holding for arrears of rent was set aside on two distinct and several grounds under S. 173 B. T. Act and O. 21, R. 90 Civil Procedure Code and the order under the latter was appealable while under the former Act it was not, *held* the sale was set aside on two distinct grounds and the fact that an appeal lay so far as one ground was concerned would not confer a right of appeal in respect of the other. 3 C. W. N. 184 followed. (*Richardson and Ghose, JJ.*) AMAR PRASAD DEB v. GAGAN CHANDRA HALDAR. (1922) Cal. 180.

—S. 174—Applicability to Orissa—Sale of holding for arrears of rent—Decree passed by Collector—Application to set aside on deposit—Law applicable. See (1921) Dig. Col. 77. LAKSHMIDAR MAHANTI v. RATNAKER MAHA-PATRA. 30 M.L.T. 32 : 48 Cal. 811 (P. C.)

—S. 178—Tenancy on new terms—Acceptance by raiyats at fixed rates of rent.

S. 178 of the B. T. Act does not affect the validity of a contract creating a tenancy on new terms entered into between the landlord and tenants who had the status of raiyats at a fixed rate of rent in 1890. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS v. TARAPRASANNA BHATTACHARYA. 36 C. L. J. 333.

—S. 178—(a)—Contract of tenancy—Land acquisition—Covenant by raiyat not to claim compensation. See (1921) Dig. Col. 78. ASUTOSH CHANDRA MITRA v. HARIPADA GANGULI. 35 C. L. J. 133 : (1922) Cal. 187.



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—S. 178 (3)—*Agreement to pay enhanced rent—Consideration—Release of non-existing obligation—Not enforceable.*

An agreement to pay enhanced rent in consideration of a non-existing obligation is void under S. 178 (3) of the Bengal Tenancy Act. (*Miller, C. J. and Adams, J.*) GRANT v. EKLAL JHA.

3 Pat. L. T. 387 : (1922) P. 171 : 67 I. C. 49.

—S. 179—*Interest on rent—Permanent—Mokurrari tenure.*

Where the word "Mokurrari" has not been used in the document and there is no express provision in the document that the rent shall not be enhanced, but there is some indication in the document to show that the parties did not intend that there should be an enhancement of rent, and where the Kabulyat provides that, if there was an increase in the land on measurement, the tenant would have to pay rent separately for the excess area at the rate stipulated in the Kabulyat that shows the rent was a fixed one because it could not have been intended that the tenant would pay for the excess area at the rate stipulated in the Kabulyat and at the same time would have to pay at an enhanced rate for the original area mentioned in the Kabulyat. The tenure is permanent Mokurrari and interest is payable on rent as agreed. (*Chatterjee and Henderson, JJ.*) CHANDY CHARAN LAW v. SREEMUTTY AZIZER-NESSA. (1922) Cal. 18.

—S. 182—*Homestead lands—If outside the operation of S. 30. See BENGAL TENANCY ACT 1928 AND 187.* 36 C. L. J. 305.

—S. 188—*Landlord and tenant—Rent suit by manager of joint Hindu family—Other members if necessary parties.*

S. 188 of the B. T. Act has no application to the institution of a suit for arrears of rent which is not something that the landlord is required or authorised to do by the B. T. Act. 33 C. 331 Ref 16 C. L. J. 427, 25 C. W. N. 38 Dist.

The tendency of modern decisions is in favour of the representative character of the manager, though no doubt, the question must be decided in each individual case or special class of cases subject to the operation of relevant statutory provisions, if any, such as the one embodied in S. 188 of the B. T. Act. Consequently a suit for rent instituted by the managing member of a joint Mitakshara family need not fail merely because the infant coparceners have not been placed on the record as joint plaintiff or as proforma defendants. 14 M. 1 A 367, 33 A 272, 29 A 311; 36 A. 383 Rel. on. (*Mookerjee and Chotzner, JJ.*) KALIPADA DAS v. RAJA SATI PRASAD GANGA BAHADUR. 36 C. L. J. 234 : (1922) Cal. 468.

—S. 192—*Landlord and tenant—Contract in force—Meaning of—Tenant's right to land settled with Zemindar—Contract before the passing of the B. T. Act.*

Where the intention of the parties to the contract was that the lease should comprise all the lands within it and the rent was settled at a lump sum for all the lands leased out, the tenant has a right to the lands settled with the zemindar after resumption by Government.

## BENG. TENANCY ACT (1885), SCH. III ART. 3.

The words "lease or contract in force" in S. 192 of the Bengal Tenancy Act have reference to the words "lease" or "contract" in the opening, lines of the section and do not affect contracts entered into before the passing of the Bengal Tenancy Act.

S. 192 of the Bengal Tenancy Act does not either expressly or impliedly, give power to a revenue officer to fix a rent so as to affect contracts entered into before the passing of the Ben. Tenancy Act. (*Chatterjee and Pearson, JJ.*) PRAFULLA NATH TAGORE v. T. C. TWEEDIE.

35 C. L. J. 14 : 65 I. C. 234 : (1922) Cal. 248.

—Sch. III, Art. 1 (a)—*Ejectment—Non-occupancy right—Limitation.*

Sch III, art 1 (a) of the B. T. Act (as amended) does not apply to suits to eject persons who were not non-occupancy raiyats of the land under Ch. VI of the Act. To fall within the article, the non-occupancy raiyat must be a person who before the expiry of his term had acquired the status and rights of a non-occupancy raiyat under Ch. VI of the Act. A lessee of a proprietor's private or Zerai land is not such a non-occupancy raiyat. (*Sir John Edge*) MAHANATH JAGANNATH DAS v. JANKI SINGH. 43 M. L. J. 55 : 3 Pat. L. T. 197 :

26 C. W. N. 833 : 35 C. L. J. 506 :

(1922) M. W. N. 410 : 1 Pat. 340 :

66 I. C. 337 : 1922 (P. C.) 142 :

31 M. L. T. (P. C.) 231 : 49 I. A. 81 (P. C.)

—Sch. III, Art. 3—*Applicability of—Dispossession of Tenant—Limitation.*

Art 3 of Sch. III applies only where it is shown that the landlord was taking part in the dispossession which is therein referred to. The landlord or somebody acting in concert with him must have caused the dispossession. 24 C. 40 Rel. (*Sanderson, C. J. and Chotzner, J.*) GOBINDA CHANDRA GOPE v. AKHIL CHANDRA DAS.

64 I. C. 858.

—Sch. III, Art. 3—*Applicability of—Conditions for.*

The essential conditions which must be satisfied in order to attract the operation of Sch. III art. 6 of the B. T. Act are these : First, the decree must be obtained in a suit between landlord and tenant, and secondly, the provisions of the Bengal Tenancy Act must be applicable to them. (*Coutts and Das, JJ.*) RAGHUNATH SAHAY v. CHOWA MAHTON. 3 Pat. L. T. 525 :

67 I. C. 882.

—Sch. III, Art. 3—*Applicability—Suit between two tenants—Dispossession by landlord.*

Art 3 of Sch. III to the B. T. Act does not apply to a suit between two tenants unless the dispossession of the plaintiff tenant is attributable to the agency of the landlord. 25 C. W. N. 102 Rel. (*Richardson and Shuhrawardy, JJ.*) JANOKI NATH SAHA v. BAIKUNTHA NATH GHATTACK.

36 C. L. J. 140 : (1922) Cal. 176.

—Sch. III, Art. 3—*Landlord and tenant—Dispossession by third party—Constructive dispossession. See (1921) DIG. COL. 79 ARMAN PEADA v. MANIK SARKAR.*

27 C. W. N. 86.



**BENG. TENANCY ACT (1885), SCH. III ART. 3.**

—Sch. III, Art. 3—*Occupancy raiyat—Dispossession by persons inducted by landlord—Ejection—Limitation.*

Where an occupancy raiyat is dispossessed by persons inducted on the holding by the landlord, at his instigation and in collusion with him, in a suit by the raiyat to recover possession, the landlord is a necessary party and such a suit is governed by the limitation provided in Art. 3 of Sch. III of the Bengal Tenancy Act. (*Chatterjee and Panton, JJ.*) **RAJAH PEARY MOHUN MUKHERJEE v ARUNODOY GHOSE.** 25 C. W. N. 168.

—Sch. III, Art. 3—*Special period of limitation—Relationship of landlord and tenant—Proof.*

Where there is a relationship of landlord and tenant between the parties and the landlord after obtaining a decree for rent attaches the crops and dispossesses the tenant, a suit by the latter for the recovery of possession is governed by Art. 3 of Sch. III of the B. T. Act.

*Seemle:*—The special limitation does not apply where the landlord dispossesses the tenant as auction purchaser. 24 C. W. N. 38 : 25 C. W. N. 102 Rel (*N. R. Chatterjee and Panton, JJ.*) **BAIKUNTHA NATH GHATAK v. SHEIKH FAZIL.**

64 I. C. 192.

—Sch. III Art. 6—*Special period of limitation—Applicability of—Execution of rent decree—Payee for declaration.*

The insertion of an unnecessary prayer for declaration as to the plf's share in the Bhaoli produce does not prevent the decree in a suit between landlord and tenant from being a rent decree and consequently the limitation for execution of that decree is that provided by Sch. III Art. 6 of the B. T. Act. (*Coutts and Das, JJ.*) **DARGAHI MIAN v. MT. MANGO KUER.**

3 Pat. L. T. 563 : (1922) P. 566 : 67 I. C. 869.

—Sch. III, Art. 3—*Suit by landlord—Limitation.*

Where there is no relationship of landlord and tenant between the parties the general law of limitation and not the special period prescribed by Sch. III, Art. 3 of the B. T. Act, applies. (*Greaves and Ghose, JJ.*) **GOPINATH JALUA v. BHAAHARI DAS.** 68 I. C. 472.

**BENG. TEN ACT (Amendment) Act (I of 1907)—If retrospective.**

The Bengal Tenancy Act (Amending) Act (I of 1907) has no retrospective effect. (*Suhrawardy and Cuming, JJ.*) **ABDUL RAKIB KHAN v. JALAL AHMED.** 65 I. C. 594.

**BENG. TEN. ACT (Amendment) Act (II of 1918) Ss. 49 (e) and (f)—Aboriginal—Power to mortgage—sanction of Collector.**

The Power of an aboriginal to effect a mortgage of his land is restricted by the provisions of S. 49 (e) and (f) of B. T. Act (II of 1918) under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage. (*Walmsley*

**BERAR LAND REV CODE, S 158**

and Ghose, JJ.) **GANGARAM MAJHI v BAMPADA MAHAPATRA.** 68 I. C. 301.

**BERAR INAM RULES (1859)—Scope of.**

The Berar Inam rules are merely instructions to Revenue officers for the original settlement of claims to Jagirs and they lay down the conditions that shall ordinarily govern each grant. (*Hallifax and Prudeaux, A. J. C.*) **SUBHAN ALI v IMAMI BEGAM.** (1922) Nag. 129 : 65 I. C. 194.

—Br. 5, 9—*Imparlibility.*

The condition of imparlibility is not one of the restrictions imposed by rule 5, though rule 9 provides that service grants cannot be divided, (*Dhobley A. J. C.*) **KIRSHNAJI v. NILAKANTH.**

18 N. L. R. 163.

—Class. III, R. V.—*Inam estates in Berar—Succession—Descendants through females—Rights of.*

Subject to the special terms, if any, of the grant the devolution and incident of an inam estate in Berar are governed by the Berar Inam Rules 1859 The recognition of a jagir or inam by the Government operates as a fresh starting point to provide conditions for its future enjoyment and devolution 11 N. L. R. 150 foll. It is the recognition by the Govt. of an inam under the Berar Inam Rules that operates as the real root of title of the grantee as against the Government. The expression "*farzandan*" means offspring or lineal descendants and includes daughters but not the children of daughters. (*Dhobby, A. J. C.*) **CHOTU v. AKABAR ALI.**

(1922) Nag. 170 : 65 I. C. 72.

**BERAR LAND REVENUE CODE, Ss. 4 and 56—Amount payable by antejagir tenant to Jagirdar if revenue—Charge on the holding.**

The sum payable by antejagir holder in respect of alienated land is land revenue and is a paramount charge on the holding under S. 56 of the Berar Land Revenue Code. There is nothing in Ss. 49 to 56 to show that S. 56 gives no charge in respect of land revenue which is not a payment due to the Government. (*Kotwal, A. J. C.*) **SHAMRAO v. SHRI SITARAM MAHARAJ.**

68 I. C. 289.

—S. 78 (2)—*Tenancy—unknown origin—Meaning of—Protection given by the statute when available.*

Where it is clear that the tenancy could not have commenced before 1868 it cannot be said that the origin of the tenancy was unknown If it can be proved with certainty that the tenancy did not commence till after a certain point of time then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such holding is not protected by S. 78 (2). 14 N. L. R. 111 foll. In the absence of any proof that the tenancy was perpetual or that the defendant was an antejagir tenant, it must be assumed that he was an annual tenant. (*Dhobley, A. J. C.*) **YESHWANT v. SHIWAPPA.** 68 I. C. 178.

—S. 158—*Patwari of a village—Public servant.* See PENAL CODE, S. 21 (10).

68 I. C. 157.

**BERAR LAND REV. CODE, S. 160**

—S. 160 (iii) — *Cess—Superior holder—Liability.*

Under S. 160 the cesses in an alienated village are recoverable from the superior holder, and it lies on him to show, if he throws the liability on another person, how the case is taken out of the application of that section. (*Kotwal, A. J. C.*) *RAMCAHANDRA v. ISHRABHO.* (1922) Nag. 168 : 64 I. C. 202.

—S. 205—*Right to pre-emption—Agreement to resell—Effect of.*

A pre-emptor's right under S. 205 of the Berar Land Revenue Code cannot be defeated by the vendee reselling to the vendor after a pre-emption decree has been passed. 2 N. L. R. 150 Rel (*Prideaux, A. J. C.*) *BAPU v. BHOMJI.*

68 I. C. 498.

**BERAR MUNICIPAL LAW, Ss. 51 and 53 — Municipal tax—Suit for recovery of—Jurisdiction of civil court—Professional tax—Levy of—Subject of the tax.**

The jurisdiction of the civil courts is not ousted when the question is, whether a particular tax purporting to have been imposed under the Berar Municipal law has any legal existence. When the levy and assessment of any tax by the committee, purporting to be done under the authority of the Berar Municipal law, is alleged to be *ultra vires*, the civil courts have jurisdiction to entertain the suit. 8 N. L. R. 107; 24 M. 124; 35 C. 859 Rel. Where the Committee acted *ultra vires* and charged income not liable to tax the civil court has jurisdiction to entertain the suit and to direct the refund of the amount realised in excess.

It is not competent to a Municipality in Berar to assess to tax professional income derived by the assessee outside the Municipal limits, when such income is not brought into or mixed up with the income arising within the Municipality. 48 C. 443 Rel. (*Dhobley, A. J. C.*) *MUNICIPAL COMMITTEE MALKAPORE v. AMRIT WAMAN DAYAL.* 65 I. C. 532 : 5 N. L. J. 214 : 18 N. L. R. 121 : (1922) Nag. 10.

**BERAR PATELS AND PATWARIS LAW, S. 20—Suit for Patel allowance—Maintainability—In Civil court.**

Under S. 20 of the Berar Patels and Patwaris Law a civil court has no jurisdiction to try a claim for a share of the arrears of allowance due to a Patel in virtue of his office. (*Kotwal, A. J. C.*) *CHAMPAT v. GANPAT RAO.* 68 I. C. 506.

**BILLS OF LADING — Carriage of goods — Special clause excluding liability for short delivery. See (1921) DIG. COL. 81. THE BRITISH INDIA STEAM NAVIGATION COMPANY, LTD. v. V. T. KUPPUSWAMI Aiyar. 30 M. L. T. 18. (H. C.)**

**BOMBAY ABKARI ACT (V of 1878) Ss. 6 and 7 —Public Servant of Government—Power to dismiss at pleasure—Statutory Restrictions on the power.**

The plff. was employed as an Inspector in the Excise Department on a salary of Rs. 125 per mensem. He was dismissed by the Commissioner of Customs, Excise and Opium, Bombay, as a result of an enquiry into certain charges of bribery levelled against him. He filed a suit

**BOMBAY CITY MUNICIPAL ACT, S. 147.**

against the Secretary of State for India alleging that his dismissal was wrongful as the inquiry in respect of the charges of misconduct was not conducted in accordance with the regulations framed by Government for dismissal of non-covenanted servants and claiming Rs. 50,000 as damages for loss of service and injury to his reputation. The defendant contended *inter alia* that the plff. held the appointment at the will and pleasure of the Government and had no cause of action against the Government :—

*Held*, that the appointment of the plff. was made by the Commissioner of Customs under S. 6 of the Bombay Abkari Act, 1878, and not by the Government direct : that as S. 7 of the Act restricted the power of the Commissioner for dismissal the employment of the plff. ceased to be at the will and pleasure of Government ; and that the provisions of S. 7 must be strictly complied with before the plff. could be dismissed. (*Kajiji, J.*) *DINSHAW J. JAVERY v. SECRETARY OF STATE FOR INDIA.* 24 Rom. L. R. 210 : (1922) Bom. 16 : 67 I. C. 280.

**BOMBAY BHAGDARI ACT (V of 1862) S. 3—Unrecognised sub-division—Alienation — Lease—Possession of alienee.**

The property in dispute formed an unrecognised sub-division of a Narva. On 28-4-1892 it was conveyed by its owners, the plaintiff's predecessors, to defendants for a long term of 500 years in consideration of a sum of money. In a suit for redemption by the plaintiffs in 1918 treating the transaction of 1892 as a mortgage, the defendants pleaded that the alienation was void in view of the Bombay Bhagdari Act and that their possession had been adverse for over 12 years. *Held*, that the transaction of 1892 was not an out and out sale but a lease for a long term and that as the alienation was void, the defendants had acquired by prescription a leasehold interest. (*Shah A. C. J. and Crump, J.*) *CHATURBHAI LALLUBHAI PATEL v. MOTIBHAI BAPUJI.* 24 Bom. L. R. 1315.

**BOMBAY CITY MUNICIPAL ACT (III of 1888) S. 147—Landlord—Taxes and rates—Liability to pay—Increase of assessment on the basis of rents obtained by sub-letting of members.**

S. 147 of the City of Bombay Municipal Act is an involved section ; but it means this, that the lessor from whom taxes are leviable under S. 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. The only question in any particular case is whether the lessor has contracted himself out of the protection afforded by S. 147. *Held* on a construction of the lease in question that the lessor was entitled to the protection afforded by S. 147. Ordinarily when the lease was granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease and it is difficult to suppose that the parties contemplated that in case of an increase in the assessment, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. (*Macleod, C. J. and Shah, J.*) *DARASHAH BOMONJI DUBASH v. LIPTON LTD.* 24 Bom. L. R. 479 : 67 I. C. 430.

**BOMBAY CITY MUNICIPAL ACT, S. 154**

—S. 154 (2) — *Valuation of building — Cost of bath-tubs, lavatories and Electric Fittings — Machinery.*

In respect of buildings newly built in Bombay City, deductions in their rateable value should not be allowed to the owner, for the cost of bath tubs, lavatories and electric lights and fans. Baths and lavatories must necessarily be put in before tenants can be expected to take the premises. Electric fittings installed by a landlord become part of the premises and are necessary for the user of the premises by the tenant. They do not constitute machinery within S. 154 (2) of the Bom. City Mun. Act. (*Macleod C. J. and Shah J.*) **Haji Dawood Haji Elias v. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY.** 24 Bom. L. R. 476 : (1922) Bom 386 : 67 I. C. 426.

**BOMBAY DT. MUNICIPAL ACT (II of 1884) S. 59** —Bye-laws of Municipality—Levy of house tax Levy of separate rate on owner of land underneath the house—Different plots forming different tenancies but comprising one survey number—Mode of rating. See (1921) DIG. COL. 84. **THE SHOLAPUR MUNICIPALITY v. SHANKAR SHESHBHATAMBALJI.** 46 Bom 205 : (1922) Bom. 158 : 64 I. C. 177.

—(III of 1901) Ss. 96 and 97—*Election of huts—Permission of Municipality not obtained —Offence.*

The accused was charged with an offence punishable under S. 96 (5) of the Bombay District Municipal Act for erecting huts on his land without permission of the Municipality. The trying Magistrate being of opinion that the accused had committed no offence under S. 93 altered the charge and convicted him under S. 97 read with S. 155 of the Act. The accused having applied in revision. *Held*, setting aside the conviction, that the Magistrate was not competent to alter the charge in the manner he did. (*Macleod, C. J. and Shah, J.*) **EMPEROR v. MATUBHAI M. SHAH.** 46 Bom. 657 : 24 Bom L R 105 : (1922) Bom. 97 : 66 I. C. 323 : 23 Cr. L. J. 259.

—Ss. 96 and 36 (2) — *New buildings — Permission to build—Permission given by Public Works Committee—Power to recall.*

The plff who wished to make additions to his existing building obtained permission to build, under S. 96 of the Bombay District Municipal Act 1901, from the Public Works Committee of the deft. Municipality. On an application by the plff's neighbour, the permission was later on recalled by the General Board of the Municipality. The plff, having sued for a declaration that he was entitled to build in accordance with the permission once granted :—

*Held* by *Macleod, C. J. and Fawcett, J.* that the General Body of the Municipality had power to cancel or revoke the permission to build granted by the Public Works Committee either of its own motion or on the application of a person injuriously affected thereby.

*Held*, By *Shah, J.*, concurring, that the power so exercised was subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96 of the Bombay District Municipal Act 1901. 19 Bom. L. R. 65 ;

**BOMBAY DT MUNICIPAL ACT, S. 188.**

20 Bom. L. R. 756: 23 Bom. L. R. 244: Rel. (*Macleod C. J. Shah and Fawcett, JJ.*) **MULJI TRIBHOVAN SEVAK v. THE DAKOR MUNICIPALITY.** 46 Bom. 663 : 24 Bom. L. R. 178 : (1922) Bom. 247 : 69 I. C. 18.

—Ss. 122 and 54—*Highway—Obstruction for over 30 years — Adverse possession — Right of municipality to remove obstruction—Lim Act, S. 29 and Art. 146 A See 1921 DIG. COL. 86* **ABAJI RAGHO v. THE MUNICIPALITY DO JALGAON.**

46 Bom. 335 : (1922) Bom. 111 : 64 I. C. 202.

—Ss. 122 and 155 — *Projection — Construction of an olla—Notice to remove—Disobedience—Penalty.*

Where an accused constructs an olla and is asked by a notice under S. 122 of the Bom. Dt. Mun. Act to remove it, in case he disobeys the notice, the proper course for the municipality is to remove the olla themselves and charge him with the cost of the removal. The accused cannot be convicted under S. 155 of the Act of having disobeyed a lawful order. S. 122 of the Act gives no power to a municipality to issue a notice to a person alleged to have effected an encroachment to remove it, although the municipality may send such a notice, it is not a notice under the section; such a notice might be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove the encroachment themselves. Since these special powers have been given that is the proper remedy as laid down by the legislature in cases of failure to comply with such a notice. (*Macleod, C. J. and Coyajee, J.*) **EMPEROR v. ATMARAM SHAMJI.** 24 Bom. L. R. 384 : 66 I. C. 817 : 23 Cr. L. J. 321.

—S. 167—*Contract with Municipality — Penalty for breach of contract—Suit to recover the amount of penalty. See (1921) DIG. COL. 87* **BABAN HEMRAJ v. THE CITY MUNICIPALITY, PCONA.**

46 Bom. 123 : 64 I. C. 357 : (1922) Bom. 380

—S. 188 Sub S 1 — *Rules for the notified area, R. 27—New building—Notice—Refusal of permission—Building in spite of refusal if an offence*

The accused applied to the Notified Area Committee for permission to build on his plot of land, but the Committee, purporting to act under R. 27 (5) of the Rules framed by the Government of Bombay, under S. 188, sub-S. (1) of the Bombay District Municipal Act, 1901, gave a model reply, "Permission refused." After waiting for one month, the accused built up his house, for which he was convicted for building his house without permission.

*Held*, reversing the conviction, that the model reply in question was not proper as it refused permission for an indefinite period and all that the Committee could do under the rules was to pass a provisional order directing that for a period, which should not be longer than one month from the date of such order, the intended work should not be proceeded with. (*Macleod,*

**BOMBAY DISTRICT POLICE ACT, S. 41.**

*C. J. and Shah, J.* **EMPEROR v. ARDESHAR JIVANJI MISTRI.** 24 Bom. L. R. 102 : (1922) Bom. 221 : 66 I. C. 331 : 23 Cr. L. J. 267.

**BOMBAY DISTRICT POLICE ACT (IV of 1890) S. 41—Order by District Magistrate—Revision by High Court.**

*A.* order of the Dt. Magistrate under S. 14 of the Act is an executive and not a judicial order with which the High Court can interfere in revision. (*Fawcett, J. C. and Kincaid, A. J. C.*) **SANTAN v. EMPEROR.**

15 S. L. R. 126 : 64 I. C. 663 : 23 Cr. L. J. 39 : (1922) Sindh 21.

—Ss. 57 and 58 (2)—Finder of property not claimed by anybody—Rights of finder.

Where a person finds property in a public highway and the property is not claimed by anybody even after a proclamation issued under S. 58 (2) of the Bom. Dt. Police Act, the property or its proceeds should be made over to the finder, there is no authority for the government to appropriate the property. (*Marten and Crump, JJ.*) **MARUTI BAPUJI SONAR In re.**

24 Bom. L. R. 707 : (1922) Bom. 240.

**BOMBAY HEREDITARY OFFICES ACT (III of 1876) S. 5—Decree—Execution—Provision for payment of mortgage amount by payment of annual sum out of profits of mortgaged lands—Application for recovery of full amount, by attachment and sale. See (1921) Dig. Col. 87** **GANESH EKNATH KAULJI v. BHAWSAHEB BHAWAN-RAO.** 46 Bom. 345 : 64 I. C. 208 : (1922) Bom. 110.

—S. 5—Money decree against valandar—Purchase at Court sale by another valandar—Binding nature of sale.

Where in execution of a money decree against a valandar, his vatan lands were sold after his death and purchased by another valandar of the same vatan, who obtained possession from the widow, held the sale in execution would bind the reversioners, as the alienation was a valid one for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod, C. J. and Shah, J.*) **GANESHI RAMCHANDRA KULKARNI v. LAXMIBAI VENKATESH NARAYAN.** 46 Bom. 726 : 24 Bom. L. R. 249 : (1922) Bom. 96 : 67 I. C. 209.

—S. 11 A—Alienation of vatan—Resumption by Collector—Levy of full rent—Rent payable to valandar. See (1921) Dig. Col. 88 **DATTATRAYA KESHAV DESHPANDE v. LAXUMAN CHIMNAJI RANJANE.** 64 I. C. 7.

—S. 18—Hereditary office dispute—Maharki Vatan—Arbitration—Award.

Under S. 18 of the Bombay Hereditary Offices Act, 1874, a dispute as regards a Maharki Vatan was referred to a Panchayat. The parties however failed to nominate the panchas and thereupon the Deputy Collector asked the Mamlatdar to appoint them but the latter in his turn issued orders to the Head Karkun to get two panchas appointed by each party and himself to act as sar-panch. The Mahars appointed their panchas but the villagers declined to do so. When this fact

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was brought to the notice of the Mamlatdar, he ordered the Head Karkun to appoint two panchas under S. 18. The panchas were so appointed and the panchavat thus constituted made the award which was submitted to the Mamlatdar and was in due course approved of by the Deputy Collector. In a suit questioning the validity of the award held that the Panch was not constituted according to the procedure prescribed by S. 18 of the Bom. Her. Offices Act and the award was invalid. Having regard to S. 18 of the Act, it is not competent to a Civil Court to entertain a suit by the Mahar Vatan-dars to restrain the villagers of their village from delivering the carcasses of dead animals and paying baluta to the mangs. (*Shah, A. C. J. and Crump, J.*) **MAHADU KASHIB v. KRISHNA TATYA MAHAR.**

24 Bom. L. R. 917 : (1922) Bom. 410 : 68 I. C. 746.

**BOMBAY HIGH COURT CIVIL CIRCULARS, CHAP. I, R. 55—Pleader summoned as a witness—Subsistence allowance—Rate of. See (1921) Dig. Col. 88. VALI ASMAL v. MALJI**

46 Bom. 89 : (1922) Bom. 116 : 64 I. C. 78.

**BOMBAY HIGH COURT RULES (ORIGINAL SIDE) R. 118—Set off—Counter-claim—Distinction between—Claim for unascertained damages when allowed as set off or counterclaim. See C. P. CODE, O. 8, R. 6**

24 Bom. L. R. 328.

—R. 116—Counter-claim—Set-off—Bar of limitation—Effect on. See C. P. CODE O. 8 R. 6

24 Bom. L. R. 398.

—R. 214—Originating summons—Suit for declaration that covenant for reconveyance or pre-emption is void—Grant of relief.

It is open to the court to pass a declaratory decree in an originating summons under R. 214 of the Bombay High Court Rules to the effect that a covenant for re-conveyance or pre-emption annexed to a sale-deed is void as infringing the rule against perpetuities. (*Macleod, C. J. and Kanga, J.*) **DINKARRAO GANPATRAO v. NARAYAN.**

24 Bom. L. R. 449 : (1922) Bom. 84.

**BOMBAY IRRIGATION ACT (VII of 1879) S. 35—Compensation for interruption of water-supply—Division of Collector—Civil Court—Jurisdiction.**

When Government fails to supply water for crops and the claim for compensation has been already decided by the Collector under S. 35 of the Bombay Irrigation Act, Civil Courts have no jurisdiction to entertain a suit for the same relief. Scope of the Act considered. (*Macleod, C. J. and Shah, J.*) **VISHNU VINAYAK VAZE v. THE SECRETARY OF STATE FOR INDIA.**

46 Bom. 738 : 24 Bom. L. R. 264 : (1922) Bom. 8 : 67 I. C. 43.

**BOMBAY KHOTI SETTLEMENT ACT (I of 1880) S. 10 Khoti lands—Permanent tenant—Transfer of a portion of Khoti lands without the consent of the Khot—Effect.**

Where the permanent tenant of Khoti lands transfers a portion thereof without the consent of

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the Khot, only the portion so transferred, and not the entire holding, is at the disposal of the Khot, under S. 10 of the Khoti Settlement Act. 1880 (*Shah and Prati, JJ.*) MADHAVRAO MOREHWAR BHANDARKAR v. KRISHNAJI SATURAO RANE.

46 Bom. 470 : 24 Bom. L. R. 131 : (1922) Bom. 257 : 68 I. C. 277.

———S. 10—Khoti land—Transfer by occupant—Simple mortgage—Suit in ejectment—Discharge of mortgage—Effect of.

A simple mortgage of Khoti land by the occupant is within the mischief of S. 10 of the Bombay Khoti Settlement Act and the fact that before a suit is filed for possession, the mortgage is discharged is immaterial. (*Shah, A. C. J. and Crump, J.*) VASU KRISHNA YEKAVDA v. MADHAVRAO MORESHWAR. 24 Bom. L. R. 1160.

———Ss. 20 and 21—Decision of Recording officer—Finality of entry in Botkhat.

The mere entry in the settlement register of the name of a particular person as the occupant of a survey number is not final and conclusive nor is it binding on all parties concerned until it is reversed or modified by a decree of the Civil Court. The decision of the Recording Officer is however binding. (*Macleod, C. J. and Coyajee, J.*) RAJARAM SITARAM v. JAGANATH GOVINDA RAO. 24 Bom. L. R. 323 : 67 I. C. 322.

———S. 21—'Decision', meaning of—Entry in Botkhat.

The Khoti Settlement Act nowhere provides that the mere entry in the settlement register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provision of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the recording Officer. An entry in Botkhat is not a decision. S. A. No. 850 of 1914 Ref. (*Macleod, C. J. and Coyajee, J.*) POTPHODE v. YESHWANTRAO. (1922) Bom. 329.

**BOMBAY LAND REV. CODE (1879) S. 81—Registered occupant—Failure to pay assessment—Payment on arrears of assessment by co-sharer—Transfer of khata to co-sharer's name—Effect of—Occupancy rights of defaulter. See (1921) DIG. COL. 91. VINAYAK DATTATRAYA JOSHI v. GANESH ANANT HASABNIS.**

46 Bom. 221 : (1922) Bom. 198 : 64 I. C. 201.

———S. 83—Duration of tenancy—Presumption as to—Commencement of the tenancy.

The phrase "commencement of the tenancy" in S. 83 of the Bom. Land Rev. Code refers to the time and not to the terms of the tenancy. The presumption in S. 83 applies only when the time (i.e.) rather the date or the period of the commencement of the tenancy is not proved by satisfactory evidence. Directly it is shown that the tenancy commenced from a particular period say between 1830 and 1850 the ordinary

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presumption that is now contained in S. 106 of the T. P. Act will have to be drawn. 18 Bom. 433 : 23 Bom. L. R. 533; 24 Bom. L. R. 226 Rcl. (*Prati and Fawcett JJ.*) NARAYAN RAM CHANDRA v. PANDURANG BALKRISHNA.

24 Bom. L. R. 831 : (1922) Bom. 402.

———S. 83—Permanent tenancy—Presumption—Origin known.

S. 83 of the Bombay Land Revenue Code 1879 does not apply to a tenancy which, though very old, can be shown to have originated in a specified year. (*Shah and Prati, JJ.*) CHIKKO BHAGWANT NADGIR v. SHIDNATH MARTAND

46 Bom. 687 : 24 Bom. L. R. 226 : (1922) Bom. 25 : (1922) Bom. 337 : 66 I. C. 315.

———S. 121—Settlement of boundaries—Survey of land in a town—Enquiry officer—Functions of—Determination by enquiry officer Jurisdiction of Civil Court. See (1921) DIG. COL. 93. GANESH VENKATESH JOGLEKAR v. RAMCHANDRA NARAYAN JOGESHAR. 46 Bom. 390 : (1922) Bom. 293 : 64 I. C. 564.

———S. 135—Suit for land—Record of Rights certified copy of entry in—Copy not attached to plaint—Decision of appeal Court—Review—C. P. C. O. 47, R. I. See (1921) DIG. COL. 93. GANESH BALKRISHNA BHIDE v. VITHAL TRIMBAK BHIDE. (1922) Bom. 114 : 64 I. C. 156.

———S. 135—Suit for land—Record of Rights certified copy of not attached to plaint—Suit decreed by first court—Reversal on appeal—Procedure if legal. See (1921) DIG. COL. 93. GIRIJABAI NAGAPPA CHANDAVAR v. HEMRAJ VRINDAWANDAS. 64 I. C. 681.

———Ss. 203 and 204—Notice of demand of assessment—If a decision or order.

A notice of demand to pay assessment by a mamlatdar cannot be treated as a decision or order within the meaning of Ss. 203 and 204 of the Bombay Land Revenue Code. (*Macleod, C. J. and Shah, J.*) NATHURAM HIRARAM v. SECRETARY OF STATE FOR INDIA. (1922) Bom. 274 : 24 Bom. L. R. 402 : 67 I. C. 842.

**BOMBAY MAMLATDARS' COURTS ACT (II of 1906) S. 5—Suit in Mamlatdar's court—Mode of trial—Procedure—Revision.**

A Mamlatdar in whose court a possessory suit was brought dismissed it on the ground that the matter could be more properly tried by the Civil Court. On revision the Collector directed the mamlatdar to proceed with the case and returned it for necessary action. The mamlatdar after recording some evidence sent the papers for orders to the Collector who heard the parties and declined to vary the original order of the mamlatdar. On an application for revision to the High court, *Held* that immediately, the case was sent back by the Collector, the Mamlatdar's duty was to try the suit under the Mamlatdar's Courts Acts and to give his own decision thereon; and that the High Court in revision should direct the mamlatdar to restore the suit to his file and dispose of it according to law. (*Shah, A. C. J. and Crump, J.*) RASUL MUSA MAFAT v. ASMAN MUSA DADI. 24 Bom. L. R. 1311.

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—S. 5—Explanation possessory suit—Joint possession. *See* (1921) DIG. COL. 95 JINA JIJIBHAI BARIA v. MATHUR JIJIBHAI BARIA.

46 Bom. 289 : (1922) Bom. 126 : 66 I. C. 225.

—S. 23—Power of Collector.

When the finding of the Mamlatdar is based on nothing but the unsupported allegations of the plaintiff it must be called a finding based on a total misappreciation of what evidence there was. It is not based on evidence such as is necessary to establish a disputed claim and the error in the Mamlatdar's finding amounts therefore not only to an error of fact but also an error of law. In such a case therefore the Collector is perfectly justified in setting aside the finding of Mamlatdar (*Kennedy J. C. and Madgaonker, A. J. C.*) MOTU MAL PARUMAL v. LEKHUMAL. (1922) Sind 18.

—S. 24—Power of Judicial Commissioner's Court.

Under S. 24 of the Act the Judicial Commissioner's court has the same powers as the High Court and exercises such revisional powers over the order of the Collector in its capacity as successors to the Sadar Diwani Adalat which exercised these powers under Regulation II of 1817 and which powers were vested in the High Court by the Statute 24 and 25 Vic. Chap. 104 (*Kennedy J. C. and Madgaonker A. J. C.*) MOTUMAL PARUMAL v. LEKHUMAL. 1922 Sind 18.

**BOMBAY MOTOR VEHICLES ACT (VIII of 1914) Ss. 10 and 11—Rules under—Schd. D—Ultra vires—Motor vehicle—Registration certificate—Time limit introduced in registration certificate.**

Rule 6 of the Bombay Motor Vehicle Rules 1915 as amended by the rules published in 1918, framed under S. 11 of the Bombay Motor Vehicles Act, 1914, and Schedule D to those rules are *ultra vires* in so far as they provide for any limit of time during which the certificate should be valid. (*MacLeod, C. J. and Shah, J.*) EMPEROR v. J. D. SHERSTON BAKER. 46 Bom. 646 :

24 Bom. L. R. 50 : (1922) Bom. 42 : 23 Cr. L. J. 169 : 65 I. C. 633.

**BOMBAY MUNICIPAL ACT, S. 145 A—Permission to build on old wall—Pulling down a wall—Withholding of permission.**

Plaintiff wanted to build another storey on his western wall, and got permission. According to a compromise in a dispute with his neighbours, he agreed to build further back to which the Municipal Committee did not give permission. The plaintiff therefore began to follow out his old plan to which the Municipality objected. *Held* The objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission (*MacLeod C. J. and Shah J.*) THE BANDRA MUNICIPALITY v. JOHN C. DE. MELLO. 1922 Bombay 344. (1).

**BOMBAY PLEADER'S ACT (XVII of 1920) S. 10—Ex parte decree—Application to set aside—Pleader appearing in the suit appearing for the application—Fresh vakalat unnecessary. *See* C. P. CODE O. 9, R. 13.**

24 Bom. L. R. 744.

**BOMBAY RENT ACT.**

—S. 10 (1)—Suit—Execution proceedings—Pleader—Vakil patra not to be filed again in execution proceedings. *See* (1921) DIG. COL. 95 ISOOB SAIBA ABDUL RAHMAN v. HAIDAR SAIBA 46 Bom. 125 : 64 I. C. 55 : (1922) Bom. 113.

—Sch. III—Pleader's fees—Costs—Taxation—Suit in ejectment by landlord. *See* (1921) DIG. COL. 95 BAI MEHERBAI NANAPHAJI BANAJI v. MRS. K. R. DADINA.

46 Bom. 396 : 64 I. C. 1000 : (1922) Bom. 171 : 23 Bom. L. R. 1133.

**BOMBAY REGULATION (XVI of 1827) — Vatan land — Settlement — Gordon settlement—Sale at a court auction of Inami and mirasi rights in vatans—Alienation operative only during vatandars life time. *See* (1921) DIG. COL. 95 BALKU SIDU KUMBHAR v. VYANKATESH VAMAN DESPANDE. 46 Bom. 52 : (1922) Bom. 192.**

**BOMBAY RENT ACT, S. 9—Bona fide and reasonable requirement—Small fraction of premises leased required by the landlord—Reasonable requirement. *See* 1921 DIG. COL. 98. VITHALDAS BHAGVANDAS v. NAQUBAI M. JOSHI. 68 I. C. 330.**

**BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918) S. 9—Requirement by landlord—Reasonable and bona-fide demand—Test of.**

The plaintiff, who carried on business in hardware in a rented shop in the Fort in the City of Bombay, was ejected by the owner of the shop-premises. The plaintiff owned a house, in another locality of the city, known as Tardeo, which had seven compartments on the ground floor. Five of these compartments were already in plaintiff's possession. He sued to recover possession of the remaining two compartments in order to carry on his business in hardware on the ground floor of the house. The area of the whole of the ground floor was the extent less than the area of the rented shop in the Fort. The trial Judge dismissed the suit on the ground that the area already in plaintiff's possession was quite enough for developing a new business in the Tardeo locality:—

*Held*, decreeing the claim for possession that to prevent the plaintiff from occupying a space in his own premises, equal to the space previously rented by him on the ground stated by the trial Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Bombay Rent Act, 1918 (*MacLeod, C. J., and Shah, J.*) NOWROJI HORMASJI PATHAK v. V. SHRINIVAS PRABHU. 46 Bom. 632 : 24 Bom. L. R. 95 : (1922) Bom. 223 : 66 I. C. 929.

—S. 9—Premises forming part of the endowment of a community—Setting out to members of the community, if a reasonable and proper purpose. *See* (1921) DIG. COL. 99. ATMARAM BABAJI CHAWGALE v. NARAYANARJUN DERE. 46 Bom. 132 : 64 I. C. 555 : (1922) Bom. 109.

—S. 9—Tenant—"Sub-tenancy."

The term 'tenant' in S. 9 of the Bombay Rent (War Restrictions) Act 1918 does not include

**BOMBAY RENT ACT, S. 9**

sub tenant. (*Pratt, J.*) SUGANCHAND SAVAT (AND  
T. MOTILAL DURGAPRASAD.

24 Bom. L. R. 154 :  
(1922) Bom. 197 : 67 I. C. 130.

———S. 9 (2)—*Landlord and tenant—Ejection of tenant—Accommodation for staff of employees of landlord—Bona fide requirement.*

The accommodation of a staff of employees of the landlord is a satisfactory cause within the meaning of S. 9 (2) of the Bombay Rent (War Restrictions) Act 1918, for the ejection of a tenant, though it does not amount to a reasonable and bona fide requirement by the landlord for his own occupation within the meaning of the section (*Pratt, J.*) NIPPON MENKWA KALMSHIKI v. F. PORTLOCK.

24 Bom. L. R. 54 :  
(1922) Bom. 70 : 65 I. C. 677.

**BOMBAY REVENUE JURISDICTION ACT (X of 1876) Ss 4 (b) and 5—Inamdar—Miraspatra—Effect—Survey settlement—Introduction of—Right to levy building fines.**

Defendants were inamdars of the village and they were grantees of the soil as well as assignees of the revenue. The plaintiffs were mirasi class or permanent tenants holding under the Inamdars under comparatively recent Miraspatra of 1859 and 1864. Survey settlement was introduced into the village at the request of the inamdars and a revised assessment of agricultural land came into effect under S. 217 of the Bom Land Rev. Code, all holders of land in the village became liable in respect of such lands to the provisions of the Land Revenue Code. The Collector under rules framed by the Government and at the request of the inamdar purported to levy building fines for the benefit of the Inamdar assignees of the land revenue. The plffs. sued for a declaration of their rights to hold the land free from building fines and for an injunction restraining the Inamdars from levying such fines. The Inamdars pleaded that the suit was barred under S. 4 (b) of the Bom Rev. Jurisdiction Act. *Held* that the suit was not barred by S. 4 of the Bom Rev. Jurisdiction Act. If without questioning the legality or propriety of the amount or incidence *per se* the plff asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount or incidence of the assessment within the meaning of S. 4 (b). An objection to come within either of the two heads of cl. (b) of S. 4 must be an objection which reaches them directly (i. e.,) an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to his particular case. 28 B 74 Ref. (*Shah, A. J. C. and Pratt, J.*) DAMODHAR MAHADEV BHONDE v. KASHINATH SADASHIV. 24 Bom. L. R. 1040.

———S. 11—*Rent free land—Demand of assessment—Notice by mamlatdar—Suit to set aside.*

Plffs, who had been holding their lands rent free were suddenly served by the mam-

**BOMBAY SEA CUSTOMS ACT, S. 182.**

latdar with a notice of demand to pay assessment. There was no order by the Collector to that effect. Plffs filed a suit for declaration that they were entitled to hold their lands rent free.

*Held* that this was a case to which S. 11 of the Bombay Rev. Jurisdn. Act would not apply and that the suit as laid was maintainable. (*Macleod, C. J. and Shah, J.*) NATHURAM HIRARAM v. SECRETARY OF STATE FOR INDIA.

24 Bom. L. R. 402 : (1922) Bom. 274 : 67 I. C. 842 :  
46 Bom. 811.

**BOMBAY SALT ACT (II of 1890. Ss. 11 and 47—Salt-pans—License to manufacture Salt—Lease from Govt—Sub-lease of salt-pans without permission of Collector—Specific performance.**

The defendants leased a salt-pan from Government under a license, one of the conditions of which was that the lessee was not at liberty to sub-lease the salt-pan without the permission of the Collector. In spite of this the defendants agreed to sub-let the salt-pan to the plaintiff. The plaintiff having sued for specific performance of the agreement of sub letting.—

*Held*, dismissing the suit, that the agreement of sub letting, which was against the condition of the license, was unenforceable at law. 33 Bom. 633 foll. (*Macleod, C. J. and Shah, J.*) RABIA BIBI v. GANGADHAR VISHNU PURANIK.

24 Bom. L. R. 111 : 46 Bom. 651 : (1922) Bom. 78 :  
66 I. C. 393.

**BOMBAY SEA CUSTOMS ACT (VIII of 1871) S. 30 (a) and (b)—Customs duty—Assessment—Wholesale price, meaning of—Costs of the goods to importer**

The term "wholesale cash price" in S. 30 cl. (a), of the Sea Customs Act 1878 means the whole cash price for which the goods of like kind and quality are sold or are capable of being sold at the time and place of importation. The expression indicates that it must be the price which the importers in India are able to realise on a wholesale disposal of the goods to some one after importation. It does not mean the cost of the goods to the importers on the basis that the goods should be taken as being sold to the importer at the price which it cost him to lay them down in Bombay.

Clause (b) of S. 30 of the Sea Customs Act applies when the wholesale price is not ascertainable. This clause is added in order that the real value might be ascertained where there is no whole sale price. (*Macleod, C. J. and Shah, J.*) THE VACUUM OIL CO. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

24 Bom. L. R. 198 : (1922) Bom. 12 : 67 I. C. 267.

———S. 182—*Confiscation and penalties—Adjudication—Procedure.*

The Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by Customs Officers under S. 182. These officers must, therefore, proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such an inquiry is instituted. (*Macleod, C. J. and Shah, J.*) MAHADEV GANESH v. SECRETARY OF STATE FOR INDIA.

46 Bom. 732 :  
(1922) Bom. 30 : 24 Bom. L. R. 245 : 67 I. C. 872.



**BOM. SUMMARY SETTLEMENT ACT, S. 7.**

**BOMBAY SUMMARY SETTLEMENT ACT (VII of 1863) S. 7.—Summary Sanad—Temple lands—Description as *Jat nam*—Suit by *Gaukar* of temple for possession—Limitation Act, Art. 120 and 144.**

A suit was filed by the plaintiff as representing *gaukars* of a village entitled to the management of a temple, against defendants who were the *Devlis* and *Bhavnis* connected with the temple and certain alienees from them for possession of lands alleged to be *Devasthan* lands. The lands were described as the *Jat nam* of the temple servants in a sanad issued by the government in 1865 under the provisions of the Summary Settlement Act, 1863. One of the defendants sold a portion of the lands in 1903 but the vendee took possession in 1916. The plaintiff's suit was filed in 1916. The defendants raised the plea that the suit was barred by limitation. Held, the issue of the sanad to the defendants did not negative the rights of the temple and the plaintiff could prove that the lands were really *devasthan* lands. The grant of a sanad to deities did not furnish a cause of action to the plaintiff. Consequently the suit was not barred Art. 120 of the Limitation Act having no application to a suit for possession (*Shah, A. C. J. and Crompton, J.*) **VITHAL DHONDJI DEVLI v. SURYAJI RAMCHANDRA NAIK.**

24 Bom. L. R. 902

**BOUNDARY LINE—Dispute as to—Was the land—Indefinite tract—Burden of proof as to boundary. See BURDEN OF PROOF. 65 I. C. 743.**

**BROKER—Commission—Right to—Completion of transaction—Failure of one of the parties to complete the contract—Effect of.**

In order to entitle a broker to his commission, he must prove either that the transaction has been completed, or that, if it is not, the non-completion was due to default on the part of the principal. *Lett v. Outhwaite*. (1893) 10 T. L. R. 76, 77, *Ret*. A mortgagee in Bombay is not bound to deliver possession of the title deeds or to produce them for the inspection of the mortgagor until actual tender or payment of the principal with interest and costs. Consequently where the vendor-mortgagor is unable to complete a contract of sale on account of the non-production of the title deeds by his mortgagee and the contract of sale falls through it is the default of the vendor that is responsible for the result. The broker who arranged for the sale will nevertheless be entitled to his Commission. (*Mulla, J.*) **MEHTA v. CASSUMBHAI KESHAVJI.**

24 Bom. L. R. 847.

**BUDDHIST LAW—Burmese—Adoption—Adopted son becoming a monk—Subsequent abandonment of monkhood—Effect of—Inheritance to adoptive parents.**

Where a person adopted by Burmese parents enters the priesthood he must be held to have severed himself from all family ties. Where after remaining as a monk for some years he resumed civil life, was received back in his old home on the old status as adopted son and heir, he must be deemed to have resumed his position of *kittima* son and the years spent in the monastery do not affect his right to inherit the property of

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his adoptive father (*Robinson, C. J. and Duckworth, J.*) **MA NALUN-SEIN v. MAUNG CHAN MYA.** 66 I. C. 573.

**—Burmese—Ancestral estate—Jointness—Burden of proof.**

There is no rule of Buddhist law that ancestral land must be presumed to remain undivided until the contrary is proved. The burden of proving jointness is on those who assert it, having regard to the fact that among Burmese-Buddhists the division of ancestral estates among co-heirs is the rule, cases of co-sharers remaining in commensality being rare. 9 Bur. L. T. foll. (*Maung Kin, J.*) **MAUNG SHWE LA v. MA KYWE.** 1 Bur. L. J. 174.

**—Burmese—Custom—Re-marriage Provision for children of first marriage.**

Among Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle on the children of the first marriage. It is most unusual for a father merely to make gifts on such an occasion, but still more unusual to include in these gifts the bulk of his property (*Duckworth and Pratt JJ.*) **MG PO LUN v. MA E MA.** 1 Bur. L. J. 111.

**—Burmese—Divorce—Desertion.**

*Obiter.*—Desertion by a husband of his wife for a period of 12 years coupled with failure to maintain her is a sufficient ground for divorce, under the Buddhist Burmese law, (*Robinson, C. J. and Maung Kin, J.*) **MAUNG SHWE SA v. MA MO.** 1 Bur. L. J. 24 : (1922) L. B. 28.

**—Burmese—Divorce Ex parte divorce—Conditions.**

A husband or wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage. 2 U. B. R. (1904—1906) foll. 7 L. B. R. 79 ; 7 B. L. T. 83 *appr.* (*Pratt, J.*) **MAUNG THEIN MYA v. MAUNG TUN HLA.** 1 Bur. L. J. 127.

**—Burmese—Divorce—Mutual consent—Misconduct—Right of husband to chastise wife—Extent of—Joint property—Onus.**

A Buddhist wife in Burma is entitled to a divorce by mutual consent if the husband is guilty of a single act of misconduct. Under the law as administered in Burma by British courts a husband has no right to chastise his wife, though it is open to the wife to submit to ill-treatment or condone it. Where in a suit for divorce by the wife, the husband claims certain property to be joint property, the onus is on him to prove it. (*Saunders, A. J. C.*) **MA SAT. v. MAUNG NYI BU.** 4 U. B. R. (1921) 68 : 64 I. C. 957.

**—Burmese—Divorce—Payin property—Right of wife.**

Where the wife is a spinster but the husband had been previously married, where the husband brings *payin* to the marriage and the wife nothing, the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault and where the relation of *missaya* and *missila* exists. Authorities reviewed.



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(*Robinson, C. J. and Heald, J.*) MA NGWE HNIT v MAUNG PO HMU.

11 L. B. R. 52 : 64 I C 806

— — — Burmese — Inheritance — Exclusion from — Disobedient child.

The texts which debar an incorrigibly disobedient child from inheriting seem to refer to a child living with his parents and still subject to their authority and not to an adult child who has married and has children of her own. A single act of mere disobedience however gross does not disqualify, and the disobedient child is to be given many chances of reforming. On the other hand apparently a single act of positive enmity may disqualify. When a disobedient child is said to be debarred from inheriting, an incorrigibly disobedient child is meant. A marriage against the wishes of the parent does not justify exclusion from inheritance. (*Maccoll, A. J. C.*) MAUNG NYI MAUNG v. MA NU.

1 Bur. L. J. 78. (1922) U. B. 12.

— — — Burmese — Inheritance — Orasa son — Mesne profits

The *orasa* son becomes entitled on the death of his father to a definite one fourth part of the estate and he can recover it with mesne profits at any subsequent date. (*Robinson, C. J. and Heald, J.*) MAUNG PANON v. MAUNG TUN THA.

11 L. B. R. 292 67 I. C 769.

— — — Burmese — Inheritance — Orasa — Rights of sons and daughters and their children.

Held by the Full Bench (*Pratt, J.* not concurring).

(1) In a family consisting of both sons and daughters a child can attain the full status of *orasa* prior to the death of its parents.

(2) In such a family where the eldest child is a daughter no son can become *orasa*.

(3) In such a family the question as to which is the *orasa* can be decided before the death of either parent.

(4) There cannot be two *orasa* children.

(5) Sons are not always preferred to daughters as *orasa*, unless the son is eldest born.

(6) The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment, if the eldest son died before he became competent to take his father's place, a younger son, being fully qualified may become *orasa*, and if that son had predeceased his parents his children will have a right to the same preferential treatment.

(7) The eldest child being a daughter can claim on the death of her mother a quarter share as *orasa* and if she then died before her father without having got the share, her children will have a preferential treatment. And if she then died after her father but before she had claimed her distributive share in the estate, her right of maintenance will devolve upon her children. (*Robinson, C. J. and Maung Kin, J.*) MAUNG KIN v. MRS. KIRKWOOD.

68 I C 49.

— — — Burmese — Inheritance — Right of eldest son to one fourth share of joint estate on the death of mother. See (1921) DIG. COL. 102 U N I TA v. KO MAUNG.

64 I. C. 23.

## BUNDLEKHAND ENC. ESTATES ACT, S. 23.

— — — Burmese — Inheritance — Step-children — Right to succeed to separate property of step parents — Breach of filial relation See (1921) DIG. COL. 103 MAUNG SEIN THWE v. MA SHWE YI.

64 I C 415

— — — Burmese — Inheritance — Step grand children collaterals — Application of Buddhist law.

Under the Burmese Buddhist law step grand children exclude collaterals in the distribution of the separate estate of their step grand parents if there are no actual grand children or heirs in the direct line. But so far as the undivided ancestral estate is concerned, they are entitled to only one half. The step grand children would not forfeit their right to their step grand parents' estate even though they may have inherited their own grand father's estate.

Per *Duckworth, J.* Even though one of the parties is a Chinese-Buddhist, still where the deceased owner was a Burmese, Buddhist Law governs the succession to his estate. (*Pratt and Duckworth, JJ.*) KHOO HAING SEIN v. KHOO PEING HOE.

1 Bur. L. J. 56 (1922) L. B. 29.

— — — Burmese — Lettetpwa property — Payin property — Conversion of.

Where *payin* property is sold and subsequently repurchased with funds belonging to both husband and wife, it becomes *lettetpwa* property. (*Pratt and Duckworth, JJ.*) MAUNG TUN GYAW v. MAUNG PO THWE.

1 Bur. L. J. 160.

— — — Burmese — Partition — Auratha son — Joint acquisition of parents — Remarriage of father.

On the death of the mother and the remarriage of the father, the auratha son is entitled to get from the father one-fourth of the estate jointly acquired by him and his mother. At the same time the auratha son cannot make that claim against his father merely by reason of his mother's death and it is only the remarriage of his father that gives him a right to the one fourth. (*Heald, J.*) MAUNG SHWE JWET v. MAUNG TUN SHEIN.

66 I. C. 538.

— — — Burmese — Partition — Partial partition — *Hnapazon* property and separate property.

Though a suit for partial partition does not lie, a claim for a share of *hnapazon* property is distinct from a claim for recovery of separate property and separate suit can be brought for each. (*Maung Kin, J.*) MAUNG SAN TIN v. MA NWE SA.

1 Bur. L. J. 206.

— — — Burmese — Succession — Death of husband and wife at short interval.

Where both husband and wife die one after the other, if it is not ascertainable who died first, the relations of both can claim the inheritance. Where the interval between the deaths is that the same rule applies. Held on the facts, an interval of 2 months and 14 days was not short to justify the application of the rule. (*Maung Kin & Macgregor JJ.*) MA PWA OP v. MA LAY.

1 Bur. L. J. 253.

BUNDLEKHAND ENCUMBERED ESTATES ACT (I of 1903) Ss. 29 and 30 — Appeal — Limitation — Time for obtaining copy of Judgment.

## BURDEN OF PROOF.

An appellant before the Court of the Commissioner under the Bundelkhand Encumbered Estates Act is bound to file a copy of the judgment appealed and is therefore entitled to the exclusion of the time requisite for obtaining the copy in computing the period of limitation for appeal (*Hopkins, S. M. and Fremantle, J. M.*) *HAZARI LAL v. PRITAM CHERA.* L. R. 3 A. 136 (Rev.)

**BURDEN OF PROOF**—Acknowledgment, proof of—Plaint barred. See **LIMITATION ACT**, S. 19. (1922) A. 37 : 20 A. L. J. 140.

—Acquiescence—Non-transferable occupancy holding—Recognition of transfer—Onus on party setting up the plea. See **LANDLORD AND TENANT**—OCCUPANCY HOLDING.

65 I. C. 882

—Admission—Duty to explain or nullify—Onus. See (1921) **DIGEST COL** 1106 **GANGA RAM v. RULIA.** 64 I. C. 901 : 2 Lah. 249.

—Adoption—Adoption by immature Hindu widow—Onus on person setting up adoption to prove that the lady understood the nature of the act and its effect upon her rights. See **HINDU LAW**—ADOPTION 24 Bom. L. R. 726

—Adoption—Onus on person setting up—Old adoption—Evidence of treatment by members of the family.—See **HINDU LAW**, ADOPTION. 36 C. L. J. 434.

—Adverse possession—Person alleging must prove. See **ADVERSE POSSESSION**—BURDEN OF PROOF. 35 C. L. J. 192.

—Adverse possession—Onus on person setting up. See **ADVERSE POSSESSION**, PROOF. 9 O. L. J. 262.

—Adverse possession—Suit under art. 144 of the Lim. Act—Onus of proving adverse possession on defendant. See **LIM. ACT ART.** 144. 36 C. L. J. 472.

—Agent—Powers of—Landlord to prove that agent not authorised to do a particular act. See **LANDLORD AND TENANT**—RENT. 64 I. C. 883.

—Alienation by Hindu widow—Alienee to show necessity. See **HINDU LAW**—WIDOW. 24 Bom. L. R. 289.

—Alienation by—Hindu widow—Compromise—Setting aside—Suit by reversioner. See **HINDU LAW**, WIDOW. 42 M. L. J. 392.

—Alienation by manager of Hindu family—Necessity as regards rate of interest—Absence of plea—Effect. See **HINDU LAW**, JOINT FAMILY. 3 Pat. L. T. 367.

—Appeal—Balance of probabilities—Onus on appellant to show judgment appealed against is wrong.

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the

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other being right, he has not succeeded (*Lord Buckmaster*,) *NABAKISHORE MANDAL v. UPEN-DRAKISHORE MANDAL* 20 A. L. J. 22 :

26 C. W. N. 322 : 35 C. L. J. 116 :

42 M. L. J. 253 : (1922) M. W. N. 95.

24 Bom. L. R. 346. 15 L. W. 417.

L. R. 3 P. C. 77 30 M. L. T. 234 :

3 Pat. L. T. 311 : (1922) P. C. 39 :

65 I. C. 305 (P. C.)

—Appeal—Onus on appellant of showing decree appealed is wrong.

The onus of proving that the judgment and decree appealed against are wrong is on the appellant. (*Woodroffe and Cuming, JJ.*) *TARAMONI CHAUDHURANI v. GOPAL DAS CHAUDHURY*, 65 I. C. 182.

—Appeal—Onus on appellant to show judgment is wrong.

It is incumbent on an appellant to show that the judgment appealed from is wrong but if the decision of the lower Court is purely arbitrary, unsupported by any reasons, the appellate Court can come to its own conclusions. (*Broadway and Martineau, JJ.*) *FIRM OF PROBHU DIAL BANWARI LAL OF DELHI v. DINA NATH KAPUR* 4 U. P. L. R. (L) 26 : (1922) Lah. 127.

65 I. C. 464

—Bailment—Loss of goods—Onus on bailee.

In a suit for damages for loss of goods entrusted to a bailee, the burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was taken by him. (*Pratt, J.*) *MAUNG PO THAIK v. MAUNG THA BYAW.*

1 Bur. L. J. 132,

—Benami—Onus on person setting up See **BENAMI.** 36 C. L. J. 396.

—Benami transaction. See **BENAMI.** 35 C. L. J. 589

—Benami—Onus on party alleging.

Primarily the party alleging that a person is a benamidar is bound to prove it. (*Newbould and Cuming, JJ.*) *TUKA MIAH v. NABIN CHANDRA MAZUMDAR.* 65 I. C. 701.

See also *ARAB ALIKHAN v. MAHMED ALIKHAN* 43 M. L. J. 104 : 20 A. L. J. 545 (P. C.)

—Bona fides—Transfer for value.

It lies on the person who pleads that he is a bona fide purchaser for value to make out his case (*Batten J. C.*) *MT KASTUR BAI v. BALINAM* 68 I. C. 732.

—Boundary—Demarcation—Proof of.

The onus lies on the person setting up the plea to show that the land is not capable of identification especially where there is no difficulty in marking off an exact area. (*Hopkins, S. M. and Burn, J. M.*) *JUTHAN RAI v. SITLOO PANDEY.* 4 U. P. L. R. (B. R.) 50:

L. R. 3 A. 391 (Rev.).

—Boundary line—Dispute as to—Onus of proof—Waste land.

On questions of boundary, specially where the dividing line in dispute runs through waste lands

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which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter claimants and both parties are bound to do what they can to aid the Court in ascertaining the true line. But the duty of both parties to aid the Court in ascertaining the true line is in cases where the dividing line in dispute runs through waste lands which have not been the subject of definite possession. This rule is not applicable where the case of both parties is that the land was capable of possession and each party was in actual possession of the land comprised within his tenure. 21 C. 504 dist.; 27 C. L. J. 599 ref (*Chatterjee and Panton, JJ.*) *RADHA KRISHNA DAS v. MATIYAR RAHMAN.* 65 I. C. 743.

—Commission agent—Onus of proving that transaction was on behalf of the principal or agent. See CONTRACT ACT, Ss 39 AND 222

67 I. C. 959.

—Consideration—Failure of, in the case of bonds—Execution admitted. See NEGOTIABLE INSTRUMENT. 4 Lah. L. J. 199

—Consideration—Fraud—Prima facie proof—Shifting of onus.

Where in a suit to set aside a registered sale-deed on the ground of a fraud practised upon the creditors and want of consideration, the burden of adducing *prima facie* proof is on the plaintiff but when this is done the onus is shifted on to the defendants to prove consideration. (*Robinson, C. J., and Duckworth, J.*) *MAUNG PO ZU v. MAUNG PO KWA.* 11 L. B. R. 323 : 65 I. C. 322.

—Consideration—mortgage.

In a redemption action the burden of proving the mortgage amount is on the plaintiff. (*Brown A. J. C.*) *MG SHWE MYIN v. MA NAMING.*

1 Bom. L. J. 248

—Consideration—Old mortgage—Presumption.

The passing of consideration for a mortgage-deed which is more than 30 years old and which was never questioned till the suit thereon was brought should be taken as proved even if the direct evidence is not as strong as might be naturally expected in recent transactions. (*Sadasiva Aiyar and Spencer, JJ.*) *JAGANA SANYASIAH v. M. P. ATCHANNA NAIDU.*

42 M. L. J. 339 : 15 L. W. 239.

—Consideration—Payment of—Onus—Entry in account books. See (1921) DIG. COL. 105. *RULIA SINGH v. TOONIA MAL.*

4 Lah. L. J. 73 : (1922) Lah. 305.

—Consideration—Receipt of—Admissions

Where a mortgagor admits before the Sub-registrar that full consideration had been received, the onus of proving that full consideration had not passed is on the person making the admission. 26 I. C. 913, foll. (*Broadway and Wilberforce, JJ.*) *GANGA RAM v. RULIA.*

2 Lah. 249 : 64 I. C. 901.

—Consideration—Recital as to payment—Stranger to the deed—Onus—Immaterial after

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whole evidence. See (1921) DIG. COL. 106 *KRISHNA KISHOR DE v. NAGENDRA BALA CHAUDHURANI.* 66 I. C. 694.

—Consideration—Recitals in bond—denial of execution found to be false—Inference of consideration.

In a suit to enforce a bond the defendant denied execution as well as consideration. The Court found that the bond was genuine and from the recitals therein drew an inference that the bond was supported by consideration. *Held*, that there was no error of law committed by the lower court. (*Newbould and Panton, JJ.*) *JADU MONDAL v. JAGENDRARATH BANERJEE.* 68 I. C. 303.

—Consideration—Sale deed executed and registered—Admission of consideration before Registrar shifting of onus.

Where a person executes and delivers a conveyance of his property and also gets it registered and the sale deed contains a recital of receipt of consideration, the burden of proving want of consideration for the sale is on the vendor. If the vendor pleads that the sale was benami the onus would be on him to prove his plea. Where, however, it is found that the vendor had retained possession of the property for 18 years after the sale and had enjoyed the rents and profits of the same and exercised rights of ownership over it, the burden of proving consideration is shifted on to the purchaser. 8 A. 461, 33 A. 483 foll. (*Robinson, C. J., and Maung Kin, J.*) *J. H. POWER v. DAW SHWE GON.* 1 Bur. L. J. 22.

—Consideration—Sale deeds—Rival purchasers.

In a dispute regarding the title of two rival purchasers of the same property, when the vendor in the first sale deed admits receipt of consideration, the onus of proof lies on the subsequent purchaser to show that consideration was not paid. The fact that the first purchaser did not get possession for a long time does not prove absence of consideration. (*Batten, J. C.*) *MR KASTUR BAI v. BALIKAM.* 63 I. C. 732.

—Consideration—Want of—Adult members parties to transaction. See (1921) DIG. COL. 106 *KRISHNA IYER v. MADHAVA PANIKKAR.*

30 M. L. T. 26

—Consideration—Want of—Registered sale deed—Admission of receipt of consideration. See (1921) DIG. COL. 107 *EHTISHAM ALI v. JAMNA PRASAD.*

30 M. L. T. 132 :

15 L. W. 104 : 9 O. L. J. 71. 64 I. C. 299 :

24 Bom. L. R. 675 : (1922) P. C. 56 :

27 C. W. N. 8 :

20 A. L. J. 961 : 48 I. A. 365 (P. C.)

—Co-owners—Adverse possession. See ADVERSE POSSESSION CO-OWNERS.

24 Bom. L. R. 261.

—Custom—Personal law—Agricultural tribe—Village community—Presumption in favour of custom. See CUSTOM, ALIENATION.

64 I. C. 180.

—Custom—Special custom at variance with personal law.

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In the case of Hindu convert to Mahomedanism the presumption is that they follow the Mahomedan Law and if it is pleaded that notwithstanding the conversion there has been an election to abide by the old law, the onus is on those setting up the plea to substantiate by clear and unambiguous evidence (*Sir Lawrence Jenkins*) MAHOMED IBRAHIM ROWTHER v. SHAIK IBRAHIM ROWTHER. 45 Mad 308 : 30 M.L.T. (P.C.) 85 : 15 L.W. 354 : 43 M.L.J. 69 (1922) M.W.N. 470 : 36 C.L.J. 64 : 24 Bom L.R. 944 (1922) P.C. 59 : L.R. 3 P.C. 149 : 26 C.W.N. 793 : 67 I.C. 115 : 49 I.A. 119 (P.C.)

———Custom—Succession—Collaterals of 9th degree—Exclusion of daughters—Onus on person setting up—Entries in riwaj-nam—Effect of. 2 Lah. 366

———Ejectment—Claim of occupancy.

Where the recorded tenant of a holding who has been paying rent to the landlord brings a suit to eject his sub tenants and the latter set up a claim of occupancy rights, the onus of proving the right is upon them. (*Hopkins, S. M. and Fremantle, J. M.*) TULSHI CHAMAR v. RAGHUBIR LONIA. L.R. 3 A. 54 (Rev.)

———Execution of document—Admission of signature—Effect of.

An admission by the defendant regarding the putting of a signature or a thumb-mark on a document does not amount to an admission of execution so as to shift the burden of proof on the defendant. This is specially so where the defendant pleads that when he signed the document it was blank. (*Rafique and Lindsay, JJ.*) PIRBHU DAYAL v. TULA RAM. 20 A.L.J. 672 : L.R. 3 A. 363. (1922) All. 401 (2) : 68 I.C. 809.

———Executor—Retention of assets for debts of testator—Onus of proof that debts were true and alive on the executor. See EXECUTOR. 36 C.L.J. 367.

———Gift—Oral gift—Onus on person setting up the plea. See HINDU LAW, GIFT. 67 I.C. 451.

———Intention and knowledge—Offence Inference from circumstances See PENAL CODE, S. 373. 35 C.L.J. 451.

———Joint family—Decree obtained on father's debt—Binding nature of. See HINDU LAW DEBT : 2 Lah. 263

———Joint family—Nature of property—Presumption. See HINDU LAW—JOINT FAMILY. 35 C.L.J. 348.

———Joint family business—Partnership with stranger—Plaintiff must prove arrangement. See HINDU LAW, JOINT FAMILY. 26 C.W.N. 273.

———Jurisdiction—Civil Court—Onus on person seeking to oust.

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The onus is on the defendants to satisfy the Court that a claim made by the plaintiffs is not within the cognizance of a Civil Court. (*Shadr Lal, C. J., and Harrison, J.*) RAMJI LAL v. MANGAL SINGH. 2 Lah 302 : 65 I.C. 256 : 28 P.L.R. 1922 : (1922) Lah 157.

———Landlord and tenant—Relationship Landlord refusing to admit tenancy. See LANDLORD AND TENANT 68 I.C. 664.

———Limited owner—Compromise decree—Malabar law

Where a limited owner like the karnavan of a Malabar tarwad compromises a case, the onus is on those claiming under the compromise to show it is fair and binding on the estate. At the same time it is not obligatory on a limited owner to contest a hopeless case. (*Oldfield and Ramesam, JJ.*) SUBRAMANIA PATTAR v. KIZHAKKARA UTHENANTHIL. 16 L.W. 620.

———Materiality of—Evidence given on both sides.

Where evidence has been fully adduced on both sides the question of the burden of proof becomes immaterial. 1 O.L.J. 59 : 1 O.L.J. 366 : 5 O.L.J. 140 Ref. (*Simpson, J.*) MUHAMMAD ANWAR KHAN v. JOHANDA SINGH. 9 O.L.J. 404 : (1922) Oudh. 274.

———Immaterial after whole evidence taken.

The question of onus loses its importance when both parties have adduced evidence in support of their respective cases and the court on an examination of such evidence shifts the burden of proof from one party to the other. This must be more so at the appellate stage. (*Suhrawardy and Cumming, JJ.*) SUDHANYA KUMAR SINGHA v. GOUR CHANDRA PAL. 27 C.W.N. 134 : (1922) Cal. 160 : 68 I.C. 86 : 35 C.L.J. 473.

———Immaterial when evidence is taken.

When the entire evidence on both sides is once before the court the debate as to onus is purely academical. 43 M. 567 foll. (*Mr Ameer Ali*) SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL v. VEERARAMA REDDI. 45 Mad. 586 : 31 M.L.T. (P.C.) 54 : 43 M.L.J. 640 : 16 L.W. 102 : (1922) M.W.N. 749 : (1922) P.C. 292 : 68 I.C. 538 : 49 I.A. 286 (P.C.).

———Materiality of, after evidence.

Where the entire evidence on both sides is once before the court, the debate as to onus is purely academical and the controversy has passed the stage at which discussion as to the burden of proof is pertinent. The question that remains for the Court is one of inference from the facts proved. (*Mookerjee and Chotzner, JJ.*) ABINAS CHANDRA DAS v. MAJUB ALI CHOWDHURY. 36 C.L.J. 196 : (1922) Cal. 461.

———Minor—Sale by guardian with sanction of court—Onus on minor to prove want of necessity. See GUARDIAN AND WARDS ACT, S. 31 (2). 42 M.L.J. 333.

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———Minority—Contract—Admission of majority—Effect of.

When the validity of a contract is questioned on the ground that the executant is a minor, it is for the plaintiff to establish by *prima facie* evidence that the contract was valid and entered into by a person who was competent to do so. An admission of minority at the time of the execution of the deed is sufficient *prima facie* evidence to establish the majority of the executant. 2 I. C. 839; 13 I. C. 556 Ref. (Stuart, J.) BACHCHA LAL v. HASAN KHAN.

4 U. P. L. R. (A) 81: 66 I. C. 814: (1922) A 240

———Mistake as to—Party accepting onus of adducing evidence—Effect of.

Where a party accepts the burden of proof as laid upon him and adduces evidence, he cannot in second appeal complain of prejudice on the ground of the burden of proof being wrongly thrown on him. (Chevis, A. C. J. Abdul Raouf, J.) JADU NATH v. RAMUN MAL 4 Lah. L. J. 426

———Mortgage—Redemption—Irredeemable mortgage—Burden of proof See MORTGAGE, REDEMPTION 42 M. L. J. 350.

———Necessity—Alienation by person with qualified power. See HINDU LAW JOINT FAMILY. 65 I. C. 658.

———Necessity—Hindu joint family—Alienation by manager—Suit by junior members impeaching sale—Onus of proving necessity on purchaser. See HINDU LAW, JOINT FAMILY, ALIENATION, 20 A. L. J. 935

———Negligence—Railway—Derailment—injury to passenger—Onus of disproving negligence on railway. See CARRIER. 48 Cal. 757 (P. C.)

———Negotiable instrument—Want of consideration—Onus on defendant—Question one of law See NEGOTIABLE INSTRUMENT. 4 Lah. L. J. 199

———Notice—Bona fide purchase without notice of prior contract for sale—Onus on defendant. See SP. REL. ACT, S. 27 (B), 67 I. C. 788 (2)

———Occupancy right—Subtenants.

In a suit by plaintiff to eject defendants alleging them to be subtenants if the latter set up rights of occupancy the onus is on them to prove their claim. (Hopkins S. M. and Fremantle, J. M.) SARUP v. RAGHUBIR LONIA. L. R. 3 A. 459 (Rev.)

———Partnership—Security bond for managing partner—Liability for loss arising—Loss to be proved. See PARTNERSHIP, 4 Lah. L. J. 214.

———Possession suits—What plaintiff has to prove. See LIM. ACT, ART. 142. 26 C. W. N. 724.

———Promissory Note—Failure of consideration—Defendant when entitled to a decree on plaintiff's evidence. See PROMISSORY NOTE. 4 U. P. L. R. (A) 46

## BURMA EXCISE ACT, S. 16

———Question of law

The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law. (Scott Smith, J.) MUSSAMMAT NIAMAT BIBI v. MAHOMED FAIZ. 65 I. C. 745.

———Railway—Carriage of goods—Non-delivery—Liability—Damages—Exception clause. See RAILWAYS ACT, S. 72. 5 M. L. J. 233.

———Railway—Carriage of goods—Loss—Onus on Company to meet *prima facie* case See RAILWAY. 24 Bom. L. R. 272

———Riway-i am—Correctness of entries—Rebuttal of presumption. See CUSTOM—SUCCESSION. 3 Lah. 181:

See also 3 Lah. 237.

———Shortage of goods—Pilferage—Consigner to prove See RAILWAYS ACT S. 76. 65 I. C. 583.

———Succession Law governing—Mahomedan Kureshis—Claim to be governed by agricultural custom. See CUSTOM—SUCCESSION. 3 Lah. 274.

———Taxation under Sch. IV, R. 7 of Madras City Municipal Act—Assessee to prove income in order to claim benefit of proviso. See MADRAS CITY MUNICIPAL ACT, SCH. IV, RR. 7 AND 17. 42 M. L. J. 283.

———Trustee—Assertion of private ownership in property proved to have been trust property—Onus on trustee to prove his claim. See RELIGIOUS ENDOWMENT. 31 M. L. T. 1 (P. C.)

———Undue influence—Pardanasabin lady—gift—Dominating position—Onus on donee to prove validity of gift. See CONTRACT ACT, Ss. 16 AND 19. 65 I. C. 380.

———Wagering contract—Common intention of parties. See CONTRACT ACT, S. 30, 15 S. L. R. 193.

———Wagering contract—Defence of—Onus on defendant to prove—Plff. not under a duty to summon and examine deft. See CONTRACT ACT, S. 30. 24 Bom. L. R. 115.

Burma Acts See also UNDER LOWER BURMA AND UPPER BURMA.

BURMA EXCISE ACT (V of 1917) Ss. 12 (c) and 30 (d)—Yeast balls—Possession of, if an offence.

Yeast balls are not excisable articles but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by S. 12 (c) and made punishable under S. 30 (d) of the Act. (Maung Kim, J.) NAN MA MYA v. EMPEROR. 66 I. C. 665: 23 Cr. L. J. 313.

———Ss. 16 (3) and 30 (a)—Possession of liquor—Bona fide private consumption—, if protected.

The possession of a large quantity of liquor, which would ordinarily be an offence under S. 30 (a), if it is intended for bona-fide private

**BURMA EXCISE ACT, S. 37.**

consumption is protected under S. 16 (3). (*Macgregor, J.*) **CHOO KHIM v. KING EMPEROR**,  
1 Bur. L. J. 105.

—S. 37—*Excisable article—Possession of small quantity—Offence.*

S. 37 of the Burma Excise Act is directed against the illicit manufacture, importation etc., of any quantity of excisable article, and it is in the nature of things necessary to provide for a presumption against a person in possession of an excisable article and throw on him the onus of proving that his possession is not illicit, as the matter would naturally be within his special knowledge. Possession of an excisable article even within the limit allowed is an offence unless such possession is accounted for. (*Maung Kin J.*) **NGA HAN KYI v. EMPEROR**.  
66 I. C. 514 : 23 Cr. L. J. 290.

**BURMA HABITUAL OFFENDERS RESTRICTION ACT (II of 1919) S. 2—Applicability of—Limitation of restriction.**

Under the Burma Habitual Offenders Restriction Act the area of restriction is not fixed in all cases but depend on the order in each case. An order restricting a man to his house at night is unjustifiable and the narrow limits of the restriction should be his village. (*Duckworth, J.*) **NGA BA SEIN v. EMPEROR**.  
1 Bur. L. J. 177

—S. 10—*Order for execution of security bond—Legality of—Report to headman and to the police.*

The Burma Habitual Offenders Restriction Act contains no provision for ordering an offender to execute a security bond. If the offender is confined to another village than his own, it must be proved that he would be able to earn his livelihood at that village. Under the Act a double report goes to the headman and the police is unnecessary. (*Duckworth, J.*) **EMPEROR v. NGA KALA**.  
1 Bur. L. J. 36

**BURMA LAWS ACT (XIII of 1898) S. 13 (1)—Burmese Buddhist—Damages—Breach of promise of marriage—Appeal.**

Suits for compensation for breach of a promise to marry as between Burman Buddhists residing in Burmah are suits involving questions regarding marriage and appeals in such suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. CODE. (*Robinson, C. J., Maung Kin and Heald, JJ.*) **MAUNG GALE v. MA HLA YIN**.  
11 L. B. R. 99 : 65 I. C. 411 : (1922) L. B. 6

**BURMA MUNICIPAL ACT, (III of 1898) S. 180—Wall—If a building under the Act.**

The erection of a wall as a mere fence or boundary is not an offence under the Act. But if they were built so as to enable the occupier of the main house to use the enclosed area as part of his habitation it then becomes a 'building' within the meaning of the Act, 2 Q. B. D. 577 and 68 L. T. 1201 *rel. to*. Any refusal to obey an order of the Municipality to dismantle it would be an offence. (*Maung Kin, J.*) **KALOO KHAN v. RAHIMA**.  
1 Bur. L. J. 102.

**CALCUTTA HIGH COURT RULES.****BURMA VILLAGE ACT, S. 28—Sanction when required—Duty of Court.**

A village headman cannot be prosecuted for an act or omission punishable under S. 10 of the Village Act or for an abuse of his power similarly punishable even though such act or omission or such abuse of power is punishable under the Indian Penal Code or other law unless the prosecution is instituted by order of or under authority from the Deputy Commissioner. It is the duty of a Magistrate to whom a complaint is made, if it is clear from the allegations of the complaint or in the course of the trial that the headman was acting in exercise of his powers, to throw out the complaint, unless the prosecution is sanctioned. (*Saunders, J., C.*) **NGA TUN LIN v. KING EMPEROR**.  
1 Bur. L. J. 245.

**CALCUTTA HIGH COURT RULES, ORIGINAL-SIDE R. 69—Application by attorney for payment order against client out of moneys in attorney's hands—Lim. Act. Arts. 84 and 181—Discretion of court—Attorney's lien—Barred debt. See (1921) DIG. COL. 111 NARENDRA LAL KHAN v. TARUBALA DAS.**

48 Cal. 817 : 66 I. C. 209.

**Ch. XXVI R. 77—Attachment before judgment—Compromise of claim—Sheriff's poundage if payable**

Pending a suit, attachment before judgment was ordered and the sheriff effected the interim attachment. Thereafter, by consent of parties the interim attachment was withdrawn and the order nisi discharged.

On a claim being made by the Sheriff of Calcutta for poundage due.

*Held*, (1) A claim to poundage by the Sheriff must be made under the express terms of a statute rule or order and there is no common law right to reward for executing a writ;

(2) The sheriff was not entitled to claim poundage as R. 77 is directed only to proceedings in which the sheriff is employed in levying sums in execution. It does not apply to cases of attachment before judgment which does not result in any execution. (*Rankin, J.*) **PICKFORD v. KAI BAHADUR JANKI NATH ROY**.  
26 C. W. N. 673.

**Ch. 34, R. 7—Costs—Taxation—Application for reversion under S. 115, C.P. Code Appeal. See 1921 DIG. COL. 110, SRAAB CHANDRA CHATTERJEE v. BIRAJ MOHUN CHUCKER BUTTY.**

68 I. C. 451.

**Ch. 36, R. 32—Payment of counsel's fees as between attorney and client—No reference by Taxing officer—Jurisdiction of Judge to hear and determine.**

On an application for change of attorneys by the debt, in a suit on the Original Side of the High Court, the judge ordered that debt. should pay a sum of money to his former attorney subject to readjustment after taxation. Upon taxation of costs a question arose as to the fees of counsel and the Taxing Officer refused to allow those fees without an order of court. On an application to the Judge by the former attorney for an order that the taxing officer in the taxing

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of his costs as between attorney and client might do so irrespective of the taxation rules as regards payment of counsel's fees. *Held* though the matter was not raised by a reference from the taxing officer, the judge had jurisdiction to deal with the application and decide it on its merits. The proviso in Rule 31 requiring the client's written authority or ratification for payment of the fees applies only to the jurisdiction and discretion of the Taxing officer and not of the court. The proviso applies only where the court or judge has not ordered or does not order otherwise.

R 6, assuming it to refer to counsel's fees, is a direction to the Taxing officer only and does not limit or control the jurisdiction of the court or a judge under R. 32. (*Sanderson, C. J. and Richardson, J.*) *SAILENDRA MOHAN DUTT v. DHARANI MOHAN ROY* 49 Cal 618 : 26 C. W. N. 870 : (1922) Cal 402.

## CALCUTTA IMPROVEMENT TRUST ACT—Powers of acquisition of land.

The legislature when it conferred powers of acquisition of land within certain well defined safe guards never intended the trust should abrogate those safeguards and acquire land indirectly through the medium of another body. (*Greaves, J.*) *MANICK CHAND MAHATAB v. THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST.* 66 I. C. 600. 48 Cal. 916.

## CALCUTTA MUNICIPAL ACT (III of 1899) Ss. 14 and 556—Acquisition of land by Municipality—Relief of congestion—Provision for Pilgrims—of municipal council.

The Corporation of Calcutta passed a resolution for acquiring lands adjoining a Hindu temple for the purpose of relieving congestion at the place and providing for a *dharmshala* which had been endowed by a private citizen. It was objected that the acquisition was beyond the powers of the Municipal Council. *Held*, that the proceedings were within the powers conferred on the Municipal Council by Ss. 14 and 556 of the Calcutta Municipal Act and that the exercise of their discretion by the Municipal Council could not be questioned by the Civil Courts. (*Lord Shaw, J.*) *AMULYA CHANDRA BANERJEE v. CORPORATION OF CALCUTTA.* 43 M.L.J. 634 : 31 M.L.T. (P. C.) 155.

16 L. W. 873 : (1922) P. C. 333 : 49 Cal. 838.  
27 C. W. N. 125 : L. R. 3 (P. C.) 229.  
69 I. C. 114 : 49 I. A. 255 (P. C.)

## Ss. 20, 357, 556 and 558—Acquisition of land by the Corporation for the Improvement Trust—Legality of—Policy of Act.

It is not the policy of the Calcutta Municipal Act that the special powers given to the corporation to acquire land should be used to enable another body to acquire land through its medium.

Hence where there was no sanctioned project of the Calcutta Corporation or any scheme of the Calcutta Improvement Trust, and the lands were ostensibly sought to be acquired by the former but the work to be carried out and paid for by the latter, the whole proceedings are bad.

The powers of acquisition under the Act are confined to cases in which the corporation itself is to execute the work. (*Greaves, J.*) *In re MANICK CHAND MAHATAB v. THE CORPORATION*

## CALCUTTA RENT ACT, S. 10.

OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST. 49 Cal. 916 : 66 I. C. 600.

## CALCUTTA POLICE ACT, S. 54 A—Essentials for conviction.

For the purpose of S 54 A of the Calcutta Police Act, it is obligatory on the prosecution to show that there is reason to believe that the goods had been stolen or fraudulently obtained—Mere evidence that the articles were recovered from the house of the accused will not do for a conviction. (*Walmsley and Sukhawardy, JJ.*) *RASHI LAL DAS v. EMPEROR.*

26 C. W. N. 712

CALCUTTA RENT ACT—(III of 1920) S 2 (C)—Workshop—If premises. See 1921 DIG. COL. 113, INDIAN ENGINEERING & MOTOR COMPANY v. GLADSTONE WYLLIE & Co. 88 I. C. 907

—Ss. 2(G) and 11 (5)—“Tenant” meaning of—Suit held before the Rent Act—Effect of non-payment of rent—Relief against forfeiture. See 1921 DIG. COL. 114, BIFALDAS CHANDAK v. LAL BEHARI DUTT 49 Cal. 369 : (1922) Cal. 391 : 68 I. C. 361.

—S. 4 (3) (iv)—Lease for 3 years—Option to renew for like period—If the lease one for five years and up-wards.

A lease for a period of three years reserving an option to renew it for another period of three years, cannot be taken to be a lease for “five years and upwards” within the meaning of S 4 (3) of the Calcutta Rent Act. Hence an application to standardise the rent does lie. (*Greaves and Ghose, JJ.*) *BASANTA CHARAN SINHA v. RAJANI MOHAN CHATTERJI.* 26 C. W. N. 711.

## —S. 8—Procedure.

A notice under sec 8 of the Rent Act is not necessary when the standard rent is fixed by the Controller and has been further increased by the President of the Tribunal, the landlord having complied with the provisions of sec. 8 as regards the increase allowed by the Controller. A certificate from the Controller is not necessary in order to entitle the landlord to recover the rent so increased by the President of the Tribunal. (*Sanderson, C. J. and Richardson, J.*) *COHEN v. DIAS.* (1922) Cal. 475 : 26 C. W. N. 961.

## —S 10—Proviso.—Bona fide requirements of landlord.—Standardisation of rent—Refusal to accept—Deposit of rent with controller.

A landlord who has premises sufficient for his requirements should not be allowed to eject tenants because he chooses for his own convenience or profits to deprive himself of the use of the premises which he is occupying and then to say to his other tenants “having deprived myself of the use of the premises which I hitherto occupied, I therefore require the house in which you live for my own occupation and I now propose to eject you.” To allow such a plea would be to defeat the object of the Act and in such circumstances a landlord cannot be said *bona fide* to require the premises for his own occupation. It is not enough that a plf. in order to defeat a plea under the Calcutta Rent Act should merely

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say that he desires the premises *bona fide* for his own occupation. The word in the Act is not "desire" but "require". This involves something more than a mere wish and it involves an element of need.

It is not necessary for a tenant to offer rent to his landlord every month and obtain a refusal every month from him before he is entitled to pay to the rent collector. It was not intended that by the Act that such a pass should be gone through every month when the relations are such that the landlord refuses to accept the rent and the tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept.

Where the rent had not been standardized by the rent Controller and no agreement between the parties to pay the increased rent had been entered into the question as to whether the tenant has paid rent to the fullest extent allowable by the Act does not arise. (*Buckland, J.*) *REKHABCHAND DOOGAR v. J. R. D' CRUZ.*

26 C. W. N. 499

—S. 11 Leasee holding on after the expiration of the lease—Rights of—Information to landlord of intention to vacate after expiry of lease—Fresh agreement for lease by landlord. See (1921) DIG. COL. 111 *KUMAR MANMATHA NATH MITTER v. WALTER LOCKE AND CO.*

68 I. C. 417

—S. 11—Monthly tenant—Fixity of tenure—Decree for possession.

The Act gives to a mere monthly tenant considerable fixity of tenure upon a condition namely, that he is a rent-paying and not a defaulting tenant. Where the sum of money which the tenant had paid to the Rent Collector was insufficient to meet either the contractual rent or the rent allowed under S. 2 (1) of the Act or the rent ultimately fixed as the standard rent by the Controller *Held*, the tenant was not in the circumstances a person who was entitled to the benefit of the provisions of S. 11 of the Act. (*Rankin, J.*) *J. I. COHEN v. S. E. HOFFINGER* 49 Cal. 388; (1922) Cal. 380.

—S. 11—Scope of—If override's provisions of S. 114, T. P. Act. See EJECTMENT.

49 Cal. 150.

—S. 11 (5)—Ejectment suit—Benefit of Act when claimable—Failure to pay in time—Effect—Agreement to extend time.

Where in a suit in ejectment, the benefit of the Rent Act is claimed, the defendant must show that he has paid arrears within 3 months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord, or in the absence of any such contract, by the 15th day of the following month, or in the event of the landlord refusing to accept rent, by depositing it with the Rent Controller within a fortnight of its becoming due.

Where there is an agreement to extend time for payment before the rent actually becomes due under the lease, then the time within which rent has to be paid under S. 11 (5) may be the extended date, but where default has already taken

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place, subsequent acceptance of rent by the landlord does not take the matter out of S. 11 (5) (*Buckland, J.*) *JETHA BHULCHAND v. GRACE.*

26 C. W. N. 678.

—S. 15—Application for standardisation of rent—Locus standi of applicant—Revision of rent Controller's order. See (1921) DIG. COL. 114. *KALI DASSI v. KANAI LAL DE* 64 I. C. 709.

—S. 15—Application for standardisation of rent—Refusal—Interference—Government of India Act S. 107.

The Rent Controller is a Court subordinate to the High Court which can revise orders under S. 15 of the Calcutta Rent Act in virtue of its powers of superintendence under S. 107 of the Govt of India Act. Under S. 15 of the Rent Act it is obligatory on the Rent Controller to grant a certificate certifying the standard rent. Where the rooms let are certain, easily ascertainable and subject to no doubt, the order of the Rent Controller rejecting an application for fixing a standard rent is liable to be set aside. (*Rankin, J.*) *ALLEN BROS & CO. v. BANDO & CO.*

26 C. W. N. 845.

—Ss. 15 and 18—Rent Controller—Status and functions of—Order of Rent Controller—Revision—Government of India Act, S. 107. See (1921) DIG. COL. 115. *BATA KRISHNA PARAMANIK v. A. K. ROY.*

65 I. C. 177.

—Ss. 15 and 18—Rent Controller—Status and functions of—Code of rent Controller—Revision—Government of India Act S. 107. See (1921) DIG. COL. 115. *H. D. CHATTERJEE v. L. B. TRIBEDI.* 49 Cal. 528; (1922) Cal. 427; 68 I. C. 274.

—S. 18—Order of Rent Controller fixing standard rent—Jurisdiction to revise—President's powers.

In the absence of a definition, the word "fix" means "to settle" "to specify" or "to determine" and there is no reason for limiting the word to the case of settlement of the rent by the Controller under the Calcutta Rent Act. The order of the Rent Controller is open to revision by the President of the tribunal under S. 18 of the Calcutta Rent Act. The Act contemplates fixing of the standard rent by the Controller even in cases not falling under S. 15. (*Chatterjee and Paulon, JJ.*) *ASHUTOSH CHATTERJEE v. UPEENDRA CHANDRA.* 27 C. W. N. 50.

—S. 20—Not ultra vires—R. 4 framed under S. 20 ultra vires—R. 4 if an enactment under S. 5 (2) Cr. P. Code. See (1921) DIG. COL. 115. *GOBERDHON DAS DEORA v. DOOLICHAND SETHIA.* 48 Cal. 955.

CANTONMENT LAND—Ownership of vested in Government—Adverse possession.

The Secretary of State is the absolute owner of all cantonment land, unless it can be proved satisfactorily that he has parted with the ownership. In the absence of evidence, all cantonment land belongs to the Secretary of State. There can be no adverse possession against him. The only position open to a person occupying



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land in cantonments which has not been specifically transferred by the Secretary of State, is the position of a tenant or the position of a licensee. (*Stuart, J.*) SECY. OF STATE *v.* MULLA. (1922) All 57 : L. R. 3 A. 169 (Rev) : 66 I. C. 582.

**CARRIER—Negligence—Railway—Deraiment—Removal of rails—Onus of proof.**

The plaintiff a passenger in a railway was injured by reason of a train of the deft. Railway Company in which he was a passenger leaving the line and being wrecked. The immediate cause of the accident was the removal of a rail, which the Railway Co. pleaded had been effected maliciously by some unknown person who was not traceable. Held, that though the onus of proof that the plaintiff's injuries were not due to the negligence of the Ry. Co. was upon them that upon the evidence they had discharged that onus. Judgment of the High Court (Sanderson, C. J. dissenting) reversed. (*Viscount Finlay.*) EAST INDIAN RAILWAY COMPANY *v.* KIRKWOOD 48 Cal. 757 : 15 L. W. 248 (1922) P. C. 195 : 67 I. C. 921 (P. C.)

**CASTE DISABILITIES REMOVAL ACT (XXI of 1850) S. 1—Malabar law—Tarwad—Conversion of member to Mahomedanism—Right to partition** See (1921) DIG. COL. 116 PATHUMMA *v.* RAMAN NAMBIAR 64 I. C. 676.

**CATTLE TRESPASS ACT S. 10—Watchman—Authority to seize cattle.**

Under S. 10 of the Cattle Trespass Act a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. (*Adams, J.*) DUSADH *v.* SARATI DUSADH. (1922) P. 317

**CAUSE OF ACTION—Jewels produced in Criminal Court—Court wrongly giving over to third party—Suit for damages against Secretary of State.**

Where a jewel which had been pawned to the plaintiff was directed to be produced in a criminal court, but at the conclusion of the case was erroneously directed to be returned to its owner

Held, as the court was not a servant or agent of the Secretary of State, a suit for damages against him would not lie. (*Rafique and Piggott, JJ.*) PANCHAEI AKHARA MAHA NIRBANI *v.* THE SECY. OF STATE FOR INDIA IN COUNCIL

20 A. L. J. 420 : L. R. 3 A. 315 : 44 All. 573 : (1922) All. 276 : 4 U. P. L. R. (A) 203 : 66 I. C. 70

**CENTRAL PROVINCES COURT OF WARDS ACT, (XXIV of 1899) S. 31—Minor—Powers of Court of Wards to bind minor's estate.**

The powers of the Court of Wards to bind the minor ward by a simple money bond executed on his behalf are no greater than those of a natural guardian. Except in so far as the Court of Wards Act gives special powers to bind the minor's estate the powers of the Court of Wards are co-extensive with those of a natural guardian. (*Hallifax and Dholey, A. J. C.*) JIWANDAS *v.* JANKI. 5 N. L. J. 49 : (1922) Nag. 98 : 18 N. L. R. 145 : 65 I. C. 53.

**C. P. LAND REVENUE ACT, S. 203.**

**C. P. LAND ALIENATION ACT (II of 1916) S. 9 (3)—Applicability of—Pending Suit—Mortgage—Foreclosure—Procedure**

Pending suits as well as suits instituted after the passing of the C. P. Land Alienation Act are governed by the Act. In a suit on a mortgage executed by a member of an aboriginal tribe providing for foreclosure on default of payment on the due date, the Civil Court must declare the mortgage to be enforceable and to refer the case to the Deputy Commissioner. (*Dholey, A. J. C.*) MUSAMMAT GORA *v.* RAMLAL 64 I. C. 729.

**C. P. LAND REVENUE ACT, S. 76—Levy of cess—Sanction of Board of Revenue.**

Under S. 76 of the C. P. Land Revenue Act all that the Board of Revenue has to do is to sanction the levy of a cess and not the rate at which such cess is leviable. Hence in a case where the Settlement officer had determined the cesses and the rate at which they were leviable in accordance with the village custom, and the levy of the cess had been sanctioned by the Board of Revenue, the cess was legally payable. (*Das and Adams, JJ.*) RAKHYAPAL SINGH *v.* LAL BIR SRIJODAY SINGH DEO. 1 Pat. 83 : (1922) P. 399.

— — — — — Ss. 78, 83—Scope of—Suit under, when maintainable.

For a suit under S. 83 of the C. P. Land Rev. Act to be maintainable in respect of a matter in the Record of Rights, it must fall within S. 78 of the Act (*Hallifax and Kotwal, A. J. C.*) THE ZAMINDAR OF HATTA *v.* RATAN. (1922) Nag. 19 : 64 I. C. 722.

— — — — — S. 83—Suit for amendment of settlement entries—Limitation Act—Art. 14 and not Art. 120 applicable. See LIM. ACT, ART. 14 & 120. 65 I. C. 970.

— — — — — Ss. 153 and 132 (h)—Village cess—Suit for recovery—Entry in wajib-ul-arz.

S. 153 of the C. P. Land Rev. Act bars a suit for the recovery of "village cesses" paid compulsorily at some time previous unless they are sanctioned by the Chief Commissioner or recorded either at the last settlement or by the Dy. Commissioner under S. 132 (h) of the Act. (*Hallifax and Kotwal, A. J. C.*) ZAMINDAR OF HATTA *v.* RATAN. (1922) Nag. 19 : 64 I. C. 722.

— — — — — S. 192—Remuneration of Lambardar.

A lambardar is not dis-entitled to his remuneration simply because the Deputy Commissioner had never fixed the remuneration for the village lambardar under S. 192 of the Act of 1917. (*Hallifax, A. J. C.*) BHOLARAM *v.* TUKARAM. (1922) Nag. 111 : 66 I. C. 465.

— — — — — S. 203—License—Revocability of—Abadi plot—Cultivation.

Where a person holds an abadi plot as licensee under another, the license is revocable at will by the grantor unless the licensee is protected by S. 60 of the Easements Act or S. 203 of the Land Revenue Act or the wajib ul arz of the village. Where the land had been under cultivation for some fifteen years neither of these Acts nor the wajib-ul-arz can give him any protection,

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(*Hallifax, O. J. C.*) RAJARAM v. CHOUDHRI MANO HAR LAL. 67 I. C. 373

## —S. 229—Scope of—Remuneration of lam-bardars.

S. 229 of Bengal Act II of 1917 continues the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars. (*Hallifax, A. J. C.*) BHOLARAM v. TIKARAM. 1922) Nag. 111 : 66 I. C. 465.

## C. P. MUNICIPAL ACT (XVI of 1903) Ss. 66 (1) 122—Building—What constitutes—Essentials for conviction.

A "building" within S. 66 (1) of the C. P. Mun. Act, implies a structure with a roof. *Moir v. Williams* (1892) 1 Q. B. 264 Ref.

Where the petitioner is convicted for encroaching upon a street in a municipal town by putting up a new structure in the place of an old one, *Held*, in the absence of proof that the new structure occupied more space than the old one, the conviction was bad. (*Diake-Brockman, J. C.*) THAKURLAL v. SECRETARY, MUNICIPAL COMMITTEE, KHANDWA. 64 I. C. 274.

## —S. 122—Encroachment by predecessor—Liability of successor.

The word "encroaches" in S. 122 of the C. P. Municipal Act *prima facie* means, commits an act of encroachment and no one can be held liable for an act or admission unless such act or admission is declared to be an offence. The section cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. The word "obstructs" in S. 122 would apply to the person who built or caused to be built the encroachment and not to the accused who originally had nothing to do with the erection of the building. (*Prideaux, A. J. C.*) CHUNI LAL v. THE MUNICIPAL COMMITTEE, ARVI. 18 N. L. R. 92 : (1922) Nag. 167 : 65 I. C. 559 : 23 Cr. L. J. 127.

## C. P. TENANCY ACT, (XI of 1898) S. 32—Improvements compensation for—When legally due—Position of sub-tenant.

Under S. 32 (1) a tenant can claim compensation for improvements only if the improvements were made in accordance with the Act, if the tenant was an absolute occupancy or ordinary tenant. If the tenant is a sub-tenant, he can claim compensation, if the improvements have been made with the landlord's consent. (*Batten, J. C.*) BALARAM v. BHAGIRATHIBAI. (1922) Nag. 47

## —S. 35—Surrender of tenancy—Ejection of trespasser—Suit by landlord.

There cannot be a valid surrender of a portion of the holding at the instance of a tenant. 7 N. L. R. 8 Ref. Even though land is let out to a tenant it is open to the landlord to sue to eject a trespasser denying his title and not claiming any title under the tenant himself, 10 C. 1076 ; 39 M. 10 42 ; 11 N. L. R. 124 Ref. (*Prideaux, A. J. C.*) ALLIBHAI v. SHAM RAO. (1922) Nag. 216 : 18 N. L. R. 82 : 64 I. C. 902.

## —S. 39—Absolute occupancy holding—Gift of, by widow with consent of landlord—Surrender and re-grant.

## C. P. TENANCY ACT, S. 41

There is no difficulty in regarding the transfer by way of gift by a widow of her absolute occupancy holding with the consent of the landlord, even though it was a subsequent consent, as a surrender to him by the widow and a fresh grant by him to the transferee. In respect of surrenders the absolute occupancy right is a tenancy and not a proprietary right. The surrender would be binding on the reversioner, for the limitations of the widow's interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. (*Hallifax, A. J. C.*) RAMCHANDRA BALAKRISHNA v. RAMCHANDRA. (1922) Nag. 222 : 65 I. C. 952.

## —S. 41—Pre-emption—Right of landlord.

S. 41 of the C. P. Ten. Act confers a right of pre-emption on the landlord whether or not the intended sale has taken place. (*Hallifax, J. C.*) RAI v. SIDAKALLI. (1922) Nag. 14 : 65 I. C. 959.

## —S. 41 (2)—Lease or mortgage—Test of.

The distinction between a lease and a mortgage is fine and it is often very difficult to determine the nature of the document. For the purpose of determining whether a transaction is a mortgage offending the provisions of S. 41, cl. (2) of the C. P. Tenancy Act, the test is whether the transfer was made for the purpose of securing a debt or was for the purpose of discharging it. (*Dhobley, A. J. C.*) RAM PRASAD v. CHANDU LAL. (1922) Nag. 156 : 65 I. C. 241.

## —S. 41 (2)—Mortgage—Interest—Zur-ippeshgi lease.

Under S. 38 (2) of the C. P. Tenancy Act of 1883 or S. 41 (2) of the Act of 1898 the sum secured by any previous mortgage includes interest on it for five years or for the period since its execution, whichever is longer.

The term "mortgage" in S. 38 (2) includes a zur-ippeshgi lease. (*Hallifax, A. J. C.*) SHIOBAKSH SINGH v. JAGANNATH. 64 I. C. 99.

## —S. 41 (2)—Notice under—Contents and particulars of.

A notice under S. 41 (2) of the C. P. Tenancy Act need not be worded with the accuracy of a plea. Where the information given in the notice is amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of his absolute occupancy holding, it is sufficient compliance with the law. S. 41 (2) does not say that the particulars specified in that sub-section should be given in the notice but it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particulars of the tenant's holding. (*Batten, A. J. C.*) RAGHOJI RAO v. RAJESWAR. 65 I. C. 816.

## —S. 41 (7)—Occupancy tenant—Alienation of part of holding—Right of Landlord to re-enter.

A mortgage by an absolute occupancy tenant of a definite portion of his holding without the consent of the landlord will not give the latter a right of re-entry under S. 41 of the Act of 1898

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on the ground that the mortgage is void.  
(*Hallifax, A. J. C.*) *JODHRAM v. DAULAT*.

18 N. L. R. 109 : 58 I. C. 112

———S. 45 (5)—*Lease in respect of sir for 5 years—Renewal—Sub tenancy—Effect of Act of 1920.*

Defts granted to plff, a lease of sir lands for 5 years ending with April 1917 and put him in possession. During the currency of the lease defts granted to plff another lease for 11 years commencing on the expiry of the term of the first lease. In a suit for possession by plff, after the expiry of the period of the first lease, the defts set up that under the Tenancy Act they had become occupancy rights of the sir land on the loss of their proprietary rights in the village and hence the lease which was subsequently to take effect was void and unenforceable. *Held* that the plea of the defendants was valid and that the plaintiff's suit must fail. (*Dhobley, A. J. C.*) *SERU LAKSHMI CHAND v. BAIKHO*.

5 N. L. J. 251.

———Ss 46 and 47—*Holding less than 100 rupees in value—Transfer—Registration—Fraud—Suit to set aside*

When two co-proprietors of a village divide up the sir land between them, to hold portions of it separately, they make an imperfect partition of that village; each has a share a separate *patti* composing the sir land he holds in severalty, and the whole of the rest of the village forms what is called a *Shamlat* patti. Where a document is by mistake admitted to registration the mistake arising from the fact that the transferees are co-proprietors of other land in the same village, the proper remedy of the party is by application to a Revenue Officer and the jurisdiction of the Civil Court is ousted. (*Hallifax, A. J. C.*) *CHUNGA PRASAD v. PHULWA*.

(1922) Nag 126 : 67 I. C. 121

———S. 46—*Partition of holding—Landlord's consent—Effect of—Surrender.*

A partition of a holding with the landlord's consent cannot be distinguished from a surrender of the whole by all of them jointly and a grant of a new lease in respect of the parts to each of them separately. Each part then is a parcel of land held on a lease which is not the same as that on which the original whole was held and it cannot be the same holding. 7 N. L. R. 8 ; 10 N. L. R. 129 Rel.

Further, if a tenant takes fresh land from the malguzar in addition to what he already holds, and the rent of the fresh lands is not kept separate, but one single sum is payable in respect of the old and the new land, then he undoubtedly has a new holding, because the new parcel is held under a different lease, and a different set of conditions from those of the old smaller parcel. (*Hallifax, A. J. C.*) *SON SINGH v. THAKUR RAM*.

18 N. L. R. 48 : (1922) Nag. 21 : 5 N. L. J. 243.

———S. 46—*Succession to occupancy holding—Rights of ladies.*

In a suit by the Malguzar for possession of an occupancy holding which had been occupied by the father of the deft. during his life time, the

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deft. pleaded that she was a permanent resident of the village in which the holding was situated and entitled to remain in possession as heir under the Hindu Law. *Held*, that S. 46 of Act XI of 1898 did not disqualify a female from inheriting an occupancy holding, if she was otherwise qualified to do so according to the personal law to which she was subject. 4 N. L. R. 9, 5 N. L. R. 103 ; 8 N. L. R. 154, 7 N. L. R. 36 ref. (*Hallifax, A. J. C.*) *SAKHUBAI v. HARI*.

(1922) Nag 207 : 5 N. L. J. 261 : 67 I. C. 229.

———S. 46 (1)—*Occupancy tenant—Succession—Collaterals—Disqualification of near collaterals.*

The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy tenure on a more remote collateral even though he may have shared in the cultivation. 15 C. P. L. R. 89, 17 A. 33 Ref. (*Batten, A. J. C.*) *AMILIA v. BADAN SINGH*.

(1922) Nag. 117 : 5 N. L. J. 270 : 18 N. L. R. 105 : 67 I. C. 292.

———Ss. 50 and 70—*Sale contrary to Rights of transferee—Dispossession—Compensation*

Where a Sale of a holding is prohibited under S. 71 of the C. P. Tenancy Act, the alienee in possession can claim compensation from the plaintiffs (seeking to set aside the sale) before they are given possession. 6 N. L. R. 12 foll. If however the alienee had not obtained possession and he sought to enforce the sale, he could not recover the consideration paid. 6 A. L. J. 555 Ref. (*Prideaux A. J. C.*) *DHONDIBA v. PANDURANG*.

68 I. C. 252.

———S. 60—*Applicability of—Tenancy—Creation of, by occupancy riyat—Section not retrospective*

S. 60 of the C. P. Ten Act is not retrospective and does not govern contracts entered into before the passing of the Act. Where an occupancy tenant has created a valid lease, his heirs can inherit the occupancy rights subject to the lease. A lease which is to commence at a future date is an *interesse termini* and is an existing and real right. (*Mittia, A. J. C.*) *MT. LAHINI v. BALA*.

(1922) Nag. 227 : 18 N. L. R. 85.

———S. 70—*Hindu widow—Tenancy—Surrender—Acceleration—Law applicable.*

In all matters of tenancy the personal law applies except in so far as it is limited or altered by the tenancy law and there is nothing in the C. P. Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it by surrender. On such surrender the estate passes to the next heir not by transfer but under the law of inheritance. If the next heir is a limited owner, e. g. a daughter, the heirs of the last male owner would succeed after the daughter's death and on default of such heirs, the malguzar can resume possession of the tenancy. In a contract creating a tenancy the parties may agree that it

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shall be subject to any conditions that are not forbidden by the law, (*Hallifax, A. J. C.*)  
**SUNDAR LAL v. BISAMBHAR,** (1922) Nag. 24 :  
 65 I. C. 180.

—Ss. 93 and 94—Scope of—Costs—Power of—Revenue Officer to award costs.

A Revenue officer holding an enquiry under S. 93 of the C. P. Ten Act has the powers of Civil Court in awarding costs. If he has not made an order as to costs he must be deemed to have disallowed them and a fresh suit does not lie in the Civil Court for the same. (*Batten, J. C.*) **MOTIRAM v. HARI.** (1922) Nag. 169 : 18 N. L. R. 65 : 65 I. C. 67.

—S. 95—Object of—Disputes between landlord and tenant.

The object of the C. P. Ten Act is to provide for the relations between landlords and tenants. The Act does not contain any provision for settling disputes between neighbouring tenants. Their remedy is under the ordinary law in a civil court. (*Batten, J. C.*) **MOTIRAM v. HARI.** 18 N. L. R. 65 : (1922) Nag. 169 : 65 I. C. 67.

—S. 95—Cosharers—Redistribution—Dispute between Tenant and former landlord—Jurisdiction—Civil and Revenue Court.

The division of *Khud Kashi* or *su* among Cosharers of a village to be held in severalty is undoubtedly a partial private partition of the village lands and each cosharer's separately held parcel of land is a separate *patti* of the village of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the cosharers having a re-distribution of the lands held in separate ownership at any time, and either *Khudkhash* or tenancy land can always be transferred to another *patti* or to what may be called the *shamslat patti*. Of tenancy land so returned to the body of cosharers they are the landlords and are ordinarily represented by the *lambardar* and the cosharer who held the land previously in separate ownership is no longer the landlord. His suit between him and the tenant in respect of that, is therefore, not a suit between landlord and tenant as such a suit is cognizable by the Civil Court and not by the Revenue Court. (*Hallifax, A. J. C.*) **JAGANNATH v. SAHEBRAO.** (1922) Nag. 27 : 65 I. C. 127.

—S. 219—Summary order of ejectment—Disobedience—Offence under S. 188 I. P. C. See PENAL CODE S. 188. 64 I. C. 499.

—(I of 1920)—Ejectment—Who is entitled to.

Nobody but a landlord can eject a tenant for arrears of rent. Any other person who obtains a decree for arrears of rent cannot execute the decree by the special process of ejecting him. (*Hallifax, A. J. C.*) **GANPATI TELI v. DAJI.** 68 I. C. 855.

—Ss 6 and 10—Absolute occupancy holding—Transfer under the old Act—Rights of landlord.

Where there was a transfer of an absolute occupancy holding while the Act of 1898 was in force the rights of the landlord to sue in eject-

## CHAUKIDARI CHAKRAN LAND.

ment or for pre-emption are not taken away by the new C. P. Ten. Act. (*Prideaux, A. J. C.*)  
**VINAYAK v. MAHEHLA KHAN,** 68 I. C. 427.

—S. 105 (1)—Rent free land—Suit—Civil Court's Jurisdiction.

Where the land has been recorded rent free, and held without payment of rent and the tenant claims it to be held rent free, S. 105 (2) applies and the suit is removed from the cognizance of the Civil Court. (*Kotwal, J. C.*) **GANPATI v. MOHANLAL.** (1922) Nag. 207.

CERTIORARI—Grant of—When issued—Want of evidence to sustain conviction.

Where none of the ordinary grounds for certiorari such as informality disclosed on the face of the proceedings or want of qualification in the Judge or Magistrate who acted, exist, where the charge was one which was liable in the court which dealt with it, and the Magistrate who heard it was qualified to do so, where there is no suggestion that he was biased or interested or that any fraud was practised upon him, where his conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the enquiry and where no conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete, the superior court will not interfere by certiorari and examine the proceedings of the inferior court for finding out whether the evidence warrants the conviction. (*Lord Sumner*). **THE KING v. NAT BELL LIQUORS, LTD** 31 M. L. T. 163 (P. C.)

CHARGE—Creation of—Annuity payable out of estate of grantor. See DEFID, CONSTRUCTION 64 I. C. 518.

CHAUKIDARI CHAKRAN LAND—Resumption of—Patni lease—No contract as to rent payable for Chakran land—Zemindar if entitled to rent. See (1921) DIG COL. 121 **BEJOY CHAND MOJATAP BAHADUR v. KRISHNA CHANDRA MOOKERJEE.** (1922) Cal. 281 : 66 I. C. 357.

—Resumption—Rights of *patnidar* and *zemindar*.

Where *chaukidari chakran* lands comprised in a *patni* are resumed, the *zemindar* is not entitled to a share in the profits derived from the settlement of such lands by the *patnidar*. To allow him to share such profits would be to vary the terms of the *patni* : 44 C. 841; 46 C. 173 foll; 34 C. L. J. 275 not foll. (*Greaves and Ghose, JJ.*) **NARPAT SINGH v. RAJA BHUPENDRA NARAIN SINGH.** 26 C. W. N. 943 : 36 C. L. J. 145 : (1922) Cal. 473 : 67 I. C. 440.

—Resumption by Government—Settlement with *zemindar*—Effect.

If *chowkidari chakran* lands are resumed by Government and are settled with a *zemindar*, all rights created in such lands by the *Chowkidar* in favour of third parties comes to an end, although if a transfer has been made by the *zemindar* before the resumption, the transferee becomes entitled to the benefits of the settlement, with the

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zemindar. (*Mookerjee A. C. J. and Fletcher J.*) SATYENDRA NATH BANERJEE v. KRISHNASAKHA KAR. (1922) Cal 193 : 35 C. L. J. 185 : 69 I. C. 7.

**CHIT FUND**—Bidder—Bond executed by in favour of stake-holder—Stipulations in, when a penalty—Default in payment of subsequent instalment—Right to enforce stipulations—Waiver See CONTRACT ACT, S. 74. 42 M. L. J. 551

**CHOTA NAGPUR ENCUMBERED ESTATES ACT, (VI of 1876) Ss. 2, 3 and 21—Declaration—Effect of—Pending suit.**

S. 21 B of the Chota Nagpur Encumbered Estates Act cannot restrict the provisions of S. 3, it refers to suits other than proceedings in regard to the debts or liabilities referred to in S. 2 A (*Coutts and Macpherson, JJ.*) BANSIDHAR DHAR v. TIKAIT HARNARAYAN SINGH. 6 P. L. J. 685 : (1922) Pat. 112 : 65 I. C. 283

—Ss. 3 and 12—Mortgage suit against several defendants—Name of one struck out—Decree against Zemindar—Desirability of mortgage, See (1921) DIG. COL. 121. RAJA JYOTI PRASAD SINGH v. RANJIT SINGH. 3 P. L. J. 94 : (1922) Pat. 152 : (1922) P. 287

**CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (I of 1879) S. 88—Ijaradar—Lease of the entire mauza—Inclusion of inam lands—Notice to quit—Necessity for. See (1921) DIG. COL. 122. CHIGU CHAUDHURI v. CHAND MONI DEBYA. 64 I. C. 695.**

**CHOTA NAGPUR TEN ACT, S. 11 (4)—Suit for rent by tenure holder—Non registration of tenure prior to suit—Effect of. See (1921) DIG. COL. 122. DUBEY SHIVA SAHAY RAM v. THAKUR SHIVA BHANJAN LAL. 6 Pat. L. J. 677 : 64 I. C. 358**

—(VI of 1907) S. 14—Grant—Resumption—Sub tenures—Effect on.

Where a jagir is resumed in Chota Nagpur all the sub-tenures created by the previous jagirdar are annulled and become void. 27 C. 156 foll. But land whereon a mine has been sunk is expressly exempted from annulment. A tenure holder cannot create a sub tenure to exceed in duration the subsistence of his own tenure. The delivery of symbolical possession in respect of a large parganah consisting of several villages of a large area of *bakshi* and *zerai* lands, has the same binding force against the judgment-debtors and his representatives (i.e.) the under tenure holders whose encumbrances stand annulled under S. 14 of the Act. (*Adami, J.*) MAHARAJA PRATAP UDAI NATH SAHI DEO v. BHAIJAN SUNDERDAS KOER. 3 Pat. L. T. 628.

—Ss. 20 and 39—Occupancy rights—Thika dar—Cultivation of lands.

Mere cultivation of the lands comprised in a thika does not confer an occupancy or non-occupancy right on a thekadar if prior to the theka he had no connection with the lands (*Adami and Bucknill, JJ.*) RAJNATH SINGH v. WAHID KHAN, 3 Pat. L. T. 107 : (1922) P. 28.

## CHOTA NAG. TENANCY ACT, S. 178.

—S. 84 (3)—Entry in record of right—Evidentiary value of—Admission by Appellate Court.

An entry in the record of rights has only a presumptive value under S. 84 cl. (3) and an Appellate Court is not bound to receive in evidence the record of right published after the decision of the trial Court. (*Adami and Bucknill, JJ.*) RAJNATH SINGH v. WAHID KHAN. (1922) P. 28 : 3 Pat. L. T. 107.

—Ss. 87 and 224 (2)—Second appeal—Decision of Judicial Commissioner—Decision, Under S. 87 whether a decree.

Under S. 224 (2) there is no second appeal to the High Court from the decision of the Judicial Commissioner passed in an appeal from a decision under S. 87 of the Chota Nagpur Tenancy Act. A decision under S. 87 is not a decree and no appeal lies to the High Court under the C. P. Code 5 P. L. J. 697 ; 16 C. W. N. 295 foll. 40 Ind. Cas. 891, not foll. (*Das and Ross, JJ.*) FOJJDAR SAHU v. NEMA BHOGTA. 6 P. L. J. 634 : (1922) Pat. 109 : 4 U. P. L. R. (Pat.) 25 : 65 I. C. 285

—S. 132—Scope of.

The provisions of S. 132 of the Chota Nagpur Tenancy Act relate only to Khunkatu lands. (*Adami and Bucknill, JJ.*) RAJNATH SINGH v. WAHID KHAN (1922) P. 28 : 3 Pat. L. T. 107.

—S. 157—Ex parte decree—Two defendants of whom one absent See (1921) DIG. COL. 124 CHAUDHURI SHAM NARAIN SINGH v. SIVACHARAN SAHU. (1922) P. 400 : 1 Pat. 32.

—S. 177—Applicability—Suit for rent—Plea of payment to third party.

S. 177 of the Chota Nagpur Tenancy Act applies when a right is claimed by or on behalf of a third person.

Where in a suit for rent, the defendant pleads payment to a third party, but the right to receive payment is not claimed by or on behalf of such third party, S. 177 does not apply and the third party need not be impleaded in the action. (*Das and Adami, JJ.*) BALJI LAL v. SURENDRA NATH ROY. (1922) P. 480 : 1 Pat. 255.

—S. 177—Suit for rent—Plea of payment to third person—Effect of.

A right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under an obligation to pay it. Where therefore in a rent suit, the tenant pleads payment to a third person, and such third person does not intervene S. 177 of the Chota Nagpur Tenancy Act, does not operate.

57 I. C. 28, foll. (*Coutts and Ross, JJ.*) GHURA MANJHI v. PROBODH CHANDRA MOZUMDAR. 6 P. L. J. 603 : (1922) Pat. 54 : 3 Pat. L. T. 131 : 64 I. C. 1003.

—Ss. 178 (2) and (3) 215 and 224—Order under S. 178 (3)—Appealability—Question relating to execution—Forum—Powers of Deputy Commissioner—Limits to exercise of—Extension of time. See (1921) DIG. COL. 124. BISSESWAR SAHU v. MAHOMED ZAINUL RAHMAN. (1922) P. 29 : 3 Pat. L. T. 108.

## CHOTA NAG, TENANCY ACT, S. 213.

—Ss. 213, 265 and 230—*Rent Sale—Application to set aside—Right to apply—Death of party—Application for substitution—Limitation.*

By the express direction of S. 265 of the Chota Nag. Ten. Act the provisions of the C. P. Code relating to substitution and addition of parties apply to the cases before the Deputy Commissioner. O. 22, R. 3, C. P. Code is therefore a part of the Chota Nagpur Ten. Act and an application for substitution in a case before the Deputy Collector must be regarded as an application under the Chota Nagpur Ten. Act. S. 230 of the Act provides that the provisions of the Limitation Act shall, so far as they are not inconsistent with the Act, apply to all suits, appeals, and applications under the Chota Nagpur Ten. Act. An application for setting aside a sale held in pursuance of an application for execution of a decree is not an application for execution of a decree or order. 2 Pat. L. T. 273 foll. Consequently the provisions of O. 22, R. 12 C. P. Code do not prevent the applicability of O. 22, R. 3 to such proceedings.

A Khorposhidar or undertenure holder cannot apply under S. 213 of the Chota Nagpur Ten. Act to set aside a sale. (*Das and Adami, JJ.*) LAL NILMONY NATH SAHI DEO v. MAHARAJAH PRATAP UDAI NATH SAHI DEO. (1922) Pat. 363

—S. 224—Landlord and Tenant—Collective suit against several tenants—Valuation for purposes of appeal. See (1921) DIG. COL. 125 CHAUDHURI SHYAM NARAIN SINGH v. SHIVACHARAN SAHU. 1 Pat. 32: (1922) P. 400.

—S. 224 (2)—Second appeal—Appellate judgment of judicial commissioner from decision under S. 87—If competent. See CH. NAG. TENANCY ACT, Ss. 87 and 224 (2), (1922) Pat. 109.

—S. 225—Transfer of appeal from rent suits of less than Rs. 100 to Judicial Commissioner—Second appeal if lies.

Five rent suits were instituted, one of the value of above Rs. 100 and the others below that value. Appeals were preferred to the Judicial Commissioner in the former, and the Deputy Commissioner in the latter, but under S. 225 of the Chota Nagpur Tenancy Act, the latter were transferred to the Judicial Commissioner. Held, the appeals having been transferred and decided, second appeals lay. (*Mullick and Atkinson, JJ.*) SADANAND TEWARI v. DEB NATH MANJHI (1922) Pat. 154: (1922) P. 184

—S. 270—Scope of—Powers of commissioner over subordinate officers.

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors.

If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same of course

C. P. CODE (1908), S. 2 (2).

would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. (*Darson-Miller, C. J. and Das, J.*) TIKAIT GANESH NARAYAN SAHI v. CHAND MISTRI. (1922) Pat. 3.

CHURS—Formation in rivers—Title to—When rests in Government. See BENGAL ALLUVION AND DILUVION REGULATION S. 4 (3)

35 C. L. J. 196.

C. P. CODE (V of 1908) S. 2. cl (2)—*Order of abatement—Appeal*

An order declaring that an appeal has abated is not a decree and is therefore not appealable. 17 A. 172; 12 A. L. J. 1113 foll. (*Ryves and Gokul Prasad, JJ.*) MAHOMED ISMAIL v. MANOHAR DAS.

20 A. L. J. 214: L. R. 3 A. 224: (1922) All. 113: 64 I. C. 838.

—S. 2 (2)—*Order dismissing appeal for deficiency of court fee—If appealable.*

An order in effect dismissing an appeal for deficiency in Court-fee should be treated as on the same footing with the rejection of a plaint for the purposes of determining whether it amounts to a decree or not and hence an appeal lies against the appellate order (*Drake Brockman, J. C.*) GABBA v. KANCHHEDILAL. 18 N. L. R. 15: (1922) Nag. 62: 67 I. C. 225.

—S. 2 (2) and O. 21, R. 71—*Execution Sale—Non-payment of purchase money—Resale—Recovery of deficiency—Adjudication if a decree and appealable.*

An order in proceedings taken by the judgment debtor for recovery of the loss caused by a resale owing to the default of the prior purchaser in depositing the purchase money, is a decree and is appealable as such. 1 A 181; 18 M. 439; 25 C. 99; 30 P. 329 foll. 14 A 201 overruled. (*Piggott, Walsh and Lindsay, JJ.*) SITA RAM v. JANKI RAM. 44 A. 266: (1922) All. 200:

20 A. L. J. 105: L. R. 3 A. 117: 65 I. C. 813.

—S. 2 (2) and O. 23, R. 1—*Order granting leave to withdraw a suit with permission to sue—Not a decree and not appealable.* See C. P. CODE, O. 23, R. 1. 65 I. C. 719.

—S. 2 (2)—*Mesne profits—Interest—Decree silent as to—Execution.*

Where a decree awarding mesne profits is silent as to interest, it must be deemed to carry interest at the court rate of 6 p. c. on the mesne profits and executed accordingly. 27 C. 951; 25 A. 275 foll. 22 A. 262 diss. (*Walsh and Stuart, JJ.*) LALTA PRASAD v. SRI GANESHJI. 20 A. L. J. 348: L. R. 3 A. 245: 4 U. P. L. R. (A) 144: (1922) All. 117: 44 All. 579: 67 I. C. 219.

—S. 2 (2)—*Order declaring that a party is not liable for mesne profits.*

An order of court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable. 35 A. 159; 20 C. L. J. 476, 480 Ref. (*Newbould, J.*) NAIMUDDIN SARKAR v. IMANI MONDAL. 67 I. C. 93.

—Ss. 2 (2) and 47—*Mortgage decree—Execution—Payment of Court-Fees—Appeal if lies.*

## C. P. CODE (1908), S. 2 (2).

Where on a mortgage decree being put in execution, an objection was raised that execution could proceed only after payment of an additional amount of court fee, but was negatived, *held* an appeal lay as it was a matter relating to execution (*Coutts and Ross, JJ.*) RAM BUJHAVAN PD. SINGH v. NATHO RAM (1922) P 59. 3 Pat. L. T. 146

—Ss. 2 (2) 97—Preliminary decree—Decision that a person is an agriculturist—Appeal if lies See DEKHAN AGRICULTURISTS RELIEF ACT S. 15. 1922 Bom. 336 (1).

—S. 2, (2) and 96—Preliminary decree—Interlocutory order—Partition suit—Appeal.

There can be only one preliminary decree in a suit for partition and where after the passing of such a decree, the Court directs the Commissioner to take a valuation of certain property, the order is an interlocutory order from which there is no appeal, (*Daniels, J. C. and Dalal, A. J. C.*) JAGMOHAN DAS v. INDAR PRASAD. 24 O. C. 366 : 65 I. C. 933

—S. 2 (2) and O. 1, R. 10—Order striking out names of defts.—Not appealable. See (1921) DIG COL. 127. SHANMUKA NADAN v. ARUNACHALA CHETTY 45 Mad. 194. 42 M. L. J. 97. (1922) Mad 332 30 M. L. T. (H. C.) 172

—S. 2 (2)—Remand order—When a decree—Rights of parties not conclusively determined

Where in a suit in ejectment the Commissioner on appeal held that a seven years lease did not bar the acquisition of occupancy rights and remanded the suit for disposal *Held* that the order of the Commissioner did not conclusively determine the rights of the parties and was not a decree. (*Hopkins S. M.*) FAKHR-UD-DIN v. SHAIKH WAHID-UD-DIN. L. R. 3 A. 509 (Rev.)

—S. 2 (3)—Decree-holder—Specific performance—Decree for—Right of defendant to execute.

A decree for specific performance is capable of being executed by the defendants as well as by the plaintiff. If this were not so, it will follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration money, the deft is left with no remedy whatever, while, owing to the decree passed against him he would still be debarred in any way from dealing with the suit property. (*Macleod, C. J. and Coyajee, J.*) BAI KARIMABIBI DAUDBHAI v. ABDEREHMAN SAYAD BANU. 24 Bom. L. R. 496 : 67 I. C. 667

—Ss. 2 (11) and 47—Question relating to execution—Legal representative—Liability of—Power of Court to decide objection.

Where on an application to substitute the brother of the deceased judgment debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made. If the Court leaves the point whether the brother was liable for the decree open and undecided and makes an order of substitution it would be acting

## C. P. CODE (1908), S. 9.

illegally. (*Jwala Prasad and Ross, JJ.*) PATAIT DINANATH SAHI v. PATAIT MALHIJI BAID. 3 Pat. L. T. 106.

—S. 2 (12)—Mesne profits—Calculation—Improvements effected by predecessor-in-title of disseisor—Deduction in respect of. See DECREE, CONSTRUCTION, 26 C. W. N. 257.

—S. 2 (12)—Mesne profits—Liability to pay interest—Rate of interest.

The very definition of mesne profits includes not merely the profits of immoveable property but also interest on such profits. Where the lower court for proper reasons awards 12 per cent interest on mesne profits the appellate court will not disturb it. (*Shadi Lal, C. J.*) CHHABER SINGH v. RADHU RAM 4 Lah. L. J. 333. 68 I. C. 807.

—S. 9—Allegations in the plaint—To be taken as correct until trial on the merits.

The jurisdiction of courts depends upon the allegations made in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded and in that case the suit would be dismissed, not because the court had no jurisdiction, but because the allegation on which it was based were found to be untrue. At the same time the court would have no jurisdiction merely because there was an assertion in the plaint that the act objected to was *ultra vires*. The plaint must make distinct allegations of fact or of law how the act was *ultra vires*. (*Dhobley, A. J. C.*) MUNICIPAL COMMITTEE, MALKAPUR v. AMRIT WAMAN DALAL, (1922) Nag 10. 18 N. L. R. 121 : 5 N. L. J. 214 : 65 I. C. 532

—S. 9—Religious property or office—Dispute as to.

The protection of the law in religious matters is confined to the protection of religious property or religious office. The Court will not decide mere question of religious rites or ceremonies nor will it pronounce on any religious doctrine unless it is necessary to do so in order to determine rights to property. 5 B 80 foll. (*Martin, J.*) THE ADVOCATE GENERAL OF BOMBAY v. YUSUF-ALLI EBRAHIM. 24 Bom. L. R. 1060.

—S. 9—Suit in Civil Court—Reference to arbitration—Award—Filing of—Bar of suit.

Though it is open to a party dissatisfied with a private award to wait till his adversary seeks to enforce it by the summary process prescribed by the Arbitration Act (IX of 1899) and then contest it by filing such objection as are allowed by the law, that is not his sole remedy and does not take away the remedy open to him of bringing a suit to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract, if made was not enforceable by reason of fraud or misrepresentation. (*Shadi Lal, C. J., and Campbell, J.*) JAI NARAIN BABU LAL v. NARAIN DAS JAINI MAL. 3 Lah. 296.

—S. 9—Suit for recovery of carcases of dead animals—Mahars—Suit not maintainable in civil Court. See BOM. HER OFFICES ACT, S. 18. 24 Bom. L. R. 917.

## C P CODE (1908), S 10

—Ss 10 and 11—*Applicability of—Miscellaneous proceedings—Law of procedure.*

The word "suit" in S. 10, C. P. Code, includes appeals and miscellaneous proceedings also. S. 141 C. P. Code is wide enough to make the provisions of S. 10 C. P. Code apply to arbitration proceedings. One of the essential conditions to attract the applicability of S. 10, C. P. Code is that the same party must be concerned in both the proceedings or the parties under whom any of them claim litigating under the same title. (*Raymond, A. J. C.*) *FIRM OF JAI NARAIN BALU LAL In the matter of* (1922) Sind 6 66 I C 796

—S 10—Order under, refusing stay of suit of open to revision See C P CODE S. 115.

(1922) Lah 55.

But See 16 L W 607

—S. 10—Stay of suit—Attachment before judgment—Receiver See (1921) DIG COL 129 *SENAGI KAPURCHAND v PANNAJI DEVI CHAND.* 46 Bom 431 (1922) Bom 276 : 64 I C 580

—S. 10—Stay of suit—Common issues—Same parties

An applicant under S. 10, C P Code, for stay of a suit is bound to show that the "matter in issue" in the suit is directly and substantially in issue in the previously instituted suit. It is not sufficient that there are some issues common to the two suits. The matters in issue in the two suits must be identical. The Court cannot apply S. 10 where the determination of the two suits depends not merely upon the decision of the common issue but also of other and entirely different issues. 24 C. L. J 514 foll. (*Venkatasubba Rao, J.*) *KOTA SREERAMULU v KOTA SREERAMULU.* 15 L.W. 646 (1922) Mad. 304 : 31 M L T. 360 H. C.

—S 10—Stay of suit—Suit not between the same parties—Common questions.

S. 10 C. P. Code does not authorise the stay of a subsequently instituted suit where the prior and the subsequent suits are not between the same parties or between parties under whom they or any of them claim litigating under the same title, even though the two suits involve some common questions. 42 A 290 ; 42 C. 926 Ref. (*Odgers, J.*) *RAMAKRISHNA PILLAI v. KRISHNASWAMI PILLAI.* 15 L. W. 667 : (1922) M W N 521. (1922) Mad 321 : 68 I C. 167.

## Res Judicata.

—S. 11—*Applicability—Doctrine one of substance—Liberal interpretation.*

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the court intended to give and has given a final decision on that question 36 M L. J. 641 foll. (*Abdul Raof, J.*) *KALU v. NUPU.* 67 I C. 755.

## Competent Court

—S. 11—Competent Court—Administration proceedings.

Directions given in an administration suit, bind all parties, determine the construction to which

## C P CODE (1908), S 11.

the will gives effect and is final and conclusive. (*Lord Buckmaster*) *GOPAL LAL SETT v. PURNA CHANDRA BASAK* 20 A. L. J. 625 : 43 M. L. J. 116 : 36 C. L. J. 57 : 24 Bom. L. R. 937 : (1922) P. C. 253 : 16 L. W. 963 : 67 I. C. 561 : 49 I. A. 100 (P. C.)

—S. 11—Competent court—First Munsif having no powers—Subsequent suit—Munsif with power up to Rs. 2,000.

Where the prior suit was decided by a Munsif who had jurisdiction to try suits up to the value of Rs. 1,000 only and the later suit was laid at Rs. 1,100 and was tried by a Munsif who had jurisdiction to try suits up to the value of Rs. 2,000 :—*Held*, the Munsif who tried the previous rent suits had no jurisdiction to try the later suit, 28 Cal 78 distinguished.

Where therefore the plaintiff's suit for recovery of possession and mesne profits is a *bona fide* suit because according to defendant's own case the plaintiff had good title to recover possession he therefore had good title to recover mesne profits also and the decision in the previous rent suits does not operate as *res judicata* (*Chatterji and Pearson, JJ*) *ASAN ALI v SARADA CHARAN KASTAGIR* (1922) Cal 138.

—S. 11—"Competent Court"—Meaning of

The "Competent Court" to which reference is made in S. 11 is the Trial Court and it does not affect the question whether the decision is a decision of an appellate court or whichever the appellate court may be 9 I. A. 197 followed. (*Stuart and Sulaiman, JJ*) *KAMMOO v MUSAMMAT FATHIMAN.* (1922) All. 445.

—S 11—Competent court—Civil and Revenue court—Ejectment—Sub-tenancy—Decision of revenue court—Res-judicata

The revenue court in a suit to eject the defendant as a sub-tenant held that he was a tenant in-chief and dismissed the suit. In a subsequent suit in the civil court for ejectment, held that the decision of the revenue court operated as *res-judicata*. 17 A. L. J 60 foll. (*Mears, C. J. and Gokul Prasad, J.*) *RAM DAS v DUBRI KOERI.* (1922) All. 336 : 20 A. L. J. 606

—S 11—Competent Court—Land Acquisition proceedings—Decision as to title between rival claimants—Subsequent suit between parties—Res judicata—Plea of.

Where in certain land acquisition proceedings a dispute arose as to apportionment of compensation between two rival claimants and the dispute is decided by the court on the construction of the terms of a gift deed in which the land acquired was included, that decision operates as *res judicata* as between those parties or their representatives not only with reference to the extent of the money but with reference to other property covered under such title in a subsequent suit between the parties though not by reason of S. 11 C. P. Code but by reason of the general principles of *res judicata* (1909) A. C. 623 : 48 C. 49 foll. 28 C 526 : 17 C. W. N. 935 overruled.

The importance of a judicial decision is not to be measured by the pecuniary value of the parti-



## C P CODE (1908), S. 11

cular item in dispute and a plea of *res judicata* is not made unsustainable by the mere fact that the value of the subject matter in the former litigation was so trifling that the parties did not think it worth their while to appeal from the decision in the former proceedings (*Lord Buckmaster*)  
**RAMACHANDRA ROW v. RAMACHANDRA RAO.**

45 Mad. 320 43 M. L. J. 78.

24 Bom. L. R. 963 16 L. W. 1.

(1922) M. W. N. 359 20 A. L. J. 684.

35 C. L. J. 545 1 R. 3 P. C. 158 67 I. C. 408.

(1922) P. C. 80 30 M. L. T. (P. C.) 154.

26 C. W. N. 713 49 I. A. 129 (P. C.)

—S. 11—Competent Court—Probate proceedings—Scope of title to property—Adjudication as to, not binding on parties in subsequent litigation. See PROB. AND ADMN. ACT, S. 33.

1 Bur. L. J. 59.

—S. 11—Competent court—Decision of Settlement officer—Mistaken admission—If binding on Revenue Court.

Where on the admission of the mukhtear of a Hindu widow owning a *zen idari*, a tenant is recorded as an occupancy tenant by the Settlement officer, *Held by* (*Hopkins S. M. and Burn J. M. contra.*) that the Settlement Officer's decision was binding on all the Revenue Courts. (*Hopkins S. M. and Burn J. M.*) **CHAUDHRI CHHEDA SINGH v. BHEJAN.**

L. R. 3 A. 162 (Rev.)

—S. 11—Competent Court—Revenue Court—Decision on question of proprietary title.

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Ten. Act operates as *res judicata* and bars the trial of the same issue in a subsequent suit in the Civil Court. (*Lindsay and Stuart, JJ.*) **THAKUR HANWANT SINGH v. MT. JHAMOLA.**

(1922) All. 95 66 I. C. 915 20 A. L. J. 340

—S. 11—Competent court—Revenue court—Decision of correction of *jamabandi* and ejectment.

In respect of the same plot of land an application for correction of records and a suit for ejectment were filed and the court disposed of both on the same day by separate judgments the suit for ejectment being decided later than the application. The order in the correction of record case was upheld in appeal but was not taken further, while the order in the suit was, appealed again to the Board. *Held* the order in the correction of record case operated as *res judicata*. (*Hopkins S. M. and Burn J. M.*) **KATWAROO SINGH v. SUKHAN PANDE.**

L. R. 3 A. 449 (Rev.)

—S. 11—Court of competent Jurisdiction—Revenue court—Suit for rent—Pecuniary Jurisdiction.

Where the Court which tried the prior rent suit had no pecuniary jurisdiction over the claim in a subsequent suit for rent, the prior decision does not operate as *res judicata*. (*Gokul Prasad, J.*) **RAM DAS v. MAHANT PERAMANAND GIR.**

L. R. 3 A. 156 (Rev.)

—S. 11—Court of competent jurisdiction—Evidence that prior court had no jurisdiction—Admissibility—Latent and patent defect.

## C. P. CODE (1903), S. 11.

When there is no want of jurisdiction in the court to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the court, then, if he does not bring that fact forward but allows the court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the court in any collateral proceeding. (*Das and Adamu, JJ.*) **DWARKA PRASAD v. JAI BARHAM.**

(1922) P. 322 67 I. C. 686

Directly and substantially in issue.

—S. 11—Directly and substantially in issue—Decision as to rate of rent in one year—Effect of.

Where in a case under S. 105 B. T. Act the only point decided was what additional rent was to be allowed for the excess area, it does not constitute *res judicata* as to the rate of rent. A rent decree in a prior suit may not be *res judicata* in the sense that it finally decided the rate of rent between the parties. But it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. (*Newbould, J.*) **BROJENDRA KISHORE ROY CHOWDHURY v. SHEIKH SOMAR ALI.**

68 I. C. 298

—S. 11—Directly and substantially in issue—Decision depending on one issue—Other issues not *res judicata*.

Plffs. sued defts. for an injunction restraining them from building on the disputed land alleging it to be the common property of the parties. The plea of the defts. was that the land was exclusively their own. A subsequent suit was instituted by defts. against plffs. in which defts. *inter alia* claimed an injunction against plffs. restraining them from allowing water to flow on the disputed land to which the plaintiffs answered that they were joint owners of the land with plaintiffs and that they had, a right of easement. The plff's. suit was dismissed on the finding that the defts. were sole owners of the land in dispute. In the suit filed by defts., the court found in favour of the easement alleged by the plffs. and dismissed that suit. Plffs. appealed against the decree dismissing their suit and there was no appeal from the decree in the other suit. *Held* that the consideration of the issue as to ownership of the land was not barred by *res judicata*, since that question ceased to be substantially in issue in the second suit by reason of the finding on the question of the easement right. 33 A. 51 Dist. (*Mears, C. J. and Piggott, J.*) **PEARY LAL v. JADO RAI.**

20 A. L. J. 784 1 R. 3 A. 450.

—S. 11—Directly and substantially in issue—Incidental observations—Not *res judicata*.

Where the decree could be sustained independently of the findings on a particular point and there is no decision against a party in a former litigation the finding does not operate as *res judicata*. (*Leslie Jones and Wilberforce, JJ.*) **AHMAD DIN v. MOHAMMAD TUFFAEL.**

4 Lah. L. J. 376.

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—S. 11—*Directly and substantially in issue—Suit by son to avoid execution sale of joint family property—Prior suit—Dismissal of—Effect of.*

A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the debt was tainted with immorality is barred by a similar previous suit on the ground that the property was joint family property (*Gokul Prasad and Stuart, JJ.*) *BADRI PRASAD v. MOHAN SINGH.*  
4 U. P. L. R. (A) 15 : 65 I. C. 511

—S. 11—*Directly and substantially in issue—Issue decided as being necessary—If res-judicata. See (1921) DIG. COL. 131, MIDNAPORE ZEMINDARY CO. LTD. v. NARESH NARAIN ROY.*  
49 Cal. 37 (1922) Cal. 345 : 65 I. C. 833

—S. 11—*Directly and substantially in issue—Issue of law—Construction of a statute—Liability to pay dues of a recurring nature—Decision for a particular period, if res-judicata. See (1921) DIG. COL. 131 SITARAM SAKHARAM MANGLE v. LAXMAN VISHNU KETKAR.*  
64 I. C. 162.

—S. 11—*Directly and Substantially in issue—Suit for possession—Previous suit for declaration.*

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the life time of the widow on the occasion of transfer by her by way of gift is no bar to a subsequent suit for possession of the property (*Gokul Prasad, J.*) *RAMJAS v. MR. SARTAJ.*  
(1922) All. 401

—S. 11—*Directly and substantially in issue—Adjudication.*

Where both parties in a dispute about land set forward certain measurements and they came to an arrangement by which the length of the rod was taken as of more than the Naikarsha rod and the plaintiffs got more than they were entitled.

*Held*, as the question of the length of rod was not a point in issue and there was no adjudication thereon, the principle underlying S. 11 C. P. C. does not apply. (*Walmsley and Sukrawardy, JJ.*) *SURADHANI DUTTA v. SITTO SHEIK.*  
(1922) Cal. 311.

—S. 11—*Directly and substantially in issue Judgment on rent payable—Effect.*

The decision in a suit for rent for a particular period is an absolute bar under the doctrine of *res-judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit, and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P. L. J. 372 distinguished. 6 C. W. N. 569 followed. (*Ross, J.*) *MANNOO LAL CHOUDHURY v. LALJI CHAUBE.*  
(1922) P. 213.

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Execution Proceedings.

—S. 11—*Execution proceedings—Appeal—Costs.*

An order for costs was passed by the Privy Council against a certain person. On an application being made for the execution of that order a decree was drawn by the High Court giving the different items of costs. After the decree, embodying the order of the Privy Council had been drawn, the Subordinate Judge had decided on another application for execution by the same decree-holder that he was not liable to pay one item of the costs. *Held*, as the Subordinate Judge's order was passed after the decree embodying the order of the Privy Council had been drawn up by the High Court and as no appeal was preferred from it, the order became final and operated as *res-judicata*. (*Martineau, J.*) *GOPI CHAND v. LALA BENARSI DAS.*  
(1922) Lah. 361.

—S. 11—*Execution proceedings—Constructive res-judicata—Principle when applicable—Omission to raise objections—Pre-emption. See (1921) DIG. COL. 1002 SHEO MANGAL v. HULSA.*  
44 A. 159 : (1922) All. 413  
65 I. C. 377.

—S. 11—*Execution proceedings—Decision as to limitation—Effect on Subsequent application.*

A decision on an application to execute a decree that the application is barred by limitation does not operate as *res-judicata* in a subsequent application to execute the decree. 21 Bom. L. R. 344, followed. (*Macleod, C. J., and Shah, J.*) *RAMCHANDRA VENKATESH SHOLEPUR v. SHRINIVAS KRISHNA KULKARNI.*  
46 Bom. 467 : 24 Bom. L. R. 97 :  
(1922) Bom. 238 : 66 I. C. 940.

—S. 11—*Execution proceedings—Decision as to question of limitation.*

Where a prior application for execution had been put in and after notice to the judgment debtors execution had been ordered, the objection that it was barred by limitation cannot be raised on a subsequent application. (*Chevis, J.*) *KIDAR NATH v. RADHA KISHEN.*  
67 I. C. 56.

—S. 11—*Execution proceedings—Decision after notice—Effect of.*

A decision on an application for execution, after notice to the judgment-debtor, that it was not barred by limitation operates as *res-judicata*, though the judgment debtor remained *ex parte*. The failure to oppose the application precludes the judgment-debtor thereafter from contending that it is barred. It is not a question of *res-judicata*; but there is a bar by a decision in the very litigation upon the same application (*Walsh and Ryves, JJ.*) *MT. MUHAMMADI BEGAM v. MT. UMDA BEGAM.*  
(1922) All. 100 : 66 I. C. 751.

—S. 11—*Execution proceedings—Objection as regards invalidity of final mortgage decree—Costs, if can be claimed later.*

A preliminary decree for sale was passed on a mortgage by the court of first instance, reversed by the appellate court, but finally restored with

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costs throughout by the High Court. When the decree was made final, the costs awarded by the High Court were not included therein and it was in effect the decree of the court of first instance that was made final, on an application for execution being put in, part of the decree amount was paid, and time taken for payment of the balance. As the money was not paid in time, a second execution application was put in, claiming for the first time the costs awarded by the High Court also. Two objections were raised (i. e.) the final decree as passed could not be executed as the only decree that could be made final was the appellate decree of the High Court and (2) the execution court could not add the further amount claimed by way of costs.

*Held*, on the first point, as the objection was not raised when the first execution application was put in it was barred by *res-judicata*; and on the second point the execution court can only add execution costs, and it cannot add to or amend the final decree which had been passed in the case, (*Ryves and Gokul Prasad, JJ.*) DAMBAR SINGH v. KALLYAN SINGH.

44 All. 350 · 20 A. L. J. 170 : L. R. 3 A. 164 : 65 I. C. 799.

—S. 11—Execution proceedings—Objection petition dismissed for non-prosecution—Effect.

Where an objection petition in an execution proceeding is dismissed for non prosecution, there is no adjudication on the merits and hence it cannot be *res judicata*. (*Greaves and Ghose, JJ.*) BAHIR DAS PAL v. GIRISH CHANDRA PAL.

67 I. C. 663.

—S. 11—Execution proceedings—Order in—Not appealed against—Finality of—Order exempting property from sale. See T P Act Ss 88 AND 89 31 M. L. T. 219 (P. C.)

—S. 11—Execution proceedings—Order in when *res-judicata*—Case struck off—Effect of.

If an order has been made or an application for execution, which directly or by implication determines the rights of the parties to the proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re open the question upon which there has been a previous adjudication. 17 C. W. N. 113 foll 6 A. 269, 8 C. 5 Ref. (*Batten J. C.*) MUSSAMMAT PURA v. BEHARILAL.

68 I. C. 239.

—S. 11—Execution proceedings—Order in when *res-judicata*—Notice to parties.

Where an order for execution of a decree is passed after due notice to the judgment debtor, but eventually the application is dismissed for default of the decree-holder, it is not open to the judgment-debtor in a subsequent application for execution to plead that the former execution was time barred. (*Jwala Prasad and Bucknill, JJ.*) GOWRCHANDRA ROY v. JANARDHAN PRASAD, THAKUR.

68 I. C. 337.

—S. 11—Execution proceedings—Order at one stage, binding subsequently

Where at one stage of an execution proceeding an order is made disallowing the objections of

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the judgment debtor, the order is binding in all subsequent stages of the same execution. 42 C 440 Ref (*N. R. Chatterjea and Panton, JJ.*) KSHITINDRA MOHAN ROY v. NAWAB KHAJEE HABIBULLA BAHADUR.

64 I. C. 724.

—S. 11—Execution proceedings—Plea decided against impliedly in suit—Not to be raised again in execution proceedings See DEKHAN AGRIC. RELIEF ACT S. 11 AND 20

24 Bom. L. R. 1291.

—S. 11—Execution proceedings—Prior order—Effect of—Judgment-debtor not a party to prior proceedings not affected.

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and therefore it was not in accordance with law. (*Cuming and Panton, JJ.*) SITANATH DAS v. RANI KANAK PROBHA DEBI

67 I. C. 879

Heard and decided.

—S. 11—Heard and decided—Cess—Liability to pay—Former decision

Inasmuch as a cess under Bengal Act IX of 1890 is a recurring charge, prior decree for cess does not operate as *res judicata* in a subsequent suit, for recovery of the cess. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHRY v. RAHMAT ALI.

1 Pat. 218 · 3 Pat. L. T. 282 · (1922) Pat. 167 : (1922) P. 303 · 65 I. C. 138.

—S. 11—Heard and decided—Decree in administration suit declaring rights of parties—Suit to enforce rights—Maintainability of

Where in an administration suit a decree is passed declaring the shares of the heirs to the estate after payment of the charges thereon, it is open to the heirs to bring a suit for distribution of the shares declared by the decree. The subsequent suit is not barred by *res-judicata*, as the plaintiff could not have enforced his rights under the prior decree. 6 B. 7 ; 14 A. L. J. 102, 22 C. L. J. 272 ; 6 B. H. C. R. 231 ref. (*Maung Kim, J.*) MAUNG PO THIN v. KO THA YE.

11 L. B. R. 60 : 64 I. C. 813.

—S. 11—Heard and decided—Judicial order—Made in one stage of a suit binding. See (1921) DIG. COL. 141 RAJA SASI KANTA ACHARJYA BAHADUR v. SANDHYA MONI DASYA.

26 C. W. N. 483 : 65 I. C. 4.

—S. 11—Heard and decided—Mortgage—Successive suits for redemption. See (1921) DIG. COL. 133. KUSHABA RAMJI THOKE v. BUDHAJI SAKARAM THORAT.

49 Bom. 348 : 64 I. C. 1004 : (1922) Bom. 127.

—S. 11—Heard and decided—Mortgage suit—Decree for redemption—Fresh suit for redemption—Maintainability of.

A mortgagor who has obtained a decree for redemption which does not contain a provision that if payment is not made on the date fixed by the court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and paid the

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decretal amount, can subsequently bring a second suit for redemption of the mortgage in respect of which such decree was obtained. The mere fact that in the previous suit the court ordered that on default of payment of the amount of the mortgage decreed within the time fixed, the suit should stand dismissed, does not operate as a bar to a fresh suit for redemption. 24 A. 44 foll (Ryves and Stuart, JJ.) HARI RAM v. INDRAJ

L. R. 3 A. 397 : 20 A. L. J. 631 :  
(1922) All. 377

—S. 11—*Heard and decided—Rent Suit—Ex parte decree—Omission to raise defences—B. T. Act, Ss. 29 and 147 A—Effect of.*

Ex parte decree in prior suits in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate, do not operate as *res judicata* in favour of the plaintiff's landlords. 16 C. 300 Ref. Even though the defendant did not take in the previous rent suits the defence under S. 29 of the B. T. Act he can raise it in a subsequent suit for rent as there cannot be an estoppel against a statute. (Suhrawardy and Cumming, JJ.) NAFAR CHANDRA PAL CHOUDHURY v. BHUSI MALLA. 65 I. C. 581.

—S. 11—*Heard and decided—Suit to contest alienation—Dismissal of—Suit for possession* See (1921) DIG. COL. 140 NAWAB v. PANJABA. 4 Lah. L. J. 442

—S. 11—*Heard and decided—Suit by Hindu widow—Bar under S. 244 (old Code)—second suit by reversioner—Not barred.*

Where a Hindu widow sued for a declaration that a certain execution sale was not valid and binding, but it was dismissed not on the merits but on the ground it was barred by S. 244 (old Code), a suit by the reversioner after the widow's death was not barred by *res judicata* as there was no adjudication on the merits on the prior suit (Macleod, C. J. and Shah, J.) GANESH RAM-CHANDRA KULKARNI v. LAXMIBAI VENKATESH NARAYAN.

46 Bom. 726 : 24 Bom. L. R. 249 :  
(1922) Bom. 96 : 67 I. C. 209.

—S. 11 and O. 23, R. 1—*Heard and decided—Suit withdrawn—Fresh suit when barred.*

There is no *res judicata* when a suit is withdrawn. The bar is that raised by O. 23, R. 1 (3), C. P. Code, which prevents a plff. from instituting a fresh suit in respect of the same subject-matter as that of the suit withdrawn. (Hopkins, S. M. and Freeman, J. M.) AMIR SINGH v. JAI RAM. L. R. 3 A. 84 (Rev.)

—S. 11—*“Heard and decided”—Suit—Counter-claim—Appeal preferred in Suit only—Effect of.*

Plff. sued to recover a sum of money from the deft. on accounts and the latter denied the claim and counterclaimed for a sum of Rs. 46. The plff.'s suit was dismissed and the deft.'s counterclaim decreed by the first court and the plff. thereupon filed two appeals, one against the dismissal of the suit and the other against the decree on the counterclaim. The District court dismissed both

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the appeals whereupon the plff. preferred two second appeals, as in the court below but the appeal against the decree on the counter claim was dismissed as being out of time. Held that the effect of the dismissal was to bar the appeal against the dismissal of the plff.'s own claim by *res judicata*. 16 C. 233, 33 C. 1101; 29 M. 333; 53 P. R. 1897, 31 P. R. 1898; 85 P. R. 1905; 33 A. 51; 24 M. 350; 1 Lah. 83 Ref. (Leslie Jones and Broadway, JJ.) GHANIYA LAL v. ROSHAN LAL. 4 Lah. L. J. 344.

—S. 11—*Inconsistent decisions—Later decision to prevail.*

Where there are two inconsistent decisions it is the later decision that operates as *res judicata*. So held with reference to an adjudication in the course of an execution proceedings. (Piggott and Walsh, JJ.) LALTA PRASAD v. SURAJ KUMAR.

[44 All. 319 : L. R. 3 A. 111 : 20 A. L. J. 185 :  
(1922) All. 145 : 65 I. C. 877.

—S. 11—*Litigating under the same title—Sale of proprietary rights—Purchase by tenants—Sale set aside—Delivery of possession—Subsequent suit for establishing occupancy rights.*

The proprietor of certain land sold it to the occupancy tenants on the land and sometime after his death his successor impugned the sale on the ground that it was not supported by necessity or consideration and obtained a decree for possession. In execution of the decree the occupancy tenants were turned out of possession. Thereupon they sued for restoration of their occupancy rights. Held that the suit was not barred by *res judicata* or by S. 47 C. P. Code. The occupancy tenants were litigating, in different capacities in the two suits. (Chevis and Abdul Qadir, JJ.) SURAJ KAUR v. NAGINA SINGH. 4 Lah. L. J. 400 : (1922) Lah. 44 : 67 I. C. 485.

Parties.

—S. 11—*Parties—Co-defendants—No conflict of interest—Incidental findings—Suit by reversioners for declaration that alienation should not affect their rights—Mortgagor and Mortgagee—Co-defendants—Finding as to payment of consideration.* See (1921) DIG. COL. 135 DEWA SINGH v. GOKUL. 67 I. C. 881

—S. 11—*Parties—Co-defendants—Decision when operative as res-judicata.*

A decree could not operate as *res-judicata* as between co-defendants if there was no conflict of interest and no decision as between the defendant themselves. It will be an *a fortiori* case where a decision as between the defendants was not necessary to give the appropriate relief to the plaintiff in the suit. 31 C. 95; 25 C. L. J. 322 Ref. (Chatterjee and Panton, JJ.) RAJENDRA KUMAR BOSE v. BISWARUP DEY. 35 C. L. J. 173 : 64 I. C. 603.

—S. 11—*Parties—Co-defts—Partition suit Res judicata.*

Unless it is necessary to decide an issue between the defts. themselves to grant relief to the plff. a decision in a prior suit does not operate as *res-judicata* between co-defts. Where in a prior suit for partition certain parties were arranged as

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co-defts. and the decision in that suit did not decide any question of partition amongst them *inter se* that decision does not operate as *res judicata* as between the co-defts. in a subsequent suit for partition. (*Mearis, C J and Banerji, J.*) MAHOMED AHMAD v. ZAHUR AHMAD. 44 All. 334

4 U P L. R. (A) 55. (1922) All. 19 67 I C. 523 : 20 A L J 193

———S. 11—Parties—Co-defendants—Previous suit for ejectment—No contest between defendants—Validity of partition not questioned—Decision whether *res-judicata*.

The decision in a previous suit for ejecting the defendants on the ground of trespass does not operate as *res judicata* on the question of the validity of the partition deed, where there was no contest between the defendants and where it was not necessary for one of them to raise the question of the validity of the partition. (*Kumarswami Sastri and Devadoss, JJ*) POTHARI ILLATH MADHAVAN NAIR v. CHALIKADAVATH PAKKISSAN THOTIYIL ABDURRAHMAN. (1922) Mad 404.

———S. 11—Parties—Co-defendants—*Res judicata*—Decision when operates as.

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *resjudicata* amongst the defendants, nor will it be *resjudicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim made against them as a group. (*Cottingham v. Earl of Shrewsbury* 3 Hare 627; 11 B. 216 foll)

Subsequent to the execution of a mortgage in favour of the plff. by a Hindu father on behalf of himself and his two sons, a third son was born. In a suit for partition by the two sons against the father, the after born son, the mortgagee and many other defendants, the trial judge held that the mortgage was not binding on the after born son as well as the plaintiffs in the suit and decreed a share to each of the sons. On appeal by the mortgagee impleading the father and the sons as respondents it was held that the mortgage was not binding on them. In a suit by the mortgagee against the father and sons. Held that the suit was barred on account of the decree in the prior suit. (*Schwabe, C. J. Oldfield and Coutts Trotter, JJ.*) KONGA RAMASWAMI IYER v. PONNUSWAMI. (1922) M. W. N: 526 : 31 M L. T. 370 (H C) : 16 L. W. 931 : (1922) Mad. 452.

———Ss. 11 and 92—Parties—Different capacity—Finding in suit for assertion of individual right—Effect on scheme suit.

Where a suit is brought by certain persons under S. 92 C. P. Code with the sanction of the Advocate General for a scheme a finding in a prior suit by them that the defendant was hereditary trustee does not operate as *res-judicata* especially when the court which tried the prior suit is not competent to try the subsequent suit.

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(*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY v. RAJAMMAL.

43 M L J 448 : (1922) M. W. N 464 : 31 M L T. 125 (H. C) : 16 L W. 122 : (1922) Mad, 394. 69 I. C. 15.

———S. 11—Parties—Mortgage suit—Persons interested in equity of redemption not impleaded in first suit—Subsequent suit on the mortgage impleading those persons—Not barred. See C. P CODE O, 34, R. 1. 65 I C 654 (2).

———S. 11—Parties—Identity of, necessary.

Unless the parties to the two suits are the same or represent the same interest the decision of an issue in a prior suit does not bar the decision of the same issue in another suit. 7 A. L. J. 861, 33 All 51 dist. (*Hopkins, S. M and Fremantle, J M*) SHANKERJI MISRA v. MUSAI.

L. R 3 A 79 (Rev.)

———S. 11.—Parties under whom they or any of them claim—Reversioner if claims through widow See HINDU LAW, REVERSIONER

35 C. L J. 348

———S. 11—Parties—Suit for partition—Consent decree—Compromise relating to matters outside suit effect of on subsequent suit. See C. P. CODE, O. 23 R. 3. 48 Cal 1059.

———S. 11—Parties or their representatives.

Defendants got certain property attached and sold in execution of a money decree and themselves purchased it. Plaintiffs sued for possession on the ground that the sale was not binding on them inasmuch as an injunction was issued to the Munsiff to stay the execution proceedings and the Munsiff without waiting for the Subordinate Judge's order cancelling the injunction, confirmed the sale; that when he applied for a review of the order confirming the sale, the application was rejected with an order that a regular suit was necessary. Held the question whether suit can lie is not *res judicata* as the defendants were not parties to or heard in the proceedings in which the order was passed. (*Kotwal, A. J. C.*) BRIJMOHANSINGH v. KASTURCHAND. (1922) Nag. 1891: 68 I C 693.

———S. 11—Parties and representatives—Auction purchaser—Execution of money decree—Decision between decree holder and judgment debtor if binding on auction purchaser.

An auction-purchaser who purchases in execution of a money-decree is bound as between himself and the decree-holder by any previous litigation between the decree-holder and the judgment-debtor whose interests he has purchased. S 11 of the Civil Procedure Code applies to the facts of the case. 22 C. 909 ; 10 C. L J. 150 foll.

14 M L A 101 ; 7 Cal. 107 (P. C.) dist.

14 Cal. 401 diss

The representative of the judgment-debtor seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by statute or common law he can

## C. P. CODE (1908), S. 11.

have no better title than the person through or under whom he claims (*Dawson Miller, C. J. and Coutts, J.*) **KALI DAYAL v. UMESH PRASAD.**

(1922) Pat 33 : 1 Pat 174 : (1922) P. 63 : 65 I. C. 266.

—S. 11—Parties and representatives—Decree in suit by Hindu widow—Reversioners when barred—Reversioners impleaded in first court but not in appeal where judgment in favour of the widow was reversed—Effect of.

To a suit by a Hindu widow for the recovery of the property of her husband from a person who claimed to be his validly adopted son, persons, who were presumptive reversionary heirs of the estate, were made parties defendants. The first court found against the adoption and decreed the suit. The alleged adopted son preferred an appeal making the widow alone a party respondent. The appellate court found in favour of the adoption and dismissed the widow's suit. In a subsequent suit filed after the death of the widow by the reversioners, who were parties defendants to the prior suit against the adopted son. Held that, whatever might have been the character in which plffs. were impleaded in the prior suit, inasmuch as the widow represented the estate in the appeal therein, the decision in the appeal was res-judicata in favour of the adopted son, there being no suggestion of fraud or collusion between the widow and the adopted son in the proceedings in the suit or appeal. The expression "special cause" referred to in the *Shuvagunga* cases 9 M. I. A. 539 must be *ejusdem generis* with unfairness or irregularity in the proceedings to which explicit reference is made. 43 B 869 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) **NACHIKALAI v. AIYAKANNU.** 43 M. L. J. 95 : 16 L. W. 94 :

(1922) M. W. N. 418 : 31 M. L. T. 129 (H. C.) : (1922) Mad 233.

—S. 11—Parties and representatives—Lessee if bound by result of suit against lessor. See (1921) Dig. COL 136. **ANAKKARAN PUTHIYA VALLAPIL MUSSAN HAJI v. THIYAN THAVARAKORAN.** 65 I. C. 979

—S. 11—Parties and representatives—Suit against joint Hindu family—All the members bound by the judgment.

Where a person obtains an *ex parte* decree against the managers of a joint Hindu family business, it is not open to the junior members subsequently to sue for a declaration that their interest is not liable as the contract on which the decree was given was a wagering contract. It was open to the managers to have raised this plea as defence to the previous suit and their omission operates as resjudicata. (*Le Rossignol and Harrison, J.*) **RAM RATTAN v. THE FIRM OF HURSUKH ROY.** 43 P. L. R. 1922.

—Parties and representatives suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision if a bar.

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had

## C. P. CODE (1908), S. 11

set up that he held the land not under A but under C, who was not a party to that suit. The prior suit had been dismissed. Held that the decision in the prior suit was no bar to the trial of the issue as to B's liability for rent 26 C. 428 1011. (*Greaves and Ghose, JJ.*) **GOPINATH v. BHAJAHARI DAS.** 68 I. C. 472.

—S. 11—Parties and Representatives—Widow and daughter's son—Decision in rent suit.

Where in a suit for rent against the widow and daughter's sons of a tenant it is held that the widow was the sole exproprietary tenant and the daughter's sons had no right to the tenancy during her life time, the decision cannot be questioned in a subsequent proceeding for correction of the revenue papers. (*Hopkins S. M. and Burn J. M.*) **RAGHUBAR DAYAL v. GANGA SAHAI.**

L. R. 3 A. 61 (Rev.).

—S. 11—Previous suit—Directly in issue—Suit for damages—Suits tried together—Separate judgments—Issue—Earlier decision if res judicata. See (1921) Dig. COL 134 **GANGADHAR KALWAR v. SEKALI TELINI** 25 C. W. N. 141 : 64 I. C. 574.

—S. 11—Res judicata—Estoppel—Scope of the two rules.

The doctrine of res judicata is sometimes treated as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel properly so called is dealt with in S. 115 of the Evidence Act. There is a difference in the principle upon which the two doctrines are based. Res judicata in this country is founded on the principle that there should be an end to litigation as to any issue has been directly determined between them by a Court of competent jurisdiction, and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset.

Estoppel is a rule of evidence based on the principle that a man who by his acts or statement has induced another to believe a thing to be true should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced. (*Dawson Miller, C. J. and Coutts, J.*) **KALI DAYAL v. UMESH PRASAD.** (1922) Pat 33 : 3 Pat. L. T. 506 : 1 Pat. 174 : (1922) P. 63 : 65 I. C. 266

—S. 11—Mortgage suit—Decree for sale—Purchase—Decision of suit after mortgage but before purchase, whether res judicata.

A purchase in auction sale in execution of a mortgage decree for sale as also the proceedings in which the decree was obtained are part of the working out of the rights of the mortgagee under his mortgage. The rights of the purchaser are not therefore affected by resjudicata by the decision in a suit subsequent to the mortgage though previous to the purchase. (*Oldfield and Venkatasubba Rao, JJ.*) **RAYABHARAN SARAMMA v. DEVA-PURAJALA GANGAYYA.**

(1922) Mad. 390.

—S. 11—Scope of.

The pre-emptor impleaded in his suit only one out of the four brothers, alienees of the property

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purchased, due to a mistake of fact. His suit was decreed, and the entire consideration having been realised by the alienee who was impleaded he was given formal possession. His application for mutation was resisted by the three brothers of the alienees who were not impleaded and their objection was allowed except for  $\frac{1}{4}$  share. In a suit for the possession of the property released in favour of the three brothers or in the alternative for a proportionate refund of the pre-emption money, it was found that the four brothers were separate. *Held*, S. 11 had obviously no application. (*Kanhaya Lal, J.*) **RAM BALI SINGH v. SHIAM SUNDER MISIR.** (1922) All 475

## —S. 11 Expln. II—Right of appeal—Competency of court—Award—Finality.

Under S. 11 Expln II C. P. Code the competency of the court which tried the previous suit is to be determined irrespective of any provisions as to a right of appeal. An award of which a decree has been passed under Sch. II para 21, C. P. Code, operates as a bar to a subsequent suit in respect of the same matter. 25 C. 757 Ref. (*Tennon and Richardson, JJ.*) **GURU CHARAN SIKKAR v. UMA CHARAN SIKKAR.** 26 C. W. N. 490

## —S. 11 Expls. IV and V—Applicability—Execution proceedings.

Although the doctrine laid down in S. 11 C. P. Code may be applied to certain proceedings in execution arising out of the same judgment so as to put an end to the litigation and may possibly be applied in certain cases when separate suits have been brought raising points which have already been decided in execution cases sought between the same parties, the special rules laid down in the explanation to S. 11, which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally to execution cases 37 All 589; 24 Mad. 681 foll. (*Miller, C. J. and Adams, J.*) **PIRTHI MAHTON v. JAMSHED KHAN.** 3 Pat. L. T. 403; (1922) P. 239 67 I. C. 656.

—S. 11—Expl. IV—Constructive *res-judicata*—Deposit under Ss. 83 and 84 of the T. P. Act—Objections.

Where the deft. (mortgagor) deposited the amount due on the mortgage under S. 83 of the T. P. Act and the mortgagee plffs. appeared in answer to the notice of the deposits sent to them under S. 84 of the T. P. Act, the only reason they gave for refusing to accept it as sufficient was that it did not include interest up to the date on which they were summoned to appear in Court. There was no suggestion that it was not the full amount due for principal and interest on the date on which the deposit was made. In a subsequent suit on the mortgage the plff's claimed a much larger amount than was deposited as due under the mortgage. *Held*, on the principle embodied in S. 11 Expl. 4 of the C. P. Code the plffs. could not be heard to say that the amount deposited was less than the sum due to them on the mortgage on that date. (*Hallifax, A. J. C.*) **KESHOO RAM v. BHANGILAL.** (1922) Nag. 174; 67 I. C. 324

—S. 11 Expln. IV—Constructive *res-judicata*—Dismissal of prior suit for non-joinder of parties.

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Where a prior suit for the same relief was dismissed for non joinder of parties, the dismissal does not operate as *res-judicata*. Expln IV to S. 11 C. P. Code deals only with a case which has been tried on the merits. (*Spencer and Krishnan, JJ.*) **KOTASSERI E. V. SANKARAN NIMBI v. KONHOLI I. D. ANTHEJENAM.** 43 M. L. J. 572; (1922) M. W. N. 428; 16 L. W. 26; (1922) Mad 259.

—S. 11 Expln. IV—Constructive *res-judicata*—Matter which might have been made a ground of defence or attack in a former suit—Dekkhan Agriculturists' Relief Act, S. 10 A, Inconsistent pleas.

The plaintiff sold his property to the defendant on the 16th March 1906, but continued in possession as tenant. The defendant agreed, by a *satekhat* executed on the 13th August 1906 to re-sell the property to the plaintiff at any time within twelve years for Rs. 395 and received Rs. 5 as earnest money. The plaintiff sued in 1911 to redeem the property, under S. 10 A of the Dekkhan Agriculturists' Relief Act 1879, alleging that the sale was a mortgage. The suit failed. The plaintiff sued again in 1918 to recover the property on payment of Rs. 395 under the *satekhat*. A question having arisen whether the second suit was barred as *res-judicata*.

*Held*, that the second suit was not barred by *res-judicata*, for the plaintiff was not bound in the first suit to have sued also for specific performance. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. (*Macleod, C. J. and Shah, J.*) **DOLA KHETAJI VAHIVATDAR v. BALYA KANOO PATEL.** 24 Bom. L. R. 236; (1922) Bom. 29; 66 I. C. 815.

## —S. 11 (Expln. IV)—Heard and decided—Counter claim—Plea in—Omission to claim standard rent—Subsequent suit—Plea under Bombay Rent Act, S. 2—Bar

In a suit filed on the Original Side of the High Court against the defendant for rents collected by him on behalf of the plaintiff, the defendant set up a counter-claim in which he prayed for a declaration that he was a monthly tenant of plff. at Rs 185 per mensem and for an injunction restraining the plaintiffs from preventing the defendant's sub-tenants from paying rent to him. The High Court dismissed the plaintiff's suit and granted the declaration and injunction prayed for by the defendant. Plaintiffs subsequently filed a suit claiming arrears of rent at the rate of Rs. 185 per mensem and the defendant pleaded that he was liable to pay only the standard rent of Rs. 150 per-mensem under the Bombay Rent Act.

*Held*, that the defendant having waived the benefit of the Rent Act in the previous counter claim and given up his right and obtained a declaration on that footing was barred by *res-judicata* from setting up the plea under the Rent Act. (*Shah, A. C. J. and Crump, J.*) **FATMABAI v. FRAMROZ.** 24 Bom. L. R. 1281.

C. P. CODE (1908), S. 11.

—S. 11 (Explan. IV)—Might and ought—Res-judicata—Execution of decree against firm—Attachment of property of person not a party to a decree—Objection of liability as partner not heard or decided—Subsequent execution. See (1921) DIG. COL. 143 PHUL CHAND v. KANDHYA LAL.  
44 A. 130 : L. R. 3 All. 1  
(1922) A. 247 : 65 I. C. 295.

—(1908) Ss 11 (Explan. IV) and 47—Sale pursuant to prior mortgage—Rejection of an application by party to reserve his rights under hypothecation bond.

The plaintiff had deposited Rs. 4,500 to release from a Court sale, held under a previous mortgage, the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected but he preferred no appeal. He instituted a suit later on for the recovery of the same. Held, there was no bar to the suit either under S. 11 or 47. S. 47 does not apply because the question raised in the suit cannot be said to relate to the execution, discharge or satisfaction of a decree. S. 11 (Explan. IV) does not apply because in the previous suit on a prior mortgage all that the present plaintiff, as defendants in that suit, could have done was to bring to the notice of the Court his own hypothecation bond and this was done, no further relief could have been asked from him. 24 All. 429 Distinguished, (Abdul Raof and Abdul Qadir, JJ.) RAHIM-UD-DIN v. SHAFQAT ULLAH  
(1922) Lah. 358

—S. 11 (Explan. VI)—Hindu Law—Alienation by widow—Suit by nearest presumptive reversioners questioning alienation—Subsequent suit after widow's death between reversioner and alienee. See (1921) DIG. COL. 145. KESHO PRASAD SINGH v. SHEO PARGASH OJHA  
44 A. 19 : (1922) All. 301 : 64 I. C. 248

—S. 11 (Explan. VI)—Hindu widow or daughter—Decree against—When res-judicata against reversioner. See (1921) DIG. COL. 145 PRAMATHA NATH BOSE v. BUBAN MOHAN BOSE  
49 Cal. 45 : (1922) Cal. 321 : 64 I. C. 980.

—S. 11 (Explan. VI)—Suit against Hindu widow—Decree when binding on reversioners

When a Hindu reversioner brings a suit against a widow in possession of her husband's estate for a declaration that a will set up by her as having been executed by her husband is a forgery the suit is brought by the reversioner to protect an interest common to the entire reversionary body. Explan. VI to S. 11 C. P. Code is applicable and the decision if obtained after fair contest must necessarily bind all the reversioners and it is not open to the reversioner who may happen to be entitled when the succession opens to claim to have the matter reargued. To hold otherwise would be to let in the very mischief which the Explan. was enacted to avoid. On grounds of public policy it would be highly mischievous that a question of fact which was decided after full contest as between the reversioners on the one hand and the widow on the other should be liable to be reopened as between other representations of the same sets of rival claimants after a lapse

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of time 38 M. 406 P. C. ; 39 M. 634 ; 19 A. L. J. 749 ; 40 A. 593 Relied on. (Daniels and Lyle A. J. C.) KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD  
90 L. J. 235 : (1922) Oudh. 236.

—S. 11 (Explan. VI)—Landlord and tenant—Representative Suit See (1921) DIG. COL. 145 SARAT CHANDRA MAITI v. BIBHABATI DEBI.  
66 I. C. 433.

—S. 11 (Explan. VI)—Representative suit—Malabar tarwad—Decision against—Decision of appellate Court operates as Res-judicata.

A decree in a suit in which the karnavan of a tarwad is joined as a defendant in his representative capacity and which he honestly defends is binding on the other members of the family though not actually impleaded parties. In considering the plea of res-judicata it is the judgment of the appellate court that has to be looked to. 20 M. 129 : 3 C. 145, 9 L. W. 84 Ref. (Spencer and Devadoss, JJ.) ABUVAKKAR v. KUNHIKUTTUVALI.  
16 L. W. 769 : 31 M. L. T. 389 (P. C.)

—S. 13—Fraud—Effect of.

Where the decision in a Foreign Court was obtained between the widow and the alleged son of the deceased, it must be held that the widow completely represented the estate and that any decision between the parties in that suit, provided there was a direct adjudication upon the point, is conclusive between them and between their successors-in-title, provided also that the judgment is not disqualified by any of the flaws set forth in S. 13 of the Code. But where the decision is obtained by fraud, it is not res-judicata between the parties (Le-Rossignol and Martineau, JJ.) GOOR BACHAN SINGH v. GIAN SINGH.  
(1922) Lah. 175.

—Ss 16 (d) and 20 (c)—Suit for declaration that a will is a forgery—Determination of right to immoveable property—Cause of action—Jurisdiction.

A suit by a Hindu reversioner for a declaration that a will set up by the widow of the last male owner was a forgery and for its cancellation can be instituted under S. 20 (c) C. P. Code in a court having jurisdiction over any one of the places where any part of the properties dealt with by the will is situate. Such a suit is not one falling within S. 16 (d) of the C. P. Code. In a suit to set aside a will the plaintiff's allegation of interest and the threat to his rights are parts of his cause of action and where the properties are situate within different jurisdictions part of the cause of action arises under each jurisdiction. (Krishnan and Venkatasubba Rao, JJ.) NITTALA ACHAYYA v. NITTALA YELLAMMA.  
43 M. L. J. 615 : 16 L. W. 783

—S. 16 (e)—Suit for mesne profits—Suit in British Indian Court—Land Situate outside British India See (1921) DIG. COL. 146 MAHADEO GOVIND v. RAM CHANDRA GOVIND  
46 Bom. 108 : (1922) Bom. 188 : 63 I. C. 510

—Ss 17 and 20—Cause of action—Sale of goods—Agreement to pay price and render account—Forum.



## C. P. CODE (1908), S. 20

Where a firm at Sialkot instituted a suit in the Sialkot Court against a commission agent carrying on business at Calcutta for sale proceeds of hydes sent by the former to the latter for sale on commission, and it appeared that the money was to be payable at Sialkot and the accounts were to be rendered there, *held*, that the Court at Sialkot had jurisdiction to try the suit. 26 P. R. 1918 ref. (*Broadway and Abdul Qadir, JJ*) LAL SINGH v. THE FIRM OF HAJI KADIR BAKHSI.

3 Lah. L. J. 499 : (1922) Lah. 36.

## —S. 20—Cause of action.

Where several shops were owned by the plaintiff's and separate *Katas* were kept in respect of them but the transactions relating to one shop were with the defendant's consent entered in the accounts of the other shops and the whole set of transactions treated by the defendants in a cross suit filed by them as forming one cause of action and one account: *Held* that the accounts in regard to each shop cannot properly be treated as entirely separate causes of action. (*Daniels, A.J.*) BANKE LAL v. KANHAIYA LAL.

(1922) Oudh. 124

—S. 20—Cause of action—Defendant residing outside jurisdiction—leave of the court—Splitting up of cause of action—Return of plaint—C. P. Code O. 2, R. 2, O. 7, R. 10. See (1921) DIG COL. 147 MAHOMED BHAI HUSEINBHAI v. ADAMI 46 Bom. 229 : (1922) Bom. 152 : 64 I. C. 919

—S. 20—Cause of action—Jurisdiction—Carrying on business—Objection to jurisdiction.

Where there has been no failure of justice an objection to the place of suing could not be entertained on appeal.

It is doubtful whether the mere letting of house property through an agent can be said to be carrying on business. A contract is concluded where it is accepted and the place of suit in respect of its breach is the place where it was concluded or the place where it ought to have been performed. The mere sending of a cheque from a particular place towards the contract does not give rise to a cause of action in that place. (*Campbell, J.*) SOHAN SINGH v. RIDDICK (1922) Lah. 164 : 66 I. C. 865

—S. 20—Jurisdiction—False allegations—Abuse of the process of court.

Where in order to bring a suit within the jurisdiction of a court of a particular locality, the plaintiff makes false statements knowing them to be false, that is a fraud on the court and the court would have no jurisdiction to entertain the suit (*Mears, C. J. and Banerji, J.*) ABDUL GHAFUR v. NURUDDIN AHMAD. 20 A. L. J. 984.

—S. 20—Jurisdiction—Place of business—Test of—Joint Hindu family carrying on a business.

A man may carry on business either personally or through an agent and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than any other. He acts on behalf of the family and

## C. P. CODE (1908), S. 20

in its interests and each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is therefore liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists (*Shadi Lal, C. J. and Harrison, J.*) JAMNA DAS v. MURLIDHAR. 67 I. C. 69.

—S. 20—Cause of action—Meaning of.

A cause of action includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his rights to the judgment of the Court. (*Wazir Hasan, A. J. C.*) MAHOMED HAMIDULLAH KHAN v. FAKHRJAHAN BEGAM. (1922) Oudh. 109 : 65 I. C. 452.

—S. 20 (a)—“Carries on business” Meaning of—Personal presence or personal effect not necessary. See (1921) DIG, COL. 148. KIRPA RAM SITARAM v. MANGAL SEN BISHAN MAL. (1922) All. 367 : 65 I. C. 93.

—S. 20 (b)—Leave to sue—Ex parte grant of.

Leave to sue may be granted under S. 20 (b) C. P. Code without previous notice to the defendant. (*Robinson, C. J. and Heald, J.*) THE INDO-BURMA OIL FIELDS, v. BURMA OIL COMPANY, LTD. 11 L. B. R. 26 : 64 I. C. 794.

—S. 20 (c)—Cause of action—Contract—Place of payment.

Where money payable to plaintiff is, according to the contract, to be paid at one place but is made in another owing to the plaintiff's own default, advantage cannot be taken of that fact to give plaintiff a choice of forum, (*Leslie Jones, J.*) FIRM OF DAMRI SHAH THAKUR RAM v. FIRM OF RULIA MAL DOGAR MAL. 17 P. L. R. 1922 : 64 I. C. 387.

—S. 20 (e)—Cause of action—Meaning of. See C. P. CODE SS. 16 (d) AND 20 (c).

43 M. L. J. 615.

—S. 20 (o)—Contract for sale of goods—Place of delivery—Breach.

Pliffs, carrying on business at Amritsar brought a suit in the court of Amritsar against a firm carrying on business at Bombay for damages for breach of a contract made in Bombay, to sell goods to pliffs. *Held* that delivery of the goods by the defts. to the Railway Company in Bombay for being despatched to Amritsar, would by S. 98 of the Contract Act, have operated as a delivery to the plaintiffs and the Railway Co. would have held the goods as agents of the plaintiffs, consequently no part of the cause of action arose at Amritsar. (*Martineau, J.*) FIRM OF NAND LAL, DAS MAL v. FIRM OF MIAN MAHOMED ALI. 67 I. C. 188 (1).

—S. 20, cl. (o)—Decree—Setting aside—Cause of action.

Where a decree is sought to be set aside on the ground of fraud and no other relief is sought, the Court that has jurisdiction to entertain the suit is the Court in the District where the fraud was committed and the decree obtained 29 All. 418 ref. Where, however, the fraudulent decree is

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threatened to be executed and there is a prayer for an injunction in addition to the relief for a declaration that the decree is null and void, the suit can be instituted in the district where the execution proceedings are threatened, (*Chatterjee and Pearson, JJ.*) *THE INDIA PROVIDENT COMPANY v. GOBINDA CHANDRA DAS*, 65 I. C. 318.

———S. 20 (c)—*Jurisdiction—Contract for delivery of goods—Breach.*

Where a contract was made in Bengal for delivery of goods in Bengal, the mere despatch of goods from a place in the United Provinces does not give rise to a cause of action enforceable in the courts of the United Provinces in respect of the breach of the contract (*Ryves, J.*) *PURNA CHAND AMIR CHAND v. JODH RAJ RAM KUMAR*, (1922) All. 448 : 66 I. C. 501.

———S. 20 (c)—*Pledge—Cause of action—Forum.*

The place where the cause of action arises in respect of a pledge must be determined with reference to the terms of the original contract and not by subsequent negotiations thereafter. (*Kotwal, A. J. C.*) *TEK CHAND v. MAHADEO*, (1922) Nag. 127 : 65 I. C. 65.

———S. 20 (c)—*Suit for damages—Breach of contract of marriage—Forum.*

In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place. (*Coutts and Bucknill, JJ.*) *MATHURA PRASAD SINGH v. SATYANARAYANA PRASAD*, 65 I. C. 812.

———S. 21—*Limits of applicability.*

In order to satisfy the court under S. 21 of the C. P. Code it is necessary to show not merely that the suit was decided wrongly but that its being decided wrongly was in some measure due to its having been instituted in a court of wrong local jurisdiction. (*Daniels, A. J. C.*) *BANKE LAL v. KANHAIYA LAL*, 1922 Oudh. 124.

———S. 23 (3)—*Transfer of suit—Chief Court—Original Side—Application to be made to which Court.*

For administrative purposes the Original side of the Chief Court of Burma is not subordinate to the Appellate Side but for the purposes of appeal it is subordinate. Consequently an application for the transfer of a suit from the original side of the Chief Court may be made to the appellate side. (*Robinson, C. J. and Duckworth, J.*) *RAMANATHAN CHETTY v. RAMANATHAN CHETTY*, 1 Bur. L. J. 194.

———S. 24 and O. 41, R. 23—*Case remanded by High Court to Dt. Court—Power of Dt. Judge to transfer case.*

Under S. 24 a Dt. Court to which an appeal has been remanded by the High Court for disposal has power to transfer it to the Court of the additional Dt. Judge unless the High Court's order was drawn up in express terms so as to disclose a clear intention of limiting those powers.

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(*Piggott and Walsh, JJ.*) *RAJKALI v. GOPI NATH NAIK*, 44 A. 211 : 20 A. L. J. 44 : (1922) All. 35 : 66 I. C. 317.

———S. 24—*Transfer of case—Adverse decision on a point of law in a connected suit.*

The fact that a judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in which the same point arises. (*Martineau, J.*) *FIRM OF JAI NARAIN BABULAL v. THE FIRM OF JOHRI MAL CHUNNA MAL OF DELHI*, (1922) Lah. 369 : 67 I. C. 228.

———S. 24—*Transfer of case—Grounds for—Balance of convenience.*

A plaintiff has an undoubted right to bring his suit in any court which has jurisdiction but there is no particular sanctity to be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred. (*Ashworth and Simpson, A. J. C.*) *THAKUR NARINDRA BIKRAM JIT SINGH v. SHEO RATAN THAKUR*, 9 O. L. J. 413.

———S. 24—*Transfer of suit from one province to another—Balance of convenience.*

When a litigant applies for the transfer of a case from one province to another the court will insist on his making out a strong case of the balance of convenience. 14 A. L. J. 242 Rel. 17 A. L. J. 371 not foll. (*Piggott and Walsh, JJ.*) *INAYAT-ULLAH KHAN v. NISAR AHMAD KHAN*, 44 A. 278 : L. R. 3 A. 97 : 20 A. L. J. 118 : (1922) All. 65 : 65 I. C. 782.

———S. 24 (4)—*Plaint returned by Small Cause Court—District Judge sending case to Munsif—Decision—if appealable—Prov. Sm. C. C. Act, S. 23.*

A Small Cause Court, finding a question of title to immovable property raised sent the plaintiff to the District Judge who in his turn sent it to a Munsif, First Class, for disposal. Or appeal from the decision of the latter.

Held, that the District Judge must be deemed to have acted under S. 23 of the Provincial Small Cause Courts Act, and not under S. 24, C.P. Code. The Munsif could not, therefore, be deemed to have tried it as a Small Cause Court under S. 24 (4) C. P. Code and his decision was appealable. (*Scott Smith, J.*) *AMIR DIN v. MUST. LACHIA*, 64 I. C. 335.

———S. 26—*Plaint—Presentation—Mode of—Delivery of plaint at private residence of Judge.*

The presentation of a plaint after the usual court hours at the private residence of the judge is valid. A Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so, 34 A. 482 Relied on. (*Dhobley, A. J. C.*) *MADHORAO v. MANOHAR LAL*, (1922) Nag. 167 : 65 I. C. 674.

———S. 27—*Suit duly instituted—Meaning of—Dismissal of suit for non-payment of deficit court-fee—Review without notice to otherside.*

## G. P. CODE (1908), S. 34

A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the defendant and time was granted for putting in the deficit court fee:

*Held*, that at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage, of the case can be reviewed without notice to the defendant. 8 W. R. 304 and 14 M. L. J. 7 ref. 43 C. 178 appl. 26 C. W. N. 391. (*Newbould, J.*) SURENDRA PRASAD LAHIRI CHOUHDURY v. ATTABUDDIN AHMED. 26 C. W. N. 391: (1922) Cal. 234

## —S. 34—Interest—Discretion of Court.

Under S. 34 of the C. P. Code the Court has a discretion as to the rate of interest to be awarded after the institution of the suit till judgment and where the courts below had awarded 8 per cent. the Privy Council refused to interfere. (*Viscount Haldane.*) PANNAH LAL v. NIHALCHAND

43 M. L. J. 66: (1922) M. W. N. 376  
26 C. W. N. 737: 16 L. W. 80: 36 C. L. J. 5  
24 Bom. L. R. 971: 31 M. L. T. 129 (P. C.)  
2 P. L. R. (P. C.) 1922: (1922) P. C. 46:  
67 I. C. 423 (P. C.)

## —S. 34—Interest—Discretion of Court—Interest not asked for in the plaint—C. P. Code, O. 7, R. 7.

Having regard to the provisions of O. 7, R. 7 of the Code the Court has discretionary power to grant interest under S. 34 of the Code in a suit for money, although interest was not specifically asked for in the plaint. (*Broadway and Abdul Qadir, JJ.*) RUP RAM v. HARPHUL.

2 Lah. 256: 64 I. C. 896.

## —S. 35—Costs—Delay in litigation—Determination of costs.

The fact that the delay in the final disposal of the suit took place owing to the laches of the plaintiff could be taken into consideration in dealing with the question of costs. (*Chatterjee and Panton, JJ.*) SIBA PRASAD DAS CHOUHDURY v. KAZIMUDDIN SARKAR. 65 I. C. 709.

## —S. 35—Costs—Discretion—Grounds for exercise of—Interference on appeal.

Where a court in the exercise of its discretion deprives a successful party of costs it ought to state its reasons or the principles on which it has exercised its discretion. Where there has been no real exercise of discretion, or where it is exercised on wrong principles or misapprehension of facts, an appellate court may interfere with the order of the trial Court as to costs. Similarly where the lower appellate Court interferes with the discretion of the trial Court where such interference is unjustified the High Court can interfere in second appeal (*Walsh, J.*) HAKIM ZAHRU AHMAD v. FATEHULLAH. 3 U. P. L. R. (A) 55: 64 I. C. 962.

## C. P. CODE (1908), S. 41

## —Ss. 38 and 47—Execution sale—Suit to set aside.

Under S. 38, Civil Procedure Code, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the Trial Court is not the Court to which the decree is sent for execution, this section prevents it from proceeding with the suit as a matter in execution and executing the decree (*Kotwal A J C.*) BRIJMOHANSINGH v. KASTURCHAND. (1922) Nag. 189: 68 I. C. 693.

## —S. 39—Transfer of decree—Award under the Co-operative Societies Act—Application to enforce award—Co-operative Societies Rules 31 and 34.

An award was made at Poona under the rules framed under S. 43 of the Co-operative Societies Act 1912, which made it enforceable in the same manner as a decree of the Court. The party to the award next applied to the Judge of the Court of Small Causes at Poona to transfer the decree to the Court of Small Causes at Bombay, under S. 39 C. P. Code.

*Held*, that inasmuch as the Poona Court could execute the decree as if it had passed it, it could also transfer the decree under S. 39 C. P. Code.

Rule 34 of the Co-operative Societies Rules, 1919, framed under S. 43 of the Co-operative Societies Act, is not clearly worded. (*Macleod, C. J. and Shah, J.*) KRISHNAJI SHRIDHAR BARDE v. MAHADEO SAKHARAM PATIL.

24 Bom. L. R. 909: (1922) Bom. 377.

## —S. 39—Transfer of decree—Court to which decree is transferred—Competency of jurisdiction.

A decree cannot be transferred for execution to a court which has no pecuniary jurisdiction to entertain the suit in which decree was passed. The legislative changes introduced in S. 39 (2) i. e. that when the court *suo motu* transfers a decree to a subordinate court, the latter court must be "of competent jurisdiction" does not mean that under S. 39 (1) a decree may be transferred to any court for execution, irrespective of its pecuniary jurisdiction. (*Jwala Prasad and Bucknill, J.*) AMRIT LAL v. MURLIDHAR. 3 Pat. L. T. 422: (1922) Pat. 229: (1922) P. 188: 67 I. C. 538.

## —Ss. 41, 42 and 39—Scope of.

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 37 Mad. 231 distinguished 20 All. followed. (*Batten, J. C. and Halifax, A. J. C.*) INDRA RAJ SINGH v. MURADKHAN. (1922) Nag. 210: 68 I. C. 657.

C. P. CODE (1908), S. 42.

—S. 42—Application for transfer of decree—Decree already transferred for execution by court which passed it—Application for further transfer to be made to court where execution is pending. See LIM ACT, ART. 182 (5)  
24 Bom L. R. 798

—S. 42—Transfer of decree—Order for, effect of—Jurisdiction of Court which passed the decree.

Where a decree holder obtains an order for the transfer of a decree by the Court which passed it to another Court for purposes of execution, but the decree is not actually sent to that Court the Court which passed the decree has jurisdiction to execute it. (*Miller, C. J. and Jwala Prasad, J.*) RAM CHANDRA MARWARI v. KRISHNA LAL MARWARI.

1 Pat. 328 3 Pat. L. T. 298 : 1922 P. 301 : 65 I. C. 332.

—S. 47 and O. 21, R. 40—Appeal—Arrest of judgment debtor

An order of the executing Court refusing to arrest the judgment debtor in execution of a decree is an order falling within the scope of S. 47 of the C. P. Code. Such an order is therefore appealable. (*Martineau, J.*) LALA DAS v. MINA MAL. 4 Lah. L. J. 266 : (1922) Lah. 259.

—S. 47 and O. 21, R. 58—Appeal—Claim by legal representative of judgment-debtor—Order on—Remedy by suit or appeal.

The provisions of S. 47 C. P. Code should receive the widest interpretation. Where the legal representative of a deceased judgment-debtor raises an objection to the attachment of certain property in his hands on the ground that it is his own property and not that of the deceased, the question must be investigated under S. 47 C. P. C. and not under O. 21, R. 58, C. P. C. There is an appeal against the order of the court on the claim petition. 17 C. 711 19 C. W. N. 517 Ref. (*Coutts and Das, JJ.*) NAURATAN LAL v. MRS. MARGARET ANNE STEPHEN 3 Pat. L. T. 613 : 68 I. C. 389.

—S. 47 and O. 21, R. 58—Appeal—Objection by party that property is not liable to attachment. See (1931) DIG. COL. 153. JAMINIBALA DEBI v. KARALI PRASAD MUKHERJEE. 67 I. C. 6

—S. 47 and O. 21, R. 58—Appeal—Objection petition of judgment debtor—Dismissal of—Order not appealable.

An application put in by a judgment debtor that the property sought to be attached is wakf property and as such is not attachable is one falling under O. 21, R. 58 and not under S. 47. No appeal lies from any order passed on such an application. (*Coutts and Das, JJ.*) SHAIKH NAZIR HUSSAIN v. MAHOMMAD EJAZ HUSSAIN.

3 Pat. L. T. 432 : (1922) P. 196 : 67 I. C. 438.

—S. 47—Appeal—Mortgage decree—Execution—Objection as to liability to pay court-fee—Question relating to execution. See C. P. CODE, SS. 2 (2) AND 47. 3 Pat. L. T. 146

—S. 47 and O. 43, R. 1—Appeal—Order dismissing execution application for default.

C. P. CODE (1908), S. 47.

An order dismissing an application for execution for default of the decree holder is not appealable. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA ROY v. JANARDAN PRASAD THAKUR. 68 I. C. 337.

—S. 47 and O. 21, R. 66—Appeal—Order settling terms of sale proclamation.

An order settling the terms of a sale proclamation and directing its issue is not appealable. 16 C. W. N. 124 ; 16 C. W. N. 970 Ref. (*Sanderson, C. J. and Chotzner, J.*) JOGESH CHANDRA CHOUDHURY v. HEMENDRA KUMAR ROY. 35 C. L. J. 170 : 64 I. C. 547.

—S. 47 and O. 41, R. 5—Appeal—Question relating to execution—Refusal to stay execution.

There is no appeal from an order refusing to stay execution by an appellate court. (*Harrison, J.*) KANHAYA LAL v. RAM GOPAL.

68 I. C. 49

—S. 47—Appeal—Stay of execution,

All questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable.

A decision that execution shall or shall not take place for the time being is a question relating to execution and is appealable. (*Le Rossignol, J.*) SARDAR KHAN v. FATEH DIN.

68 I. C. 751.

—S. 47 and O. 21, Rr. 98 and 102

—Appeal—Suit in ejectment—Transfer of suit property pendente lite—Transfer in pursuance of prior agreement to sell—Transferee not a party to the suit—Decree in ejectment—Decree-holder applying for delivery—Obstruction by transferee. See (1921) DIG. COL. 153. N. K. M. MEYVAPPA CHETTI v. MEYVAPPA CHETTI. 66 I. C. 722.

—S. 47—Bar of suit—Decree for possession—Obstruction—Subsequent suit for declaration of title—If maintainable—Remedy of party.

Where a decree of court awards a person possession of properties, his duty is to proceed under the C. P. Code and if obstructed to proceed under the provisions of O. 21, Rr. 97-100. A subsequent suit for declaration of title is barred by S. 47. (*Das and Adams, JJ.*) SOVANJI JENA v. BHIMA RAY. 1 Pat. 157 : (1922) P. 407.

—S. 47—Bar of suit—Execution proceedings against minor—No affidavit as required by O. 32, R. 3—Failure of guardian to appear—Suit to declare sale a nullity—Limitation.

Proceedings in execution were commenced against a judgment debtor, but on his death his minor sons were brought on record. In appointing a guardian for them, the affidavit under O. 32, R. 3 was not put in. The guardian did not appear on their behalf at any stage and prior to the confirmation of the auction sale though the court specifically sent him notice to appear in court and pay up the small decree amount, the guardian did not pay any attention to the notice but actually purchased the properties himself some months later from the court auction purchaser. In a suit by the minors to set aside the sale: Held. (1) the minors not being represented at

## C. P. CODE (1908), S. 47.

all, cannot be considered parties to the proceedings and S. 47 of the C. P. Code did not bar the suit; (2) not being parties, the suit was governed by Art. 144 and not Art. 12 of the Lim Act (*Harrison, J.*) *ALAM DIN v. ALLAH DAD*

67 I. C. 547.

## —S. 47—Bar of suit—Objection if can be raised by way of defence

An objection, which could not have been raised by plaintiff in a suit by him under S. 47 C. P. C., can be made the ground of defence in a suit by another 26 Cal. 946 followed. (*Walmsey and Suhrawardy, JJ.*) *SURADHANI DUTTA v. SITTOO SHEIK* 1922 Cal. 311.

## —S. 47—Bar of suit—Possession in execution proceedings—Subsequent dispossession—Remedy.

Where in the course of execution proceedings, the decree holder got possession of the properties though not through the Court officer, and was subsequently dispossessed by the judgment debtor, a suit to recover possession is maintainable. (*Chevis and Harrison, JJ.*) *RUP CHAND v. ALLAH JAUNAYA.* 68 I. C. 744.

## —S. 47—Bar of Suit—Subsequent suit for ejectment on fresh cause of action.

Plff's father obtained a decree for possession against the deft. who admitted his right after the passing of the decree and paid him all costs of the suit. Subsequently deft. set up adverse possession. Held that a fresh suit for possession was not barred. (*Gokul Prasad and Stuart, JJ.*) *JETHU MISIR v. GODAWARI DUTT.*

L R. 3 A. 404 : 20 A. L. J. 619 : (1922) All. 411.

## —S. 47—Bar of suit—Representative character of parties.

Where in a suit to set aside an execution sale, the plaintiffs were the representatives of judgment-debtor and the defendants were the decree-holders in the suit in which the decree was passed and the matter related to an execution of a decree. Held Sec. 47 applied to the case (*Kotwal, A. J. C.*) *BRIJMOHANSINGH v. KASTURA CHAND.* 1923 Nag. 189. 68 I. C. 693.

## —S. 47—Bar of suit—Suit for declaration of satisfaction of decree—Maintainability.

A suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under S. 47 C. P. Code. (*Chevis, Abdul Raoof, and Abdul Qadir, JJ.*) *RAM LABHAYA v. FIRM OF MUKUNDH MAL KAPUR CHAND*

3 Lah. 319 : 67 I. C. 593 (F. B.)

—Ss. 47 and 50—Execution proceedings—Legal representatives not brought on record—Sale void—Right of redemption. See (1921) Dig. Col. 156. *RAGHUNATHASWAMI AIYENGAR v. GOPAUL RAO* 15 L. W. 123 (1922) Mad. 307 : 68 I. C. 667.

## —S. 47 and O. 21, Rr. 92 and 103—Execution sale—Decree holder selling his own

## C. P. CODE (1908), S. 47.

## properties by mistake—Confirmation of sale—Remedy of decree-holder.

Where a decree holder under a *bona fide* mistake brought to sale in execution some of his own properties and they were purchased by a stranger and the sale was confirmed. Held that, thereafter the decree-holder's only remedy was by a suit under O. 21, R. 103, C. P. C. and that an application under S. 47, C. P. C. was incompetent. (*Ayling O. C. J. and Odgers, J.*) *RAMASWAMI KONAN : KOLANDAIVELU PILLAI.* 15 L. W. 272 : (1922) M. W. N. 121 : (1922) Mad. 63.

—S. 47 and O. 21, R. 90—Execution sale—Mortgage decree—Execution for costs only—Sale of share of the mortgaged properties—Not void but irregular. See (1921) Dig. Col. 157. *KAMINI KUMAR BHOUMIK v. PROTAP CHANDRA BHOUMIK.* 66 I. C. 608.

—S. 47—Execution sale—Setting aside—Illegality or irregularity—Limitation—Art. 166 and not art. 181 of the Lim. Act applicable. See LIM. ACT, ART. 166 AND 181.

(1922) M. W. N. 176.

—S. 47 and O. 21, R. 90—Execution sale—Setting aside—Property included in decree by mistake and sold in execution—Suit for recovery of-maintainability.

Where property outside the suit had been included by a mistake in the decree and was sold in execution and 2 years after the sale and its confirmation, the plff. sued for the recovery of the property or its value. Held that the suit could not lie until the court sale was set aside, if not being a nullity, and that the plff. not having set aside the sale within the period prescribed by Art. 166 of the Lim. Act the suit was barred. (*Macleod, C. J. and Coyajee, J.*) *NAGABHATTA v. NAGAPPA.* 24 Bom. L. R. 423 : 67 I. C. 857.

—S. 47—Execution sale—Setting aside—Purchase by decree-holder without obtaining leave to bid or in spite of refusal of leave—Sale not void but voidable—Application to set aside—Limitation, See LIM. ACT, ART. 12.

3 Pat. L. T. 529 (P. C.)

—S. 47 and O. 21, R. 90—Execution sale—Application to set aside—Limitation. See LIM. ACT, ART. 166. 43 M. L. J. 184.

—S. 47 and O. 21, R. 100—Parties and representatives—Application under O. 21, R. 100.

*Semble* :—A person, who is a representative of the judgment debtor within the meaning of S. 47 of the C. P. Code might maintain an application under O. 21, R. 100 of the C. P. Code 3 Pat. L. J. 579 doubted. (*Shurawardy and Cuming, JJ.*) *GIRIBALA DAS v. L'RIANATH PAL*

65 I. C. 476.

—S. 47—Parties and representatives—Auction purchaser—Not a representative of Judgment-debtor.

An auction purchaser is not a representative of the judgment-debtor and he cannot apply under S. 47, C. P. Code to set aside an execution sale.

## C. P. CODE (1908), S. 47

34 M. 417; 42 B. 411 Ref. (*Prideaux, A. J. C.*)  
BALWANT V RATAN LAL. 68 I. C. 429

—S. 47—Parties and representatives—  
Execution sale—Property taken in excess of  
what was sold—Auction purchaser—Application  
by judgment debtor.

A complaint by the judgment-debtors that the auction purchaser had taken possession of certain property not covered by the sale, cannot be tried in execution but only in a separate suit. The auction-purchaser is not a party to the suit and even assuming he is the representative of the judgment-debtor, S. 47 does not authorise the trial of questions arising between a party and his own representative.\* 25 B. 631 foll. (*Batten and Kotwal, A. J. C.*) PANDURANG V. GOPIKISAN.

64 I. C. 860

—S. 47—Parties and representatives—  
Purchaser of non-transferable holding—Right  
to object to execution proceedings against original  
tenants.

Where the landlord has accepted rent for a long period from the purchaser of a non-transferable occupancy holding as marfatdar he has a locus standi, under S. 47, C. P. Code, to object to execution proceedings against the original tenant in respect of his holding.

The use of the word "marfat" in a rent-receipt is not sufficient to resist the claim of the purchaser to take objection under S. 47, C. P. Code, (*Newbould, and Cumming, JJ.*) GAGAN CHANDRA MANNA V. NAFAR CHANDRA GHOSE.

64 I. C. 124.

—S. 47—Parties and representatives—  
Purchaser from auction purchaser decree holder.

The purchaser from the decree holder auction purchaser is not a representative of the decree holder *qua* decree-holder. His suit is therefore not barred by S. 47 as he is not a representative of the decree holder and as the question does not relate to execution, discharge and satisfaction of a decree. A purchaser from a decree holder auction purchaser no doubt acquires the interest and the rights of the auction purchaser, but he is not to be deprived of the rights of an ordinary auction purchaser to bring a suit at any time within twelve years to recover possession (*Robinson, C. J. and Heald, J.*) MI. AH KOOK V MI HLA MO WAY. (1922) L. B. 18: 64 I. C. 68.

—S. 47—Parties—Unnecessary party. See  
(1921) DIG. COL. 158. JAMINIBALA DEBI V.  
KARALI PRASAD MUKERJEE. 67 I. C. 6.

—S. 47 and O. 21 R. 2—Question relating  
to execution—Adjustment of decree—Not certified—Fraud—Executing Court—No power to  
enquire. See C. P. CODE, O. 21, R. 2.

1 Bur. L. J. 226.

—S. 47 and O. 21, R. 16—Question relating  
to execution—Application by decree holders  
to execute—Assignment—Determination of right  
of assignee.

Where a decree holder applying for execution wanted his application to be dismissed only if the assignment was considered to be binding upon

## C. P. CODE (1908), S. 47.

the assignee so that the latter could be made liable for the money mentioned in the deed of assignment, it would be wrong to hold that while the assignment should be considered as binding upon the assignor so far as his rights under the decree are concerned the assignee should be able to wriggle out of his liability for the price of the assignment by relying upon fraud. The transaction is an undivided one and must be viewed as a whole. Where the order of the Court dismisses the application for execution, it adversely affects the rights of the decree holder against the judgment debtor and consequently determines a question relating to the execution or discharge or satisfaction of the decree. Such an order is therefore appealable, (*Shadi Lal, C.J.*) HARDITTA V NIGHAHIA MAL.

4 Lah. L. J. 259 :  
(1922) Lah. 396.

—S. 47 and O. 21, R. 2—Question relating  
to—Execution and satisfaction of decree—Ap-  
plication for certifying payment—Order on—If  
appealable.

An application by the judgment debtor for certifying payments by him to the decree-holder out of court raises questions as to the execution and satisfaction of the decree, and as such falls under S. 47 C. P. C. The dismissal of such an application gives a right of appeal to the judgment-debtor. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH V SHEONANDAN PRASAD.

(1922) Pat. 200 : 3 Pat. L. T. 487 : (1922) P. 276 :  
1 Pat. 644 : 68 I. C. 645.

—S. 47 and O. 23, R. 3—Question relating  
to execution—Compromise of suit—Decree—Ob-  
jection to validity of—Remedy by suit. See (1921)  
DIG. COL. 159. ANA-PAKIRI SHA V. SOMASUNDA-  
RAM SERVAI. (1922) L. B. 22 : 64 I. C. 391.

—S. 47—Questions relating to execution  
—Decree for possession of share in Ijmali Mahal  
—Partition—Enquiry into shares.

A decree for possession of a share in an Ijmali Mahal can be executed against the specific lands which have been allotted in lieu of the share in partition proceedings. An enquiry as to what are the lands thus substituted is one relating to the execution of the decree and falls under S. 47, (*Sir John Edge.*) RAI BAJNATH GOENKA V. RAVANESHWAR PRASAD SINGH.

43 M. L. J. 124 : 1 Pat. 378 : 20 A. L. J. 650 :  
(1922) M. W. N. 415 : 31 M. L. T. 43 (P. C.)

16 L. W. 128 : 36 C. L. J. 1 :

26 C. W. N. 906 : 3 Pat. L. T. 547 :

L. R. 3 P. C. 146 : 24 Bom. L. R. 974 :

(1922) P. C. 54 : 49 I. A. 139 (P. C.)

—S. 47—Question relating to execution or  
discharge—Discharge antecedent to decree.

Questions relating to the execution of a decree and arising between parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. A claim that the debt on which the decree sought to be executed was obtained had been discharged before suit is not within S. 47 C. P. Code. (*Broadway, J.*) RAM DAS V. S. P. NETTO. 4 U P. L. R. (Lah) 93 : 67 I. C. 753.

C. P. CODE (1903), S. 47.

—S. 47—Questions relating to execution—Lease *pendente lite*—Liability of lessee for mesne profits—If falls within section. See C P CODE, O. 22, R. 10 AND S. 47 49 I. A. 220

—S. 47—Question relating to execution, discharge or satisfaction—Application for mesne profits under S. 144—Nature of. See COURT FEES ACT, SCH II, ART 11 18 N L R 15.

—S. 47—Question relating to execution discharge or satisfaction—Mortgage decree—Execution—Objection as regards payment of court-fee. See C. P. CODE, Ss 2 (2) AND 47. (1922) F 59 : 3 Pat. L T. 146.

—S. 47—Questions relating to execution—Mortgage sale—Application by party to reserve rights under hypothecation bond—Dismissal—Suit for enforcement not barred. See C. P CODE, S. 11 Exp IV AND 47. (1922) Lah. 358

—S. 47 and O 21, R. 2—Question relating to execution—Non certification—Enquiry—Fraud—Effect of.

O. 21, R. 2 of the C. P. Code does not in any way limit or affect the operation of S. 47 of the C. P. Code and does not prevent the Court from investigating a question of fraud on the part of the decree holder in omitting to certify satisfaction of a decree. (Rutledge, J.) P. R. P. L. CHETTY FIRM v G. LON POW. 1 Bur. L. J 43 : (1922) L. B. 31 : 11 L. B. R. 363 : 68 I. C. 924

—Ss. 47, cl. (2) and 144—Restitution—Suit for conversion into execution application.

Where a suit is brought for restitution in spite of the provision in S. 144 of the C. P. Code, it is open to the Court to treat the suits as a proceeding in execution in the exercise of its powers under S. 47 cl. (2) of the C. P. Code. 13 Bom. 485; 28 Mad. 355, 45 Bom. 1137, 25 All. 441 foll. (Pradeaux, A. J. C.) JAMANLAL v. RAGHO (1922) Nag 198 : 67 I. C. 319

—S. 47 (3) and O. 22, R. 5—Question relating to execution—Legal representative of deceased decree-holder.

Where in the course of execution proceedings the decree-holder dies and a question arises as to who are his legal representatives entitled to execute the decree, the question must be decided by the executing court. (Hopkins, S M and Burn, J. M) MUSTAFA HUSAIN KHAN v CHET RAM L R 3 A. 473 (Rev.)

—S. 48—Fraud, Meaning of—Fivolous and futile objections to execution.

"Fraud" in S. 48 C. P. Code should be understood in a large and liberal sense. The delaying of execution by frivolous, futile and dishonest objections on the part of the judgment debtors amounts to fraud. 6 A. L. J. 401; 9 A. L. J. 17 foll 11 Q. B. D. 270 ref. (Piggott and Walsh, JJ.) LALTA PRASAD v. SURAJ KUMAR.

44 All. 319 : L. R. 13 A. 111 : 20 A. L. J. 185 : (1922) All 145 : 65 I. C. 877.

—Ss. 48 and 73—Fresh application—Continuation of old application—Rateable distri-

C. P. CODE (1908), S. 51

bution—Revision. See (1921) DIG. COL. 160. RENTALA VEERA RAZU v. KURUVELLA SUBBA-RAYUDU. (1922) Mad 3 : 15 L. W 245 : 64 I. C. 493.

—S. 48—Mortgage Decree under Dekhan Agriculturists' Relief Act—No necessity for decree absolute—Effect of making decree absolute—Limitation.

Where a decree is passed under the Dekhan Agriculturists' Relief Act, there is no necessity to apply to the court to make it absolute. On default of payment of any instalment, execution can be applied for, and an application to have the decree made absolute would at best be considered as a step-in-aid of execution. Hence when the application for execution is put in more than 12 years from the date when the decree could have been executed, though within 12 years from the date of decree absolute, it is barred under S. 48 C. P. Code. (MacLeod, C. J. and Shah, J.) HIRACHAND KHEMCHAND GUJAR v. ABA LALA PATIL. 46 Bom 761 : 24 Bom. L. R. 269 : (1922) Bom 95 67 I. C. 153

—S. 48—Mortgage decree—Time when runs—Execution sale—Mortgage not paid in full—Personal decree—Insolvency of judgment debtor—Application by mortgagee to be entered in the list of scheduled creditors. See (1921) DIG. COL. 160, BARANASHI KOER v BHABADEB CHATTERJE 66 I. C. 758.

—S. 48—Scope of—Period under, if can be extended. See LIM. ACT. S. 15

43 M L. J. 168.

—S. 48, (b) O. 20, R. 11—Starting point—"Subsequent order"—Meaning of.

The subsequent order, directing payment in S. 48 Cl. (b), means an order made by the court which passed the decree acting as that court and not as an executing court. O. 20, R. 11 also refers to an order passed by the court, which made the decree. 40 All. 198 foll, 11 Cal 143 dissented. 14 Cal. 348 Ref. (Coultis and Adams, JJ) GOBARDHAN PRASAD v. BISHUNATH PRASAD 2 Pat. L. T. 80.

—S. 51—Personal decree—Right to arrest Judgment debtor

Every personal decree does not carry with it a right to arrest the Judgment debtor in execution. There are exceptions as in the case of minors, legal representatives, and females against whom a decree has been passed or is sought to be executed. (Hallifax and Dobby, A. J. C.) JIWANDAS v. JANKI. 18 N. L. R. 145 : 5 N L. J. 49 : (1922) Nag. 98 : 65 I. C. 53.

—S. 51 and O. 40, R. 1 Receiver—Appointment of—Mortgage decree—Objection of decree-holder—Effect.

It would be stretching too far the discretion of the court under O. 40 R. 1 in the matter of appointment of receivers, if it thereby deprives the decree holder of his right to sell the mortgaged property under the decree. S. 51 does not apply to the case, for it merely prescribes the mode in which the decree-holder may execute his decree, one of them being by the appointment of a

## C. P. CODE (1908) S. 51.

receiver. The section does not give any right to the judgment-debtor to apply for the appointment of a receiver (*Jwala Prasad and Bucknill, JJ*) MALIK MOKHTAR AHMED v. MT BIBI RAHI-MUNNISSA BEGUM. (1922) Pat. 66 (1922) P. 369 : 67 I. C. 606

## —S. 51 (E)—Decree—Execution—Supplementary relief.

Cl. (E) of S. 51 of the C. P. Code cannot be taken as authorising a Court to read into a decree a supplementary or alternative relief which is not there (*Ayling, O. C. J. and Odgers, J.*) MARATH SIVARAMAN NAIR v. SESHU PATTAR

42 M. L. J. 356 : 16 L. W. 589 : (1922) Mad. 299

## —S. 52—Appropriation of assets of the deceased—Personal liability.

Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to exceed the debts, a personal decree can be passed against the defendant. 20 Mad. 446 followed. (*Kanhaya Lal, J. C.*) MIHI LAL v. BABU LAL. (1922) Oudh. 200.

## —S. 52—Hindu Law—Son—Liability for father's debts—Form of decree.

A Hindu son sued for his father's debts is liable only to the extent of the co-parcenary property in his hands and a decree though passed as a personal decree against him could not, in view of S. 52, C. P. Code, be executed against the separate property of the son (*Jwala Prasad and Ross, JJ.*) BUJHAWAN PRASAD SINGH v. RAM NARAYAN. 65 I. C. 224

## —S. 53—Decree against assets—Execution—Gratuity given to heir of deceased employee—If part of assets.

A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. (*Wazir Hasan, J.*) LACHMI NARAIN KAUL v. UMAID RAI. 90 L. J. 401

4 U. P. L. R. (O. 96)

## —S. 53—Hindu father—Decree debt—Pious obligation—Extent of

A Hindu son is liable for the unsatisfied decree debts of his deceased father to the extent of the ancestral properties unless he shows that the debt was contracted for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. (*Piggott and Walsh, JJ.*) RAMANAND SHUKUL v. CHHOTAY LAL. 20 A. L. J. 969.

—Ss. 53 and 54—Question relating to execution—Hindu father—Son's liability—Separate suit. See (1921) DIG. COL. 162 SHEIK KAROO v. RAMESHWAR RAO. 3 Pat. L. T. 43.

—S. 55 (4)—Liability of surety—Extent of See (1921) DIG. COL. 162 ABDUL HUSSAIN ESSUF ALLI v. MISTRI AND CO. 46 Bom. 702 : (1922) Bom. 340 : 64 I. C. 648.

—S. 56—Personal decree—Mode of execution—Arrest—Minor.

## C. P. CODE (1908) S. 64.

A money decree does not necessarily carry with it a right to execute it by arrest of the judgment-debtor: e. g. a minor or a female, or a legal representative. (*Halliday and Dholey, A. J. C.*) JIWANDAS v. JANKI. 5 N. L. J. 49 : 65 I. C. 53 : 18 N. L. R. 145 : (1922) Nag. 98.

## —S. 60—Attachment—Exemption from—Tools of artisans.

Under S. 60 C. P. C. a sewing machine owned by a tailor is a tool of an artisan and therefore exempt from attachment. (*Macnair, A. J. C.*) VITHOBA v. BABU LAL. 65 I. C. 416.

—S. 60—Inam—Service inam—Swasthi wachakam service—Grant burdened with public service—Not liable to attachment and sale in execution. See INAM SERVICE, INAM.

42 M. L. J. 477.

—S. 60—Service tenure—Ghatwalli Liability to sale in execution. See (1921) DIG. COL. 163. BHIKAMBAK SINGH v. BHAJO HARI MARWARI. 64 I. C. 522.

## —S. 60 (f)—Attachment—Jatri Bahis of a Gayawal.

Though Jatribahis of a Gayawal are sold at fancy prices and have got a marketable value, they are not attachable and saleable in execution. They are merely entries as to the names and addresses of the pilgrims who deal with the gayawal and represent the claim of the judgment debtor to personal service. 2 Pat. L. J. 705 Ref. (*Jwala Prasad and Bucknill, JJ.*) LACHMAN LAL PATHAK v. BALDEO LAL. (1922) Pat. 228 : 3 Pat. L. T. 603 : (1922) P. 556 : 68 I. C. 944.

—S. 64—Attachment—Alienation—Decree on award. See (1921) DIG. COL. 165 NARAYANA AYYAR v. BIVARI BIVI. 45 Mad. 103 : (1922) Mad. 221 : 68 I. C. 673.

## —S. 64—Attachment before judgment—Alienation pending void—Non-compliance with O. 38, R. 5, C. P. Code—Effect of.

An alienation of property validly attached before judgment is void under S. 64, C. P. Code. But where the attachment before judgment is *ultra vires* and has been passed without complying with the formalities prescribed by O. 38, R. 5, C. P. Code the alienation is not void. (*Kotwal, A. J. C.*) BANSILAL v. SITARAM. (1922) Nag. 238 : 68 I. C. 188.

—S. 64 and O. 21, R. 63—Attachment of debt—Claim—Order allowing claim—Suit by defeated decree-holder and decree in his favour—Effect of decree—Revivor of attachment. See (1921) DIG. COL. 165 ANTHAYA HEGADE v. MANJAIYA SHETTY. 45 Mad. 84 : (1922) Mad. 176.

## —S. 64—Attachment—Liability for—Property belonging to Gaddinashin—Mutation in the name of the shrine—Effect of.

Where property has stood in the name of a Gaddinashin he cannot defeat an attachment of the property by getting it mutated in the name of the shrine. If satisfaction of the decree could not be obtained by sale of the property, the gaddinashin could be arrested and imprisoned in



## C. P. CODE (1908) S. 64.

execution. (*Chevis, J*) FIRM OF GANDA MAL & CO v. GANGA NATH. 4 L. L. J. 49 (1922) Lah 147.

—S. 64—Attachment—Private sale—Agreement by decree holder to exonerate property sold—Assignee of decree with knowledge of agreement.

A decree-holder after attaching certain items of property entered into an agreement for consideration with a private purchaser of a particular item that he would not bring to sale that item of property. Subsequently an assignee of the decree with knowledge of the aforesaid agreement sought to bring the property alienated to sale in execution. Held that the prohibition against alienation after an attachment was one for the benefit of the decree-holder which he could waive and that an assignee from him with knowledge of such waiver stood in the same position as his assignor and could not execute the decree against the property alienated. (*Krishnan and Venkatasubba Rao, JJ.*) NANDIGAM GANGAYYA v. MADUPALLI VENCATARAMAYYA 16 L. W. 988 : 31 M. L. T. 423 (H. C.)

—S. 64 and O. 21, R. 58—Attachment—Revival of—Claim Suit—Subsequent application for execution—Transfer in the interval.

On a decree being made in favour of the plff in a claim suit, the attachment was raised. But on appeal the decree was reversed and the claim dismissed. The decree-holder then applied for execution. After the raising of the attachment and before the decree on appeal the judgment-debtor alienated the property. Held that on the subsequent application for execution the prior attachment was revived and the transfer was void as against the decree holder. 14 M. I. A. 543 ; 20 A. 421 ; 35 B. 516 ; 15 C. 771 ; 25 A. 431 ; 16 B. 91 ; 28 M. 50 ; 37 C. 796 Ref. (*Drake Brockman, J.*) BHURIA v. BALIRAM. (1922) Nag. 138 : 65 I. C. 220

—Ss 64 and 73—Claims enforceable under the attachment—Right to rateable distribution—Liability of transferee pending attachment.

When an attachment has been levied on property in execution of a decree, then any attempt by the judgment-debtor to deal thereafter with the property, must be considered as contrary to the attachment, and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which could be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer, but will also include the claims of any other execution creditors who may apply for execution before the assets are realised. Plff. attached certain properties of defts 2-10 before judgment and defts. 2-10 subsequently mortgaged the properties. There was a decree in favour of the plff. against defts. 2-10. The Deft. No. 1 filed another suit against defts 2-10 and obtained a money decree. In execution of his decree plaintiff sold the properties free from the mortgage and brought the proceeds into court. Deft No. 1 applied for rateable distribution of the money realised by the sale. Held that 1st deft was entitled to rateable distribution.

## C. P. CODE (1908) S. 66.

Subsequent claims for rateable distribution are claim, enforceable under the original attachment within the meaning of S. 64, C. P. Code. (*Macleod, C. J. and Coyajee, J.*) CHUNILAL DEVAJI v. KARAM CHAND SHRI CHAND (1922) Bom 241 24 Bom L. R. 364

—Ss 64 and 73—Claims enforceable under attachment—Rateable distribution.

S. 64 Expln gives priority to claims under S. 73 C. P. Code only in connection with the attachment under which they are enforceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution. S. 64 C. P. C. refers only to claims enforceable under the attachment effected prior to the alienation and not to claims enforceable under the decree in execution of which the attachment was made. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI v. BHAGWATI PRASAD SINGH 66 I. C. 642.

—S. 66—Applicability of—Agreement with auction purchaser—Specific performance of contract—No bar.

S. 66, C. P. Code, does not preclude a suit to enforce specific performance of an agreement made prior to the auction purchase by the auction purchaser to sell the property to the plaintiff when the purchase money has been entirely found by the defendant and where there is no allegation that without the enforcement of the agreement to sell, the property is actually the property of the plaintiff, that is to say, that it was bought by the defendant benami for the plaintiff. 43 M. 643 ; 42 M. 615 Ref. (*Batten, J. C.*) ABDULLA KHAN v. JALAM SINGH 68 I. C. 559.

—S. 66—Execution Sale—Hindu Joint family—Manager—Purchase at execution sale benami in the name of stranger with family funds—Suit by other members for a share—C. P. Code of 1882 S. 317.

In execution of a decree obtained by A the manager of a joint Hindu family, but with the aid of joint family funds purchased the property of the judgment debtor himself benami in the name of B a stranger without obtaining leave of the Court to bid. In a suit for partition by A's son against the other members of the family and B. Held that S. 66 C. P. C. was no bar to the plaintiff's claim to a partition of the property purchased in the name of B on the ground that B was only a benamidar for A and that the property was joint family property. The purchase was not one made on behalf of the plaintiff within the meaning of S. 66 (1) C. P. Code. 6 M. 135 ; 9 M. L. J. 298 ; 20 M. 349 ; 40 A. 159 Ref. (*Schwabe C. J. and Coutts Trotter, J.*) NATARAJA MUDALIAR v. RAMASWAMI MUDALIAR 43 M. L. J. 363 : (1922) M. W. N. 584 : 16 L. W. 358 : (1922) Mad. 481

—S. 66—Hindu joint family—Benami auction purchase in the name of a female member—Suit for declaration that purchase was benami. See (1921) Dig. Col. 171 BAJNATH DAS v. BISHAN DEVI. 43 All. 711.

—S. 66—Not retrospective—Execution sale under the old code.

## C. P. CODE (1908), S. 67.

S. 66 C P Code has no retrospective operation and does not avail an execution purchaser whose title was perfected under the Code of 1882. 47 C. 1108 R<sup>2</sup>l. (*Mookerjee and Chotzner JJ*) *PROMODE KUMAR ROY v MADAN MOHAN SAHA*. 36 C. L. J. 396.

—S. 67—Sale by receiver of insolvent's agricultural land—Sanction of Commissioner. See (1921) DIG. COL. 172. *FAKIR MAHOMED v. AMIR CHAND*. 66 I. C. 893.

—S. 68 and Sch. III—Execution sale—Setting aside—Ancestral property sold as non-ancestral property, effect of.

Where with the knowledge of the judgment debtor, ancestral property was sold by the Court in execution of a decree in the manner prescribed for the sale of non-ancestral property a subsequent suit by the judgment debtor to set aside the execution sale on account of that irregularity is not maintainable. 28 A. 273; 42 A. 58 foll. (*Piggott and Walsh, JJ.*) *BHATELAY CHUNNI LAL v CHAKKERPAN*. 44 A. 380; (1922) ALL 56.

20 A. L. J. 281; L. R. 3 A. 187; 67 I. C. 934.

—Ss 68 and Sch. III, paras 1 and 2—Powers of Collector—Transfer of decree for execution See 1921 DIG. 172 *GANGARAM v. RAM GOPAL*. 18 N. L. R. 131.

—Ss 68 and 69—Alienation of land—Agriculturist—Power of civil court to order temporary alienation.

A civil Court has jurisdiction to order the temporary alienation of the land of an agricultural tribe in satisfaction of a money decree (*Scott Smith and Dandas, JJ*) *SAIN DITTA v. NUR AHMAD*. 4 Lah. L. J. 476.

—S. 73 and O. 21, R. 11—Application for—If an application for execution.

Before a decree-holder can claim rateable distribution he must, before the receipt of the assets, have applied to the Court by which the assets are held for the execution of his decree, and such application must be in the form prescribed by O. 21, R. 11 (2), C. P. Code.

An application for rateable distribution is not an application for execution (*Kotval, L. J. C*) *DWARKADAS v GHASI RAM*. 64 I. C. 53.

—S. 73—Assets—Meaning of—Change in Code.

The omission of the words "realized by sale or otherwise in execution" and the substitution of "assets held by the court" must have been deliberate and the intention of the legislature was that the term 'assets' should now include any assets held by the court irrespective of the manner in which they came into possession of the court. The scope of the section has been deliberately enlarged (*Cuming, J.*) *HARI CHARAN ROY CHAUDHURI v. BIRENDRA NATH SAHA*.

35 C. L. J. 327.

—Ss. 73 and 115—Assets held by Court—Money deposited by sureties for release of an attachment before judgment—Rateable distribution of such money—Interference in revision.

## C. P. CODE (1908), S. 73

In a money-suit certain property belonging to the defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the Trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the Petitioner's application of rateable distribution.

*Held*, that the amount deposited was subject to rateable distribution under S. 73, C. P. Code. The natural interpretation of the wide language of the section would include any assets in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. Besides, the assets in the present case though not strictly speaking realised in process of execution were realised by a process in the nature of an anticipatory execution 40 Cal. 619; 36 Bom. 156 referred to. 41 Mad. 616 discussed.

In cases like these where no appeal is allowed, it has been the practice of the High Court to interfere under the powers conferred by S. 115 of C. P. Code (*Richardson, J.*) *GHSULAL AGARWALLA v. TODARMULL AGARWALLA*.

26 C. W. N. 169 (1922) Cal. 19.

—S. 73—Claims enforceable under the attachment—Withdrawal of attachment—Effect. See C. P. CODE Ss. 64 AND 73. 66 I. C. 642.

—S. 73—Order for rateable distribution—Payment not made—Ownership of the fund

Where moneys have been allowed to various decree-holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the judgment debtor, but they remain the properties of the various decree-holders even though the amounts have not been paid out to them. (*Ayling, O. C. J. and Odgers, J.*) *OFFICIAL RECEIVER OF TANJORE v M. R. VENKATARAMA IYER*.

42 M. L. J. 361; (1922) M. W. N. 51; 15 L. W. 37; (1922) Mad. 31; 68 I. C. 512.

—Ss. 73 and 47—Order for rateable distribution—Rival decree holder.

Where an order for rateable distribution is made among rival decree-holders on a decision of the disputes among them without any objection on the part of the judgment debtor or without in any way affecting his rights, the order is not one under S. 47 C. P. C. or a decree within the meaning of S. 144 C. P. Code. If the order for rateable distribution is set aside on appeal, there is no power to order restitution under S. 144 C.

C. P. CODE (1908), S. 73.

P. Code. (*Ayling and Venkatasubba Row, JJ*)  
 VARADA RAMASWAMI v. UMMA VENKATARATNAM.  
 42 M. L. J. 473 : 30 M. L. T. 178 (H.C.) :  
 (1922) M. W. N. 184 : 15 L. W. 421  
 (1922) Mad. 99 : 67 I. C. 546.

—S. 73—Proceeds of execution sale—Property sold free of mortgage Rights of mortgagee. See (1921) DIG. COL. 175 V. P. T. REDDYAR v. V. R. M. ARUNACHALAM CHETTY.  
 64 I. C. 417.

—S. 73—Rival decree-holders—Right of one decree-holder being to impeach his rival's decree as being fraudulent.

An executing Court, when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree under which distribution is claimed has been obtained by fraud.

13 Bom. 154, overruled. (*Macleod, C. J. Shah and Fawcett, JJ.*) DATTATRAYA GOVINDSETH LUBRI v. PURSHOTTAM NARAYANSETH DALI.

46 Bom. 635 : (1922) Bom. 31 :  
 24 Bom. L. R. 1 : 65 I. C. 600.

—S. 73—Several attachments—Attachment before judgment—Effect of.

Where there are several attachments before judgment and the moneys are realised before any of the plffs. obtains a decree, the moneys should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. (*Kumara-swami Sastri, J.*) SUBRAMANIAM CHETTY v. SANKARA AIYAR  
 15 L. W. 531 :  
 (1922) M. W. N. 262 : 31 M. L. T. 70 (H. C.)  
 (1922) Mad. 236 : 68 I. C. 714.

—S. 73 (2)—Suit for recovery of money wrongly distributed.

S. 73 (2) C. P. Code does not imply that an execution sale by virtue of which assets have been made available for rateable distribution can be attacked in a separate suit. The cause of action under the section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained. (*Drake Brockman, J. C.*) LAKHMICHAND v. CHATURBHUI.  
 65 I. C. 230.

—S. 73 (2)—Remedy by suit—Assets not liable to be distributed.

Where the assets are not liable to be rateably distributed S. 73 (2). C. P. Code has no application. (*Ayling and Venkata Subba Rao, JJ*)  
 VARADA RAMASWAMI v. UMMA VENKATARATNAM.  
 42 M. L. J. 473 : 30 M. L. T. 178 :  
 (1922) M. W. N. 184 : 15 L. W. 421 :  
 (1922) Mad. 99 : 67 I. C. 546

—S. 75 and O. 26—Commission—Issue of—Judge delegating trial of material issues to commissioner—Validity of.

S. 75 C. P. Code defines clearly the circumstances under which a commission may be issued and does not authorize a court to delegate to a commissioner the trial of any material issue which the Judge is bound to try 16 Mad. 350 foll.

O. 26 does not in any way amplify the scope of S. 75. (*Abdul Raoof and Harrison, JJ.*) SAWAN MAL v. RAUNAQ MAL-CHUNI LAL.  
 3 Lah. 209 :  
 (1922) Lah. 47 : 68 I. C. 802.

C. P. CODE (1908), S. 92.

—S. 82, O. 23, R. 3 and Sch. II Para 20—Arbitration—Reference without intervention of court pending appeal—Award—Effect of. See (1921) DIG. COL. 177. HARI PRASAD v. MT. SOOGNI DEVI.  
 67 I. C. 123,

—S. 88 and O. 35, R. 5—Interpleader suit—Nature of.

Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader suit. (*Chatterji and Pearson, JJ*)  
 ASAN ALI v. SARADA CHARAN KASTAGIR.  
 (1922) Cal 138.

—Ss. 89 and 96—Award—Compromise modifying—Decree—Appeal.

A court is competent on an application under Sch. II para 20 C. P. Code to pass a decree on an award as modified by a lawful compromise filed by the parties and from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. (*Kanharya Lal J. C. and Daniels, A. J. C.*) HAKIM FAZAL AHMAD v. ENAYAT AHMAD.  
 9 O. L. J. 219 :  
 (1922) Oudh 189 : 68 I. C. 209.

Applicability.

—S. 92—Applicability of—Hereditary trustee—Suit against co-trustee for joint possession, scheme and accounts—Sanction if necessary. See (1921) DIG. COL. 177 APPANNA PORICHA v. NARASINGHA PORICHA.  
 15 L. W. 18 :  
 30 M. L. T. 1 : 45 M. 113 : (1922) Mad. 17 (F.B.)

—S. 92—Applicability of—Idol—Suit against trespasser on property—Sanction—Necessity for.

A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by S. 92, C. P. Code

It is not a correct proposition to say that an idol, who is being defrauded by his lawful guardian or trustee, might be treated by a court of law on the footing of an infant and that any person claiming a benevolent interest in the fortunes of the said idol, would be permitted to maintain a suit in the name and as the next friend of the injured idol. (*Piggott, and Walsh, JJ.*) DARSHAN LAL v. SHIBJI MAHARAJ BIRAJMAN  
 20 A. L. J. 977.

—S. 92—Applicability of—Suit for a declaration of public right of way—Permission of court obtained under O. 1, R. 8—Effect See C. P. CODE, O. 1, R. 8.  
 26 C. W. N. 587.

—S. 92—Applicability of—Mutt—Suit by Chela of mutt for possession of office and emoluments—Forfeiture of office by reigning mahant.

Where the chela of an asthal claims possession of the office of mahant and of the properties of the asthal in his own right alleging that the reigning mahant has forfeited the office by contracting a marriage and other irregularities, the suit is not one falling within the scope of S. 92 C. P. Code and the sanction of the Advocate General is not necessary therefor. (*Das and Bucknill,*

## C. P. CODE (1908), S. 92.

JJ.) NAHANT RAGHUNATH DAS v. SHEO KUMAR  
MISSER 67 I. C. 464.

—S. 92—Applicability—Private trusts See  
HINDU LAW—WILL. 49 I. A. 100

—S. 92—Applicability of—Suit for declaration that defendants are not trustees of a temple—Suit outside section. See (1921) DIG. COL. 178. NILKANTH DEVRAO v. RAMKRISHNA VITTHAL BHAT. 46 Bom. 101: 64 I. C. 353

—S. 92—Applicability of—Will—Request to charity—Administration—Suit for,

S. 92 of the C. P. Code deals with completed trusts and is inapplicable where that stage has not yet been reached. Where the will of the deceased testator bequeathes a legacy for the constitution of a trust the proper remedy to enforce the provisions of the will is by an administration suit. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is not bad because it is not brought under S. 92 C. P. Code (Wallis, C. J. and Kumaraswamy Sastry, J.) ANNAVARAPU NACHARAMMA v. MALLADI VENKATAPPAYYA. 31 M. L. T. 63 (H. C.): 16 L. W. 922

—S. 92—Bar to suit—Decree in suit under S. 5 of the Rel. End. Act. See (1921) DIG. COL. 178. SAHAYRAM CHAKRAVARTHY v. KHAGENDRA NANDA. 26 C. W. N. 504.

—S. 92—No limitation.

Where a suit is brought by pliffs, not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief there is no bar of limitation. (Spencer and Devadoss, JJ.) GOPU NATARAJA CHETTY v. RAJAMMAL. 43 M. L. J. 448: (1922) Mad. 394. (1922) M. W. N. 464. 31 M. L. T. 125 (H.C.). 16 L. W. 122: 69 I. C. 15.

—S. 92—Persons having an interest.

Nature of interest required—Descendants of founder—Decision as to character of property—Scheme suit—Removal of trustee—Denial of public character of trust—Description in deeds. See, (1921) DIG. COL. 178. VAYTHINATHA AIYAR v. THEYAGARAJA AIYAR 68 I. C. 631.

—S. 92 and O. 40, R. I.—Receiver—Appointment of—Trustee appointed by temple committee—Removal. See 1921. DIG. COL. 181. KUPPUSWAMI MUDALIAR v. SUBRAMANIAM CHETTIAR. 16 L. W. 927: 68 I. C. 565.

—S. 92—Sanction—Form of—General terms—Relief need not be confined to those sanctioned—Death of party pendente lite—Right of others to continue. See (1921) DIG. COL. 180. RAJA ANAND ROW v. RAMA DAS. 30 M. L. T. 194 (H. C.)

—S. 92—Successive suits—Maintainability of—Application for amendment of scheme.

When a scheme drawn up by a Court contains a provision permitting parties or persons interested in the religious institution to apply to the

## C. P. CODE (1908), S. 92.

Court for directions and for modifications to be made in the scheme already existing, the proper remedy for defects discovered in the original scheme is to apply by petition to the court that framed the scheme and not to file a regular suit. *Quære* Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme? 24 B. 45; 43 I. C. 772 Ref.

The mere fact that in a prior suit a prayer for the settlement of a scheme was not granted will not prevent a renewed attempt being made by a suit to have a scheme framed when the occasion arises at a later date. 36 M. 364, 37 C. 870 Ref. (Spencer and Krishnan, JJ.) GOVINDASAMI NAIDU v. UCHAPPA GOUNDAN. (1922) M. W. N. 477: (1922) Mad. 413.

—S. 92—Scope of—Suit for removal of trustee—Private right to office.

S. 92 C. P. Code provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. A dispute between rival claimants to the office of trustee does not fall within the section. In order to bring a case within S. 92 C. P. C. the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action, alleging a breach of trust or necessity for directions as to its administration against a trustee of such express or constructive trust. Such a trustee may be a *de jure* trustee or a trustee *de son tort*, (Lindsay and Kanhaiya Lal, JJ.) PUTTU LAL v. DAYA NAND. 20 A. L. J. 712: L. R. 3 A. 455. (1922) All. 449: 68 I. C. 786.

—S. 92—Hereditary trustee—Advisory Board—Creation of a new body—Inexpediency of.

Where a hereditary trustee has been appointed and the control of the charity left in him and the legislature has not thought fit to take away from the control or administration of the trust, it is not for the court, because it may think that is undesirable that charitable funds should be administered by one man without control or even without audit to impose a control which was not part of the original trust. But the Court has very wide powers under S. 92 C. P. Code and the circumstances under which those powers, should be exercised are clearly stated by the Privy Council in 43 C. 1085, 1101 (P. C.) (Sir Walter Schwabe, C. J. and Odgers, J.) DORAIVELU MUDALIAR v. ADIKESAVALU NAIDU. (1922) M. W. N. 620: (1922) Mad. 409.

—S. 92—Suit by trustee against co-trustee for accounts—Sanction.

A suit by a trustee against his co-trustee for accounts of management is a suit coming within S. 92 C. P. C. and sanction of the Advocate General is necessary for the suit, (Sadasiva

C. P. CODE (1908), S. 92.

*Aiyar and Coutts Trotter, JJ.*) GOVINDASAMI  
KADAVAKAN v. KALIAPERUMAL.  
(1922) M. W. N. 83 : 16 L. W. 155 :  
66 I. C. 837

—S. 92—Trustee—Removal of—Grounds  
for—Archaka and trustee same individual—  
Committee of supervision.

The mere fact that the hereditary trustees of a temple are also its archakas is no ground for their removal though it is not desirable that the two offices should be combined in the same individuals. It is possible to appoint a committee or some other authority to supervise their management. Where the hereditary archaka trustees of a Hindu Temple have long been acting *bona fide* in the belief that they were the owners of certain lands subject to the performance of services to the deity and have been appropriating the surplus income of the lands, they are not liable to removal. (*Abdur Rahim and Moore, JJ.*)  
MUTTEVI SRINIVASACHARYULU v. DINAVATI PRATYANGA RAO. 30 M. L. T. 101 : (H. C.)  
64 I. C. 816

—S. 92—Removal of trustee—Failure to  
keep accounts—Doubt as to existence of trust.

Where there is considerable doubt as to whether there is a trust in respect of certain properties, the omission of the alleged hereditary trustees to maintain proper accounts without any wilful default on their part is no ground for their removal. (1918) M. W. N. 786 foll. 16 L. W. 247 dist. (*Spencer and Devadoss, JJ.*)  
JAK KAM REDDI SESHADRI REDDI v. SIR S. SUBRAMANIAM IYER K. C. D. E. 16 L. W. 839.

—S. 92—Removal, Grounds of—Hindu temple—Dharmakarta—Position of, that of a trustee—Assertion of private ownership in trust property—Falsification of accounts—See RELIGIOUS ENDOWMENT

31 M. L. T. 1 (P. C.)

—S. 92—Trustee de son tort—Suit against—Maintainability of.

A suit under S. 92 C. P. Code is maintainable against a trustee *de son tort* who has without title chosen to take upon himself the character of trustee. (*Rafiq and Lindsay, JJ.*)  
RAM BILAS v. NITEA NAND. 44 A. 652 : L. R. 3 A. 365.

—S. 92 (h)—Alienation by trustee—Suit for declaration of invalidity—Maintainability—When granted—Scope of section.

S. 92, C. P. Code is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature.

A declaration regarding the validity of an alienation by a trustee comes within S. 92 (h). If the result of a declaration is not to produce any effect on the parties, but will only be a stepping stone for further litigation, the Court ought not to exercise its discretion and grant a declaration of

C. P. CODE (1908), S. 97.

such a nature. (*Piggott and Walsh, JJ.*)  
MUTTI ALI JAFAR v. FAZAL HUSAIN KHAN.  
20 A. L. J. 557 : L. R. 3 A. 352.  
4 U. P. L. R. (A) 131 : (1922) A. 349 :  
44 A. 622 : 67 I. C. 658.

—S. 96—Appeal—Decision in favour of a party. See (1921) Dig. Col. 182 BOMKESH SETH v. BHUTNATH PAL. 64 I. C. 689.

—S. 96 (3)—Compromise—Consent—Decree based on—Distinction

*Held by Coutts Trotter, J.*—A decree to which the pleaders of both parties had consented is a consent decree, though subsequently at the time of passing the decree, one of the parties resiled from it. From such a decree there is no appeal. 41 M. 233 not foll. (*Sadasiva Aiyer and Coutts Trotter, JJ.*)  
GOVINDASAMI KADAVAKAN v. KALIAPERUMAL. (1922) M. W. N. 83 :  
16 L. W. 155 : 66 I. C. 837 :

—Ss. 96 (3) and 104 (2)—Oral compromise—Refusal to recognise—Appeal—Decree passed in accordance with—Further appeal

The trial court refused to record an oral compromise alleged by the defendants on the ground that all the parties to the suit had not joined the compromise. On appeal, the District court found as a fact that all the parties had agreed to the compromise and passed a decree in terms of the compromise. On a further appeal to the High Court, *held*, that the order of the District court was final under S. 104 (2) C. P. Code and that the decree passed by him fell under S. 96 (3) C. P. Code and was not appealable. 27 M. L. J. 173 ; 46 I. C. 775 diss. (*Le Rossignol and Campbell, JJ.*)  
GURCHARAN SINGH v. SHIBDEV SINGH. 3 Lah. 175 :  
(1922) Lah. 309 : 66 I. C. 258.

—S. 97—Preliminary decree Appeal against—Passing of final decree—Effect of.

There is a difference between cases where the final decree is passed before the appeal is preferred from the final decree and cases where it is passed after the appeal is preferred. In the latter case the appellate court is competent to hear and dispose of the appeal. 25 C. W. N. 776 ; 18 C. L. J. 214 18 C. L. J. 321 Ref. (*Newbould and Panton, JJ.*)  
MEA HUSSAIN KHAN v. SHEIKH SAMIR. 68 I. C. 475.

—S. 97—Preliminary decree—Appeal from—Passing of final decree—Effect of.

Where there are preliminary and final decrees in the same suit an appeal against the preliminary decree alone cannot be maintained unless it is instituted before the passing of the final decree 36 Cal. 762 ; 30 All. 479 ; 37 Mad. 455 ref. (*Hallifax, A. J. C.*)  
BIHARIDAS v. BAJRANGDAS. (1922) Nag. 179 : 67 I. C. 261.

—S. 97—Preliminary and final decree—Duty of party to appeal against both.

Where a final decree has been made, whether or not an appeal had been preferred against the preliminary decree it is the duty of the party aggrieved by the final decree to appeal against the final decree. An appeal therefore, against the preliminary decree after the passing but before

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the signing of the final decree and without challenging by appeal the final decree is useless and could not be entertained. 18 C. L. J. 321, 32 All. 225, 36 Cal. 762 foll. (*Broadway, J.*) GANDA RAM v. SUNDER LAL. 67 I. C. 278.

—S. 99 and O. 1, R. 9—*Objections as to non-joinder—Procedure.*

*Per Ramesam, J.*—Objections as to non-joinder should be taken at the earliest opportunity and if so taken fall under two heads:—

(1) If it is absolutely necessary to have the absent party, he ought to be added unless the plff. refuses to add him, when the suit should be dismissed. If the trial Court erroneously proceeds with the suit, without following either of these courses, the objection can be repeated on appeal and the appellate Court may dispose of it in one of the two ways aforesaid.

(2) If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be tried without him. In such a case the objection if repeated in appeal may be dealt with similarly. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPANAR v. MONA CHUNA NANA SUBBAYYA MOOPANAR. 42 M. L. J. 133 :

(1922) M. W. N. 106 : 15 L. W. 233.  
(1922) Mad. 317 : 31 M. L. T. 266 (H. C.)

—S. 99—Power of attorney—Institution of suit under—Defect in power—Special power and not a general power—Mere irregularity. See C. P. CODE, O. 3, R. 2. 24 Bom. L.R. 1302,

—S. 99—*Re-trial—Grounds—Omission of Judge to sign deposition of witness.*

Where the deposition of a witness is signed only by him, but not by the presiding judge, the omission is only an irregularity but does not afford a ground for retrial so long as there is no doubt it was recorded by the Judge (*Batten, J.*) ALAMSINGH v. JATH GOPALDAS. 68 I. C. 664.

—S. 100—*Appellate Court Powers of to decide issues of fact.*

*Per Miller, C. J.* : It is not for the High Court, sitting in second appeal, even if it thought that certain evidence had been improperly rejected by the lower court, to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter, except in cases where on the evidence only one conclusion is possible for any court.

*Per Iwala Prasad, J.* : Where once a second appeal has been properly laid, the ordinary rules under O. 41 and O. 42, C. P. Code will apply—When a finding of fact is set aside and the evidence on the record is sufficient, there is nothing to prevent the court from going into the evidence and determining the case finally under O. 41, R. 24. (*Miller, C. J. and Iwala Prasad, J.*) LOCHAN RAI v. LALA SANT PRASAD. 3 Pat. L. T. 303 : (1922) P. 417 : 65 I. C. 536.

—S. 100—*Appellate order not appealed against in time—Amendment of the decree relating to a clerical omission or error as regards interest—Subsequent filing of appeal—Question of interest not attacked—Limitation.*

## C. P. CODE (1908), S. 100.

Where long after the time for filing a second appeal had expired, an amendment of the decree relating to a mere clerical error as regards calculation of interest was granted and thereafter a second appeal was filed, but no objection was taken therein as regards the interest, *Held* the second appeal was barred by time. (*Stuart, J.*) SHIMBHU PRASAD v. RAMJAS. L. R. 3 A. 27.

*Custom.*

—S. 100—*Appellate judge, Duty of to arrive at clear findings.*

It is the duty of the judge in his judgment when sitting as the final court of fact to state clearly what his findings are, and the High Court sitting in second appeal cannot deduce from casual statements in the judgment findings of fact which are not clearly expressed. (*Newbould and Pantou, JJ.*) JOGENDRA KISHORE ROY v. SHEIKH AKTAR. 67 I. C. 998.

—S. 100—*Custom—Certificate as to—Second appeal.*

On second appeal, the question of custom must be confined to that set out in the certificate granted by the lower appellate Court. (*Scott Smith and Abdul Raoof, JJ.*) NATHU v. BANNA. 3 Lah. 344.

—S. 100—*Custom—Burden of proof—Necessity for certificate.*

Where a question of burden of proof clearly involves a question of custom, an appellant is not entitled to argue it on second appeal without a certificate. (*Abdul Raoof and Harrison, JJ.*) MILKHI v. MUSSAMMAT PUNNI. 2 Lah. 348 : 66 I. C. 492.

—S. 100—*Custom—Finding on Nature of.*

A finding on a question of custom is a mixed finding of fact and law. (*Rafique, and Piggott, JJ.*) SHAMSHER SINGH v. PYARE LAL. (1922) All. 88 : 64 I. C. 956 : 20 A. L. J. 57 : L. R. 3 A. 87.

—S. 100—*Custom—Pre-emption—Mixed question of fact and law—Interference in second appeal.*

The question of the custom of pre-emption cannot be put on a wholly different basis from the question of a custom alleged to govern the parties in any other matter. A finding on the question of custom must be treated as a mixed question of fact and law, and if it be shown that the finding of the lower appellate court proceeds upon some clear error of law, or misinterpretation of a document, the finding is open to interference in second appeal. (*Mears, C. J. and Piggott, J.*) YAQUB ALI v. TAJAMAL HUSAIN. L. R. 3 A. 504.

—S. 100—*Discretionary matter—Second Appeal—No interference in.*

Unless a very strong case is made out a court of second appeal will not interfere with the discretion of the court below in passing a decree for money payable in instalments, especially where a large portion of the amount decreed consists of interest 15 C.W.N. 1088 Ref. (*Abdul Raoof and Martineau, JJ.*) BHUP CHAND v. UDE RAM. (1922) Lah. 355. 66 I. C. 147.

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—S. 100—*Error of law—Misunderstanding of parties' case.*

Mis-understanding the case of a party and not giving proper effect to a statement is an error of law and can be gone into in second appeal (*Hopkins, S. M. and Freeman, J. M.*) GAURI SHANKAR v. UMRAO SINGH

L. R. 3 A, 222 (Rev) 4 U P L. R. (B.R.) 43.

—S. 100 and O. 41, R. 17—*Ex parte hearing of appeal—Interference on second appeal.*

Where the lower appellate court has decided an appeal ex parte, the High Court has power to interfere in second appeal on the ground that the lower appellate Court acted irregularly in hearing the appeal ex parte.

30 M. 54 foll; 1 I. C. 329 dissented. (*Martineau and Harrison, JJ.*) GULAM HAIDAR v. JIWAN.

3 Lah 357.

## Evidence.

—S. 100—*Evidence of—Appreciation of.*

In second appeal the High Court will not entertain any question as regards the weight to be attached to the oral evidence in a case (*Daniels, J. C.*) BHUDHAR SINGH v. BHIKAM SINGH.

65 I. C. 370.

—S. 100—*Evidence—Commissioner's report—Failure of lower appellate court to consider.*

The report of the commissioner in a case of a boundary dispute is an important piece of evidence and should be considered by the lower appellate court. An omission to do so justifies the second appellate court in remanding the case to the lower appellate court. (*Coutts and Das, JJ.*) MUSSAMMAT SONKEUAR v. BAIDYANATH SAHAY

3 Pat. L. T. 483.

—S. 100—*Evidence—Misreading of—Ground for second appeal.*

Where the lower appellate Court comes to an erroneous decision owing to a misreading of the revenue records, the High Court can interfere in second appeal. (*Wib force, J.*) MALIK KHAN v. NAWAB.

4 Lah. L. J. 307.

## Finding of fact

—S. 100—*Finding of fact.*

A pure finding of fact based on evidence cannot be disputed in second appeal. (*Lyle, A. J. C.*) NIAMAT ALI v. ASHIQ ALI.

90 L. J. 127; (1922) Oudh. 96: 67 I. C. 803.

See also ABDUL RAZZAQ v. MUHAMMAD HAJ JAIN.

(1922) Oudh. 11: 9 O. L. J. 131.

—S. 100—*Finding of fact—Admissibility of evidence—Erroneous view—Interference. See (1921) Dig. Col. 184. SWAMI DAYAL v. RAM DAS.*

64 I. C. 86.

—S. 100—*Finding of fact—Adverse possession—Prescription.*

A finding of the lower appellate court that the possession of a party to the suit has not been adverse for a continuous period of 12 years is a finding of fact which cannot be reached in second appeal. (*Martineau, J.*) MAHOMED AZIMKHAN v. SULTAN AHMED KHAN.

4 Lah. L. J. 309.

—S. 100—*Finding of fact—Alienation by Hindu widow—Necessity.*

## C. P. CODE (1908), S. 100.

Ordinarily it will not be for a court of second appeal to determine whether there is sufficient or insufficient evidence in support of a finding that an alienation by a Hindu widow was or was not supported by necessity (*Stuart and Sulaiman, JJ.*) UDAI BHAN SINGH v. GAJENDRA SINGH.

L. R. 3 A. 376.

—S. 100—*Finding of fact—Ancestral Property. See (1921) Dig. Col. 184 BISHIN DATT v. KISHEN DATT.*

67 I. C. 439.

—S. 100—*Finding of fact.*

Where the Lower Appellate Court arrived at the finding on relevant evidence and certain admissible registered deeds that there was a partition, *Held*; that being a finding of fact was conclusive. (*Stuart, J.*) SYED MOHAMMED v. SAYED MANZUR HASAN.

(1922) All. 283.

—S. 100—*Finding of fact when not binding on the Court of second appeal.*

When there is (i) no evidence (12 Cal 972) or (ii) no sufficient legal evidence (16 I. C. 887) or (iii) important evidence is ignored (103 P. L. R. 1915) or (iv) only a colourable pretence of considering the evidence is made (38 I. C. 561) or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. Otherwise it is final (18 Cal 23 P. C.) (*Scot-Smith and Abdul Raouf, JJ.*) RAM SINGH v. GANGA RAM

3 Lah 389; (1922) Lah 356 (2).

—S. 100—*Finding of fact—Ancestral property—Plff's relationship.*

Findings as to the relationship of the plff. and the ancestral character of the property in dispute are findings of fact binding on the court of second appeal. (*Broadway and Moti Sagar, JJ.*) KARTAR SINGH v. KIRPA SINGH.

30 P. L. R. 1922.

—S. 100—*Finding of fact—Breach of Contract.*

A finding that it was the defendant who committed the breach of contract and not the plff. is one of fact with which the High Court will not interfere in second appeal. (*Shadi Lal, C. J. and Wilberforce, J.*) WELD AND COMPANY v. HAR CHARAN DAS.

4 Lah. L. J. 317.

—S. 100—*Finding of fact—Building—Moveable or immoveable property.*

It is a question of fact in each case whether a particular house and the building materials are moveable or not and the High Court will not interfere with the findings of the Court below in second appeal 8 C. 590 Ref. (*Mears, C. J. and Banerji, J.*) JITAN TAMBOLI v. NANKO.

L. R. 3 A 128. (1922) All. 45

—S. 100—*Finding of fact—Burden of proof—Error as to—Interference.*

Defts. executed a mortgage in favour of the plff. for Rs. 4,580, made up of sums due to previous mortgagees, previous debts due on account-price of buffaloes and payment of debts due to other persons. Before the Sub-Registrar the executants admitted receipt of full consideration, but at mutation they stated that the whole of the consideration had not been received. In a suit by plff. for possession as mortgagee, *Held*, that the

C. P. CODE (1908), § 100.

question of *onus probandi* arising in this case was a question of law rendering a second appeal competent. (*Broadway and Wilberforce, JJ.*)  
GANGA RAM v. RULIA. 2 Lah. 249. 64 I C 901

—S. 100—Finding of fact—Custom

The High Court in second appeal can consider whether the facts found in a particular case are sufficient to support the existence of a valid custom. (*Dhobley A J. C.*) KRISHNAJI v. NILAKANTH. 18 N. L. R. 163.

—S. 100—Finding of fact—Custom—Power of High Court to interfere

Where a question arises as to the existence or non-existence of a particular custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law and the High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence. The High Court in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up. Where the lower appellate court after examining the evidence legally and properly and not having rejected admissible evidence finds that the evidence is not sufficient to establish a custom, no question of law can arise. 30 A 311, 37 A 125, 31 A. 557; 45 C. 285 Ref. (*Stuart, J.*) SHAKIRA BIBI v. NANDAN RAI. 4 U P L. R. 95; (1922) All. 241. 66 I C 613

—S. 100—Finding of fact—Existence of custom of privacy—Second appeal.

A question as to the existence of a customary right of privacy in a town is a question of fact and when the evidence on both sides has been considered by the lower appellate Court the High Court will not interfere in second appeal 45 C. 285; 46 C. 189; 37 M. L. J. 199 foll. (*Fawcett, J. C. and Kemp, A J. C.*) SHAH MAHOMED v. RAMZAN. 66 I. C. 633.

—S. 100—Finding of fact—Deed—Conveyance—Inclusion of *shamilat* land—New plea.

The finding of the lower appellate Court that no *shamilat* rights were sold with the proprietary land is one of fact and is not a matter to be decided in second appeal.

3 P. R. 1917 and 85 P. R. 1919, foll

The question that the defendants were entitled to the *shamilat* land as a natural accretion to the proprietary land not having been raised in either of the lower Courts cannot be raised in second appeal. (*Shadi Lal, C. J. and Wilberforce, J.*) KARAM CHAND v. VIR SINGH. 3 Lah. L. J. 470.

—S. 100—Finding of fact—Deed open to one of two constructions—Interpretations of—Objection that appeal to lower appellate court was time barred.

Where it is possible to read the words of a document in dispute either way, it is open to the lower appellate court to adopt whichever reading appears to be more reasonable to it after considering all the connected circumstances and where it has done so, its finding as to what the words in dispute really are, is a finding of fact which

C. P. CODE (1908), § 100.

cannot be questioned in second appeal. An objection that the appeal to the lower appellate court was presented out of time being a question of law may be taken on Second Appeal. (*Scott Smith and Abdul Qadir, JJ.*) NIGAHIA RAM v. BHAGU MAL (1922) Lah. 240 65 I. C. 580.

—S. 100—Finding of fact—Dharmasala always treated as private property—Binding in Second Appeal. See REL ENDOWMENT 3 Lah L. J. 514.

—S. 100—Finding of fact—Interpretation of documents—Inference

Interpretation of documents and inferences to be drawn from that interpretation are not mere questions of fact and even concurrent findings based on such interpretation and inferences can be set aside in second appeal. (*Dhobley, A J. C.*) KRISHNAJI v. NILKANTH. 18 N L R. 163.

—S. 100—Finding of fact—Errors in—Not open to consideration on second appeal. See (1911) DIG. COL. 185 BHAGWAN SINGH v. NIRANJAN SINGH. 67 I. C. 436.

—S. 100—Finding of fact—Errors in—No interference in second appeal. See (1921) DIG COL. 184. AHMAD HUSAIN v. UMRAO FATIMA. 64 I. C. 223.

—S. 100—Finding of fact—Erroneous view of law—Interference.

The finding of fact of a lower appellate court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited, can be interfered with by the High Court. (*Piggott and Walsh, JJ.*) SABAL SINGH v. SALIK RAM SINGH. 44 A 602; 20 A L. J. 478; L. R. 3 A 301 4 U P L R (A) 93; (1922) A 188. 67 I C. 67.

—S. 100—Finding of fact—Consideration of evidence inadequate—Remand.

Where the judgment of the court below is not satisfactory and the court has not come to a finding on a consideration of the whole evidence on the point, the case should be remanded for a rehearing. (*Suhrawardy and Cuming, JJ.*) ISAP ALI v. SATIS CHANDRA ROY. 65 I C. 504.

—S. 100—Finding of fact—Discussion of evidence—Partition.

Where the judgment of the lower appellate Court leaves no room for doubt that the material evidence in the case has been considered, the mere fact that reference in detail is not made to every piece of evidence, does not vitiate its judgment. The findings of fact would therefore be binding on second appeal. The question whether there has been a partition in a Hindu family is one of fact. (*Broadway and Abdul Raouf, JJ.*) NATHU SHAH v. HAVELI SHAH. (1922) Lah. 140; 65 I. C. 475.

—S. 100—Finding of fact Gift—Nature of.

A finding that a gift was an absolute one enuring for the benefit of the donee's descendants is one of fact and cannot be interfered with in second appeal. (*Scott Smith and Abdul Raouf JJ.*) ALLAH JAWAYA v. ADIL. 4 Lah. L. J. 457.



C. P. CODE (1908), S. 100.

—S. 100—*Finding of fact—Inference.*

When the lower appellate court lays down the essentials for a certain conclusion and goes on to say that in that particular case all those are not clear, it amounts to a finding that the essentials necessary for that conclusion are absent in that case. A finding of fact cannot be interfered with in second appeal. (*Hopkins S. M.*) ACHUTANAND PANDEY v. KHELAWAN. L R 3, A 231 (Rev.)

—S. 100—*Finding of fact—Insufficiency of evidence.*

A finding of fact cannot be attacked in second appeal on the ground of the insufficiency of evidence. (*Newbould and Pantor, JJ.*) PROSARNA KUMAR BEDANTA v. MADHU BADYA.

68 I. C. 500.

—S. 100—*Finding of fact—Misconstruction of evidence.*

It is not open to the High Court in second appeal to upset a finding of fact on the ground that the evidence on record has not been properly appreciated by the court below. (*Chevis A. C. J.*) ABDUL RAUF, J. JADU NATH v. RAMAN MAL.

4 Lah. L. J. 426

—S. 100—*Finding of fact—Evidence—Absence of.*

The question whether there is any evidence in support of a finding of fact is a question of law with which it is competent to the High Court to interfere in second appeal. 23 C. W. N. 315 ref. (*Wazir Hasan, A. J. C.*) GHULAM SARWAR KHAN v. MAHOMED ALI KHAN. (1922) Oudh. 98.

65 I. C. 398

—S. 100—*Finding of fact—Inadmissible evidence—Interference.*

Where a finding of fact is vitiated by the consideration of inadmissible evidence, it is open to the High Court in second appeal to come to an opposite conclusion on a consideration of the evidence. (*Stuart, J.*) SAKTOO MAL v. GOPAL CHAND. 4 U P. L. R. (A), 5 : (1922) All. 439.

66 I. C. 313.

—S. 100—*Finding of fact—Inadmissible evidence—Findings based on—Open to attack in second appeal.*

Findings of a lower appellate Court based on inadmissible evidence can be impeached in second appeal. 2 W. R 74; 21 C L J. 45 Ref. (*Mookerjee and Chotzner, JJ.*) TARAKUMAR GHOSE v. KUMARA ARUN CHANDRA SINGH.

36 C. L. J. 389

—S. 100—*Finding of fact—Inadmissible evidence—Right to question.*

A finding of fact arrived at on a consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal, 57 I. C. 561 foll. (*Broadway and Abdul Kadir, JJ.*) BALWANT SINGH v. BALDEV SINGH. 2 Lah. 271. 64 I. C. 929.

—S. 100—*Finding of fact—No evidence—Interference in second appeal.*

Where a finding of fact is based on no evidence whatever or on purely conjectural grounds, it

C. P. CODE (1908), S. 160.

can be examined by a High Court in second appeal. 47 C. 107; 33 P. L. R. 1918 Ref. (*Broadway and Abdul Qadir, JJ.*) MUNSHA SINGH v. UTTAM SINGH. 4 Lah. L. J. 31; 4 U P. L. R. (Lah) 18 : (1922) Lah. 65; 64 I. C. 428.

—S. 100—*Finding of fact—Family arrangements—Binding nature of.*

The question whether a family arrangement is beneficial or detrimental to the interests of the minor members of a family and therefore binding or not binding upon them is one of fact and cannot be attacked in Second Appeal, (*Broadway and Abdul Qadir, JJ.*) THAKUR v. JAWALA, 4 Lah. L. J. 40.

—S. 100—*Finding of fact—Genuineness of documentary evidence.*

The question whether a piece of documentary evidence is genuine or forged is one of fact. (*Hopkins, S. M.*) GATTI SINGH v. COURT OF WARDS, KUCHAISER ESTATE. L R 3 A. 248 (Rev.)

—S. 100—*Finding of fact—When open to question—Evidence not properly appraised.*

A finding of fact by the lower appellate court reached without considering material evidence in the case will not be accepted, (*Prideaux, A. J. C.*) LAL SINGH v. PARASHRAM. (1922) Nag. 226; 68 I. C. 332.

—S. 100—*Finding of fact—Whole evidence not considered—Effect.*

A finding of fact which has been arrived at without the consideration of the entire evidence on record is not binding on the court in second appeal. (*Coutts and Das JJ.*) LALA GIRJA PRASAD v. JAGAL KISHORE. (1922) P. 503.

—S. 100—*Finding of fact—Inference from facts found—Interpretation of documents—Custom or usage.*

Though the High Court cannot interfere with the findings of fact of the Court below in second appeal it can consider whether the facts found are sufficient to support a custom alleged. 41 M. L. J. 437 ref. Interpretation of documents and inferences to be drawn from that interpretation are not mere questions of fact and even concurrent findings based on such interpretation and inferences can be set aside in second appeal. 24 C. W. N. 594 ref. (*Dhobley, A. J. C.*) KRISHNA RAO v. NILKANTH. 5 N. L. J. 25; (1922) Nag. 52.

—S. 100—*Finding of fact—Joint Hindu family—Finding as to status.*

Where the principles of Hindu Law applicable to the case have been correctly appreciated by the lower appellate court a finding as to whether certain persons form members of a joint Hindu family or not is a finding of fact with which the High Court will not interfere in second appeal. (*Wilberforce and Abdul Qadir, JJ.*) MT. MAYA WANHI v. ISHAR SINGH. 3 Lah. L. J. 552; 67 I. C. 789.

—S. 100—*Finding of fact—Landlord and tenant—Existence of relationship—Presumption—Entry in record of rights.*

Where on a consideration of the entire evidence in the case the lower appellate court has come

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to the conclusion that the relationship of landlord and tenant exists between the parties and that the presumption raised by an entry in the record of rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second appeal. (*Newbould, J.*) **KARIM BUX v. DWARAKANATH KAR.** 64 I. C. 190

## —S. 100—Finding of fact—Mistake as to—No interference.

A finding of fact cannot be interfered with on second appeal though the error is gross and inexcusable. (*Leslie Jones and Wilberforce, JJ.*) **HAYAT v FIRM OF DTTU RAM RAJU RAM.** 4 Lah. L. J. 464.

## —S. 100—Finding of fact—Negligence.

The question of negligence is very largely a question of fact. (*Richardson and Suhrawardy, JJ.*) **SYED SADAG REZA v. KHOSHMOHINI DAS.** (1922) Cal. 317.

## —S. 100—Negligence—Mixed question of law and fact Whether can be reviewed in second appeal.

A finding that there was a gross negligence on the part of a Lambardar involves a question of mixed fact and law and is open to review in second appeal. (*Lindsay and Kanharya Lal, JJ.*) **ASAD ALI v FAIYAZ ALI.** (1922) All. 421.

## —S. 100—Finding of fact—Nuisance—Mixed question of law and fact.

Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the court in second appeal. 31 I. C. 62; 106 P. R. 1888; 40 B. 401 Ref. (*N. R. Chatterjee and Suhrawardy, JJ.*) **CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF DACCA v. KRISHNA DAS NAG.** 36 C. L. J. 189; 64 I. C. 168.

## —S. 100—Finding of fact—Partnership not one.

A finding that there was a partnership as defined in the Contract Act is not a finding of fact by which the High Court is bound. The findings that are final are those on the facts from which the existence of the legal relationship of partners might or might not be inferred provided of course they are not otherwise unsound. (*Halifax, A. J. C.*) **MOULA BUX v. MUHAMMAD AFZAL.** (1922) Nag. 96.

## —S. 100—Finding of fact—Preemption suit—Fictitious item of consideration—Market value of the property

A finding in a pre-emption suit that a portion of the price mentioned in the deed of sale is fictitious, though erroneous is binding upon the High Court in second appeal. So is a finding as to the market value of the property in dispute based on evidence. (*Chevis and Scott Smith, JJ.*) **GANPAT RAI v. HARI RAM.** 64 I. C. 297 (L.)

## —S. 100—Findings of fact—When open to attack in second Appeal.

Ordinarily grounds which impugn findings of fact cannot be entertained in second appeal but where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon

## C. P. CODE (1908), S 100.

the point the finding is not binding on a court of Second Appeal. A finding of fact to be binding on a Court of Second appeal must be a Judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in Second Appeal 58 I. C. 482, 56 I. C. 529; 54 I. C. 768, 65 I. C. 475 Ref. (*Broadway and Moti Sagar JJ.*) **FIRM OF MAUSA RAM GORDHAN DAS v. FIRM OF MANGAL SAIN DUNI CHAND.** (1922) Lah. 149; 65 I. C. 497.

## —S. 100—Finding of fact—Oral will—Proof of—Question, one of fact. See WILL, ORAL WILL 66 I. C. 413.

## —S. 100—Finding of fact—Permanent tenancy—Evidence.

Where on a consideration of the entire evidence in the case the Lower appellate court comes to the decision that a permanent tenancy had not been established, it is a finding of fact which cannot be interfered with in second appeal. (*Broadway and Abdul Raoof, JJ.*) **RAM SAHAI v. MAHOMED SADIQ** 4 Lah. L. J. 811.

## —S. 100—Finding of fact—Time of the essence of contract.

The question whether time is or is not of the essence of a contract is one of fact and a finding thereon cannot be assailed on second appeal. (*Scott Smith and Abdul Qadir, JJ.*) **FAZAL ILAHI v. THE IMPERIAL CHEMICAL COMPANY.** 67 I. C. 157.

## —S. 100—Legal inferences from facts—If open to.

Legal inferences drawn from facts may be examined in second appeal. 20 Cal. 93 follows. (*Broadway and Abdul Qadir, JJ.*) **GURDIT SINGH v. MT. JSHAR KAUR.** 3 Lah. 257; (1922) Lah. 392; 68 I. C. 551.

## —S. 100—Maintainability of—Board of Revenue—Suit in ejectment dismissed by lower Courts.

Where both the lower Courts have dismissed a suit in ejectment, though for different reasons, a second appeal does not lie. But the Board may convert the appeal as a revision and allow it as such. (*Burn, J. M.*) **HANUMAN PRASAD NARAIN SINGH v. BARAMDEI.** 4 U. P. L. R. Br. 39; L. R. 3 A. 490 (Rev.)

## —S. 100—Misconstruction of document—Misreading of documentary evidence.

Misreading of the documentary evidence is no a question of law which justifies a second appeal. (*Das, J.*) **MAHABIR MISSEER v. MT. ASO KUER.** 67 I. C. 435

## —S. 100—Negotiable instrument—Want of consideration—Question of onus of proof—One of law. See NEGOTIABLE INSTRUMENT.

4 Lah. L. J. 199.

## —S. 100—New case—Not to be set up. See (1921) DIG. COL. 186. CHANDBHAI MAHOMED BHAI v. HASANBHAI RAHIMTULA.

46 Bom. 213; 64 I. C. 205; (1922) Bom. 150.

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—S. 100—*New plea—Point abandoned in the Court below.*

Where a party or his pleader abandons a point in the lower appellate Court he cannot raise it in second appeal. (*Lindsay, J. C.*) MAHADEO TEWARI v. SITLA BAKSH SINGH. (1922) Oudh 102 : 65 I. C. 408.

—S. 100—*Point expressly abandoned in court below*

Where the appellant expressly abandons a point in the court below he ought not to be allowed to take it in second appeal. (*Mukerjee and Chotzner, JJ.*) JADA GOPAL KUNDU CHOWDHURY v. GOPAL CHANDRA NANDI. 69 I. C. 44 (1).

—S. 100—*New point—Question of limitation—Facts necessary for, not pleaded—Entertainability of See LIMITATION.* 1 Pat. 23

—S. 100—*New plea—Point of law—Limitation—When allowed to be raised.*

A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time 21 A 446 foll., 42 C 72 dist. (*Gokul Prasad, J.*) BHAKHARI SINGH v. JOKHAN. 4 U. P. L. R. A 104 : 66 I. C. 856. (1922) All. 124.

—S. 100—*New plea—Mixed question of law and fact—Not to be raised for the first time on second appeal.*

A mixed question of fact and law like the power of a widow governed by the customary law to make a gift of a portion of her husband's estate in favour of the next reversioner, cannot be raised on second appeal for the first time. (*Scott-Smith and Dundas, JJ.*) JAGGA v. BHAG MAL. 4 Lah. L. J. 432

—S. 100—*New point—Question of fact—Not allowed.*

A new point involving a pure question of fact not raised in the courts below nor in the memorandum of second appeal, cannot be allowed to be argued for the first time in second appeal. (*Scott-Smith and Martineau, JJ.*) MAULA BAKSH v. JAFAR ALI KHAN. 4 Lah. L. J. 437.

—S. 100—*New plea—When allowed,*

A point which is a new one and taken for the first time in second appeal in High Court should not be allowed to be raised when there is no evidence on the record and no finding to support it (*Dawson-Miller, C. J. and Coutts, J.*) CHANDRA MOHAN DUTTA v. SASIBALA DAS. 3 Pat. L. T. 623 : (1922) Pat. 39 : 4 U. P. L. R. (Pat.) 7 : (1922) P. 68 : 65 I. C. 277.

—S. 100—*New point—Question involving consideration of evidence.*

Where a point of fact was not raised in the courts below nor had any issue been framed with reference to it, it cannot be raised for the first time on second appeal. (*Greaves, J.*) SYED NAYAJAN ALI v. MIDNAPORE ZAMINDARI COMPANY. 67 I. C. 770.

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—3. 100—*New point—Question of law—When allowed for the first time. See (1921) Dig. COL 1010. SHEIK ABDUL RAHMAN v. SHIB LAL SAHU 6 Pat. L. J. 650 : (1922) Pat. 81 : 4 U. P. L. R. (Pat.) 13 : (1922) P. 252.*

—S. 100—*New point—Fresh evidence required—Practice.*

A point of law which cannot be decided without further evidence should not be allowed to be raised in second appeal. 24 Bom. 260 foll. (*Pratt and Fawcett, JJ.*) DODDAVA v. YELLAWA. (1922) Bom. 233.

—S. 100—*New point—When allowed to be raised for the first time in appeal or second appeal.*

The court will allow a party to raise a new point of law on appeal or second appeal when no further investigation of facts is necessary and when there is no surprise to the other side. If however the new plea raises a question of fact or mixed question of fact and law, the court will not allow it to be raised 35 A. 273, 10 M. 1 Ref. (*Mookerjee and Cumming, JJ.*) SECRETARY OF STATE FOR INDIA v. UPENDRA NARAIN ROY. 36 C. L. J. 336.

—S. 100—*New plea—Sufficiency of tender—When can be raised*

The question of sufficiency or insufficiency of the sum tendered cannot be allowed to be raised for the first time in second appeal (*Coutts and Ross, JJ.*) JAG SAHU v. RAM SAKHI KUER. 1 Pat. 350 : (1922) Pat. 58 : 3 Pat. L. T. 332 : (1922) P. 167 : 65 I. C. 668.

—S. 100—*New plea—When allowed in second appeal.*

Where a point which had been the subject of an issue in the trial court was definitely given up it cannot be considered again on second appeal. Similarly a new point depending on the evidence not raised in the Court below cannot be raised on second appeal. (*Scott-Smith and Harrison, JJ.*) SADHU RAM v. UTTAM DAS. 3 Lah. L. J. 516

—S. 100—*New plea—When can be raised.*

It is not open to the appellant to raise, for the first time in second appeal, an issue which would depend on facts. (*Suhrawardy and Cumming, JJ.*) HRIDAY NATH MONDAL v. TALA BEWA. 65 I. C. 706.

—S. 100—*Objections as to maintainability of suit—If can be raised for the first time. See PUNJAB REDEMPTION OF MORTGAGES ACT, S. 12. 3 Lah. 239.*

—S. 100—*Question of fact—Adverse possession—Interference from facts.*

The question of adverse possession is a mixed question of fact and law. The facts found by the judge must be accepted by the High Court in second appeal, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by the High Court. 19 Cal 253, 262, 20 C. 93; 29 C. L. J. 241; 24 C. W. N. 1057 Ref. (*Chatterjee*

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and Pearson, JJ.) JOGENDRA NATH MOOKERJEE v. RAJENDRA NATH BHATTACHERJEE  
26 C. W. N. 890 : (1922) Cal. 54 : 68 I. C. 200.

—S. 100—Question of law—Abandonment. See (1921) DIG. COL. 187 RAJA v. SALABAT.  
66 I. C. 935

—S. 100—Practice—Document wrongly admitted in courts below—High Court in second appeal, not to decide if there is other evidence to justify decree. See PRACTICE, 35 C. L. J. 182.

—S. 100—Question of law—Burden of proof.

The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law on which a second appeal lies (Scott Smith, J.) MUSSAMMAT NIAMAT BIBI v. MAHOMED FAIZ.  
65 I. C. 745

—S. 100—Question of law—Misconstruction of document containing admission—If one.

Per Mookerjee, J. The misconstruction of a document which is the foundation of a suit is no doubt a question of law, but the misconstruction of a document which is alleged to contain an admission that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal (Mookerjee, A. J. C. and Fletcher, J.) UJIR ALI SIRDAR v. SHADHAI BEHARA  
35 C. L. J. 182 : (1922) Cal. 185 : 68 I. C. 1003.

—S. 100—Question of law—Penalty—Stipulation in deed.

The question whether a stipulation in a deed as to payment of interest is one by way of penalty is a question of law, which is open to consideration in second appeal (Scott Smith, J.) LACHHMAN v. SANTA.  
14 P. L. R. 1922 : 64 I. C. 350.

—S. 100—Question of law—When can be raised—Change of case.

A pure question of law arising out of the findings of the Courts below and which is patent on the record can be raised for the first time in second appeal 51 I. C. 588 foll.

The nature of a suit cannot be changed in second appeal so as to make a suit for arrears of maintenance one for contribution. (Broadway J.) DIWANCHAND v. BISHERE PAS.  
2 Lah. L. J. 285 : 67 I. C. 919

—S. 100—Scope of—Gift.

If for the first time, in Second Appeal various questions of law are raised but in order to decide these questions of law evidence would have to be taken, points of law of that description are not admissible. A deed of gift to be valid must be accepted by the donee; but where it was never suggested in the Court below that the deed was invalid, because it had not been accepted. Held, it is not competent in Second Appeal for the appellant to urge the invalidity of the gift on the ground of non-acceptance. (Macleod, C. J. and Shah, J.) TRIKAM LAL v. NAGENDAS JETH LAL.  
(1922) Bom. 148.

## C. P. CODE (1908), s. 102.

—S. 102—Applicability of—Suit for rent other than house rent—Second appeal if lies. See PROV. SM. C. C. ACT, SCH. II, ART. 8  
(1922) Pat. 154.

—S. 102—Execution proceedings—Second appeal—Valuation of suit.

In the case of execution proceedings the test to find out whether a second appeal lies is the value of the suit and not the amount sought to be recovered in execution. 29 P. R. 1902 ; 30 M. 212 Ref. (Broadway and Martincau, JJ.) MOHNA MAL v. TULSI RAM (1922) Lah. 290 : 3 Lah. 141, 67 I. C. 718.

—S. 102—Execution—Small cause decree transferred to original side—Second Appeal. See (1922) DIG. COL. 188 JAMINIBALA DEBI v. KARALI PRASAD MUKERJEE.  
67 I. C. 6.

—S. 102—Small Cause nature—Agreement to share proceeds of tenancy. See (1921) DIG. COL. 189 GANGA RAM v. MAYA DAS.  
67 I. C. 841.

—S. 102—Second appeal—Plaint returned for presentation to original side by Small Cause Court—Effect of.

Where in a suit for damages or for the value of trees cut by the defendant from plaintiff's land, the Small Cause Court returns the plaint for presentation on the Original Side, the suit does not cease to be of a small cause nature and there is no second appeal. 20 A. 480, 12 A. L. J. 1032 foll. (Lyle, A. J. C.) KANWAR SINGH v. UJAGA SINGH.  
3 U. P. L. R. (J. C.) 18 : 8 O. L. J. 391 : 65 I. C. 7.

—S. 102—Rent suit for sums below Rs. 500—Madras Estates Land Act S. 189, See (1921) DIG. COL. 189. SRI VARADARAJA SOORU HARIS-CHANDRA DEO BAHADUR v. KANDA BARIKIVADUR  
15 L. W. 150 : (1922) Mad. 119.

—Ss 102 and 115—Second appeal—Suit of small cause nature—Suit for price of fish taken from a tank.

There is no second appeal from the decree in a suit for recovery of the price of fish removed from a tank after declaration of title, when the value of the suit does not exceed Rs. 500. But the appellate court expounded the declaration of title. (Woodroffe and Ghose, JJ.) ARADHAN MONDAL v. ABHOYA CHARAN MONDAL,  
68 I. C. 626.

—S. 102—Suit for interest on mortgage money—Pro. Sm. C. C. Act Sch. II, art. 8—Second appeal.

A suit only for the interest on the mortgage money due to the mortgagee is one triable by a Court of Small Causes and there is no second appeal from the decision in the case. (Scott Smith, J.) PARDUMAN CHAND v. GANGA RAM.  
66 I. C. 285

—Ss. 102 and 115—Suit to recover arrears of kattubadi—Small cause nature—Trial on the original side—Appeal. See (1921) DIG. COL. 189. BHUVANAPALLI SUBBAYA v. RAJA OF VENKATAGIRI.  
42 M. L. J. 118 : (1922) Mad. 352 : 66 I. C. 207.

## C. P. CODE (1908), S. 103.

—S. 103 and O. 41, R. 25—*Powers of High Court on second appeal—Finding of fact*

To avoid gross miscarriage of justice resulting from the omission by the lower appellate court to determine any issue of fact or to come to a definite conclusion on a set of facts, the High Court has the power of determining the issue left undetermined by the lower appellate court on the evidence on record, or of remitting the case to the lower court for a finding on that issue, with liberty to the parties to adduce additional evidence. 43 M. 567 Ref. (*Mr Ameer Ali*.) SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL v. VEERAMA REDDI 45 Mad. 586 : 43 M. L. J. 640 : (1922) M. W. N. 749 : 1922 (P. C.) 292 : 16 L. W. 102 : 68 I. C. 538 : 49 I. A. 286 : 31 M. L. T. 54 (P. C.).

—S. 103—*Scope of.*

Per *Jwala Prasad*, J. S. 103 C. P. Code, which has been newly added, has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below (*Miller, C. J. and Jwala Prasad, J.*) LOCHAN RAI v. LALA SANT PRASAD.

3 Pat. L. T. 303 : (1922) P. 417 : 65 I. C. 536.

—S. 104 (2)—Order of District Court in appeal in terms of compromise—Finality. See C. P. CODE, Ss. 96 (3) AND 104 (2). 66 I. C. 258.

—S. 104 (2) and O. 41, R. 1 (a) (u)—*Order returning plaint for presentation to proper court—Appeal—Remand—Second appeal, if lies.*

There is no second appeal against an appellate order setting aside an order returning a plaint to be presented to the proper court and remanding the case for trial on the merits. 33 All. 479 and 101 P. L. R. 1913 foll. (*Broadway, J.*) FIRM OF BHAWANI SAHAI KANSHI RAM FEROPZEPOR v. FIRM OF HARBANS SINGH GOPAL DAS.

2 Lah. L. J. 587 : 68 I. C. 304

—S. 104 (2)—*Scope of—Appeals under cl. 10 of the Letters Patent not affected.*

It was not intended by S. 104 (2) C. P. C. to override the express provision of the Letters Patent or to take away by implication a right of appeal conferred thereunder. 14 A. 226 : 39 A. 191 : 9 C. 482, 11 A. 375 : 26 C. 361 : 25 M. 555 Ref. (*Shadi Lal C. J. and Harrison, J.*) RULDU SINGH v. SANWAL SINGH. 3 Lah. 188 : 67 I. C. 388.

—S. 105—*Interlocutory order—Defect or irregularity—Appeal from final decree—Dismissal of appeal against interlocutory order—Effect of.*

Notwithstanding the dismissal of an appeal against an interlocutory order in a suit on the ground that no appeal lay against it, it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. (*Walsh and Ryess, J.J.*) SHANKER LAL v. MAHOMED AMIN. 44 All. 534 : 20 A. L. J. 349 : L. R. 3 A. 304 : 4 U. P. L. R. (A) 97 : (1922) All. 118 : 66 I. C. 920.

—S. 105 (2)—*Order of remand—Appealability—C. P. Code O. 41, R. 23.*

Where an order of remand purports to be made under O. 41, R. 23 C. P. Code, it is the duty of a party adversely affected to appeal against the

## C. P. CODE (1908), S. 109.

order. Otherwise the order would be final. (*Scott Smith, J.*) MUSSAMMAT NIAMAT BIBI v. MAHOMED FAIZ. 65 I. C. 745.

—S. 105 (2)—*Order of remand—Failure to appeal—Effect.*

Where it was open to the persons aggrieved by an order of remand to appeal against it, but they failed to do so, they are precluded from further contesting the correctness of that order (*Brown, A. J. C.*) MAUNG PO KAING v. MA TOK.

1 Bur. L. J. 231.

—Ss. 109 and 110—Certificate of High Court—If conclusive for purpose of appeal—Appealable value—Test of. See PRIVY COUNCIL 49 I. A. 211.

—Ss. 109 and 110—*“Final order”—Meaning of.*

The word “final” in S. 109 C. P. Code is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. A suit ended in a compromise decree passed on a compromise entered into between plff. and deft. No. 2, The other defendant appealed against the order recording the compromise and the High Court on appeal set aside the order and directed a trial of the suit on the merits. On an application for leave to appeal to the Privy Council against the order, *Held* that the order of the High Court was not a final order and that therefore leave could not be granted for an appeal to the Privy Council. (*Shah, A. C. J. and Crump, J.*) SHANKAR BHARATI v. NARASIMHA BHARATHI

24 Bom. L. R. 925 : (1922) Bom. 383 : 69 I. C. 80.

—Ss. 109 and 110—*Final order—Substantial question of law—Co-decree holder allowed to join as executing decree holder.*

The High Court declined to interfere in revision with an order of the lower court allowing a co-decree holder to join in executing the decree. On an application for leave to appeal to His Majesty in Council *Held* that the order of the High Court was not a final order determining the rights of the parties in any matter in controversy between the parties and that leave to appeal should be refused. (*Miller, C. J. and Mullick, J.*) PRAKASH CHANDRA SARKAR v. BRINDABAN CHANDRA SARKAR.

4 U. P. L. R. (Pat) 93 : 3 Pat. L. T. 781 : 67 I. C. 991.

—Ss. 109 and 110—*Leave to appeal to the Privy Council—Final order—Meaning of—Suit for dissolution of partnership and accounts.*

To find out whether an order is a “final order” within S. 109, C. P. C. it is the effect of the order as determining the disputed right of a party not as formally concluding the proceedings which must be regarded as decisive. Where a suit for dissolution of partnership and accounts was dismissed as barred by limitation by the trial court but on appeal the High Court reversed that decision and remanded the case for the passing of a preliminary decree. *Held* that the order

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of the High Court as it finally declared plaintiff's right to an account, was a final order and was therefore appealable to the Privy Council. (*Oldfield and Ramesam, JJ.*) *SATHAPPA CHETTY v. SUBRAMANIAM CHETTY.* 16 L. W. 718

43 M. L. J. 758 : 31 M. L. T. 385 (H. C.)

## —S. 109 (a) and (b)—Final order—Order of remand—Appeal to His Majesty in Council.

*Semble.* Where the High Court on appeal reverses the decision of the Court below and remands the case for taking certain accounts for the purpose of determining whether the defendant is liable as a partner and not merely for ascertaining the extent of his liability, the order is a "final order" from which an appeal would lie to His Majesty in Council. (*Sir Lawrence Jenkins*) *SANYASI CHARAN MANDAL v. KRISHNADHA BANERJI.* 49 Cal. 560 : 43 M. L. J. 41

16 L. W. 536 : (1922) M. W. N. 364 :

26 C. W. N. 954 : 35 C. L. J. 498 :

(1922) P. C. 237 : L. R. 3 (P. C.) 133.

30 M. L. T. 228 : 20 A. L. J. 409

24 Bom. L. R. 700 : 67 I. C. 124 :

49 I. A. 108 (P. C.)

## —S. 109 (c)—Interlocutory order.

The word "order" referred to in S. 109 (c) of the C. P. Code is intended to be not merely a final order but it is wide enough to include an interlocutory order. It does not mean the same thing as "final order" referred to in S. 109 (a). 48 I. A. 31 : 28 A. 227 : 21 C. L. J. 281 Ref. (*Sanderson, C. J. and Richardson, J.*) *SHIVA PRASAD v. RANI PRAYAG KUMARI DEBI.* 26 C. W. N. 819 : (1922) Cal. 130.

## —Ss. 109 (c) and 110—Question of general importance—Valuation—Plaintiff if can go behind his own valuation in the plaint and appeal—Indirectly affecting property of over 10,000 rupees in value.

To come within S. 109 (c) C. P. Code it must be shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great public or private importance. 21 I. C. 783 Ref.

The question whether a decree involves indirectly a claim or question to property worth more than 10,000 rupees in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 15 L. W. 140 : 24 A. 236 : 85 A. 445 : 8 C. 210 : 4 C. L. R. 125 Ref.

Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court fee in the court of first instance and on appeal, they could not be allowed to change their valuation for the Privy Council. (*Oldfield and Spencer, JJ.*) *ALAGAIPA CHETTY v. NACHIAPPAN.* 16 L. W. 517 : 43 M. L. J. 728 : (1922) M. W. N. 683 : 31 M. L. T. 335 (H. C.)

## —S. 110—Affirming Judgment—Variation of decree as to costs. See (1921) DIG. COL 195

*CHAITANYA CHARAN SET v. MAHOMED YUSUF.* (1922) Cal. 316 : 66 I. C. 407.

## C. P. CODE (1908), S. 110.

## —S. 110—Decision—Affirmance.

The word "decision" in S. 110, Cr. P. Code means the decision of the case by the court. To constitute an affirming judgment it is not necessary that the appellate court should affirm the grounds of facts upon which the judgment was made 25 A. 109 Ref. (*Robinson, C. J. and Macgregor, J.*) *S. N. SEN v. AZIZI AZZ TAR MAHOMED* 1 Bur. L. J. 215.

## —S. 110—Judgment of affirmance—Variation on appeal—Valuation

The trial court decreed a suit by a Hindu reversioner to set aside an alienation by the limited owner as having been effected without justifying necessity. On appeal to the High Court the decision of the lower court was varied, the court finding that out of a total sum of Rs. 3,800 the purchase price, Rs. 1,412 was justified by legal necessity at the time of transfer. Accordingly the High Court varied the decree of the trial court by ordering that the plaintiff's title to the property in question should be declared and that he should recover possession thereof upon condition that he first paid to defendants Rs. 1,412 with interest from the date of decree. Held that the value of the appeal did not come up to the statutory requirements and that leave to appeal to the Privy Council could not be granted. (*Miller, C. J. and Mullick, J.*) *BISHUN PRASAD SINGH v. NARSINGH DAS.* 3 Pat. L. T. 530 : (1922) P. 555 : 63 I. C. 663.

## —S. 110—Affirming judgment—Modification by Appellate court by consent of pleaders. See (1921) DIG. COL. 196

*UMA CHAND SETT v. KANAI LAL SETT.* 66 I. C. 621.

## —S. 110—Leave to appeal to Privy Council—Affirming judgment—Modification of decree in favour of party seeking to appeal—Appeal directed against part which was affirmed.

A decree on a mortgage bond which was passed by the Court of first instance was affirmed in appeal with a modification as to the rate of interest, the mortgagor claimed a right to appeal to the Privy Council on the basis of this modification, but wanted to impeach the genuineness and validity of the mortgage deed, as to which both the Courts has concurred.

Held, the subject matter of the appeal not being the modification as regards interest, and there being an affirmance of the decree of the Court below on the question of the validity of the mortgage deed, the application for leave to appeal must fail. (*Mears, C. J. and Banerji, J.*) *KAMAL NATH v. BITHAL DAS.* 44 A. 200 :

20 A. L. J. 9 : L. R. 3 A. 83 : (1922) All. 89 :

64 I. C. 916.

## —S. 110—Decree of High Court partly affirming and partly reversing decree of lower court.

When a portion of the decree of the High Court was in reversal of the decree of the lower court and in favour of the applicant for leave to appeal to His Majesty in Council, and the remaining portion of the decree was in confirmation of the decree of the lower court and against the applicant for leave, he is not entitled to leave, as

## C. P. CODE (1908), s. 110.

a matter of right under S. 110 C. P. Code 8 C. W. N. 294; 20 A. L. J. 9 Ref. (*Mars C. J. and Banerji, J.*) CHANDER SEKHAR v. MT. AMIR BEGAM. (1922) All. 243, 66 I. C. 721.

—S. 110—Certificate of fitness for appeal to Privy Council—Form of. See. (1921) DIG. COL. 195, MAHARAJ BAHADUR SINGH v. BAL CHAND.

24 Bom. L. R. 623: (1922) P. C. 165

—S. 110—Mortgage suit—Valuation.

Plaintiff sued to redeem his mortgaged property. He claimed that all the money due had been paid from the usufruct and that there was a large surplus which was due to him. The trial Court held that the entire mortgage money had been paid and decreed plaintiff's claim for possession and for a surplus amount of Rs. 9,012-12-8. The defendant appealed to the High Court to be relieved of the surplus awarded to plaintiff and claimed a sum of Rs. 2,073 due on the mortgage. The decree of the trial Court was modified in the High Court to the extent of reducing the surplus awarded to 7,910-11-7. The defendant then applied for leave to appeal to His Majesty. Held that the value of the subject matter, including the surplus awarded viz. 7,910-11-7 amounted to Rs. 9,983-11-7 since in the memorandum of appeal to the High Court the defendant had claimed only Rs. 2,073 on the mortgage and had not claimed possession of the property. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value, no leave to appeal could be granted under S. 110 although the decree of the High Court varied the decree of the court below. (*Kanhaya Lal, J. C. and Simpson, A. J. C.*) SANSUTI PRASAD v. MUNSHI EHTISHAM ALI. (1922) Oudh. 214.

—S. 110 — Privy Council — Appeal to — Appellate decree modifying that of lower court—Affirming decision—Meaning of. See (1921) DIG. COL. 197. BHAGWAN SINGH v. THE ALLAHABAD BANK, LTD. 64 I. C. 3.

—S. 110—Suit for damages—Valuation in the first court and on appeal.

A suit for damages exceeding Rs. 10,000 was brought in respect of loss of crops caused by an inundation due to the defendant's tortious acts. The first court decreed 8,000 rupees and odd but on appeal the appellate court dismissed the suit. On an application for leave to appeal, Held that as regards the valuation and other matters the case was a fit one for appeal to the Privy Council. In granting leave the correct principle is to look at the judgment as it affects the interests of the parties, who are prejudiced by it, and who seek to relieve themselves from it by an appeal. 6 Bom. L. R. 403; 4 Pat. L. J. 415; 15 Moo. P. C. 181; 3 C. L. J. 257; 35 A. 445 Foll.

Per *Robinson, J.* The second paragraph of S. 110, C. P. C. is intended to deal with property other than that forming part of the actual subject matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject matter in dispute on appeal to His Majesty in Council. 39 M.

## C. P. CODE (1908), s. 110.

843 foll. (*Robinson, C. J. and Duckworth, J.*) MAUNG BYA v. MAUNG KYI NYO. 66 I. C. 606.

—S. 110—Valuation—Future interest.

Where in a suit for sale on a mortgage the plaintiff claimed Rs. 9,300 with interest pending the suit and the plaintiff got a decree for more than 10,000 rupees, the case satisfies the requirements of S. 110 C. P. Code as regards the valuation. (*Mears C. J. and Piggott, J.*) GAJADHAR MAHTON v. AMBIKA PRASAD TIWARI. 20 A. L. J. 903; L. R. 3 A. 615.

—S. 110—Valuation — Proceedings under the Bombay Rent Act.

Plffs sought to eject their tenant in order that they might occupy the premises themselves while the tenant sought the protection of the Bombay Rent Act. The monthly rent of the premises was Rs. 275 and capitalised at 20 years' purchase the value of the property would be over Rs. 10,000. The plff. got a decree and debt applied for leave to appeal to the Privy Council. Held that the decree involved directly a claim, question to or respecting property over Rs. 10,000 and leave to appeal must be granted. (*Macleod, C. J. and Coyajee J.*) KASTURBHAI MANIBHAI v. HIRALAL D. NANAVATI. 24 Bom. L. R. 350.

—S. 110—Valuation of appeal—Substantial question of law.

To enable an applicant to obtain leave to appeal to the Privy Council it must be shown that the value of the subject matter in the Court of first instance was Rs. 10,000 at the date of the decree of that Court. A decision as regards the validity of a particular alienation by a co-heir of properties worth less than Rs. 10,000 does not affect other alienations made by other co-heirs to different persons.

The power of co-heirs in respect of alienation of joint and undivided property is well settled and is not a question of general importance. For the grant of special leave the question involved must be not merely substantial but must be of great public or private importance which did not exist in the case. 27 A. 174, 6 B. 403, 39 Mad. 843 foll. (*Robinson, C. J. and Macgregor, J.*) MAUNG THWE v. A. L. A. R. CHETTY FIRM. 1 Bur. L. J. 62; 11 L. B. R. 335; 68 I. C. 690.

—S. 110—Valuation—Suit for declaration of status—Valuation fixed by plaintiff not conclusive.

Plff. sued for a declaration that he was a Rajput by caste and valued his suit for purposes of jurisdiction at Rs. 11,000. His suit was decreed by the Subordinate Judge, but dismissed by the High Court. On an application for leave to appeal to His Majesty in Council.

Held, that the suit was not one to which any special money value could be attached, and that the value of the subject matter of the suit could not be said to amount to Rs. 10,000 or upwards or that the decree involved directly or indirectly any claim or question to or respecting property of like amount or value. 18 Cal. 378, foll. 60 P. R. 1905. 15 Mad. 237 (F. B.) 25 Cal. W. N. 269 (P. C.) Dist. (*Chevis and Scott-Smith, JJ.*) GHULAM RASUL KHAN v. SECRETARY OF STATE. 2 Lah. 297; 26 P. L. R. 1922: (1922) Lah. 131; 65 I. C. 239.

## C. P. CODE (1908). S. 110

—S. 110—Valuation—Suit on mortgage—Interest allowed by first Court till date of realisation—Appeal to High Court—Dismissal of suit—Valuation of appeal to Privy Council over Rs. 10,000—Valuation in the Court of first instance. See (1921) DIG. COL. 198 RAMYAD SINGH v. RAMBILAS SINGH. 6 Pat L J 596

—S. 110—Valuation of appeal—Interest subsequent to suit—Inclusion of.

For the purpose of ascertaining the pecuniary value of an appeal for purposes of leave to appeal to His Majesty in Council, interest subsequent to the date of plaint and up to the date of the decree must be included in the subject-matter 16 L. W. 18 Rel. 39 M. 843 dist. (Oldfield and Ramesam, JJ.) RAGHUNATHASWAMI IYENGAR v. GOPAUL RAO. 16 L. W. 682 : 43 M. L. J. 622

—S. 110 (1)—Causes of action different against defendants—Valuation how made

In a suit against several persons where the cause of action against each is quite distinct and different from the others, the fact that a joint suit is brought cannot make the subject matter of the appeal the same as that of the joint suit. The valuation will depend upon the relief claimed against the particular defendant. (Spencer and Krishnan, JJ.) VADIVELU AMMAL v. RAJARATNA MUDALIAR. 30 M. L. T. 337 (H. C.) : 16 L. W. 262

—S. 110 (2)—Deed—Construction.

More questions of construction of particular documents cannot be treated as questions of general importance or substantial questions of law within the meaning of S. 110. (Kanhaya Lal, J. C. and Simpson, A. J. C.) SANSUTI PRASAD v. MUNSHI EHTISHAM LAL (1922) Oudh 214.

—S. 110 (3)—Leave to appeal to Privy Council—Substantial question of Law—Discretionary matter—Practice.

The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law within S. 110 (3) of the Civil Procedure Code.

The High Court declined to grant a certificate for leave to appeal to the Privy Council. Where the only appeal which the appellant could make would be to ask the Privy Council to hold that the High Court had wrongly exercised its discretion in refusing to grant leave, under Cl. 12 of the Letters Patent, to file an additional statement. (MacLeod, C. J. and Shah, J.) GOVIND LAL BANSILAL v. BANSILAL MOTILAL. 46 Bom. 249 : 24 Bom. L. R. 196 : (1922) Bom. 11.

—S. 110, Cl. (3)—Substantial question of law.

What the last clause of S. 110, C. P. C., requires is substantial questions of law and not mere questions of law. (Spencer and Krishnan, JJ.) VADIVELU AMMAL v. RAJARATNA MUDALIAR. 30 M. L. T. 337 (H. C.) : 16 L. W. 262.

—S. 110 (3)—Substantial question of law—Decree of High Court dismissing appeal, yet varying decree of lower court—Effect.

Where the High Court dismissed an appeal with costs, but yet made one substantial variation which amounted to overruling the decision of the lower court on that point, it cannot be held there

## C. P. CODE (1908), S. 115.

was an affirmance of the decision of the court below. Hence a substantial question of law was not necessary for appealing to the Privy Council. (Sanderson, C. J. and Richardson, J.) NAGENDRA-BALA DAS v. DINANATH. 26 C. W. N. 651.

—S. 110 (3)—Variation in decree regarding costs—If decree one of affirmance.

A variation, not touching the merits of the case but relating only to costs, does not make the decree anything other than an affirming decree. (Spencer and Krishnan, JJ.) VADIVELU AMMAL v. RAJARATNA MUDALIAR.

30 M. L. T. 337 (H. C.) : 16 L. W. 262.

—S. 114—Review—Grounds for—Reversal of High Court's decision in a connected case by the Privy Council—Not a sufficient cause, See C. P. Code O. 47, R. 1. 43 M. L. J. 33.

—S. 115 and O. 41, R. 27—Additional evidence—Refusal to admit by appellate Court—discretion—Interference in revision.

Where an appellate Court in the exercise of the discretion vested in it by O. 41, R. 27 of the C.P. Code refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. (Suhrawardy and Cuming, JJ.) HARI CHARAN KARANJAI v. BAHAR SHEIKH.

67 I. C. 252,

—S. 115 and O. 1 R. 10—Addition of parties—Revision—Discretion.

It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower court rejects an application under O. 1, R. 10 C. P. C. on the ground that it was made too late (Richardson, J.) RAM CHARAN MOHAJAN v. JIBAN CHANDRA SARMA. 64 I. C. 563.

—S. 115—Amendment of plaint not allowed—Revision if lies. See C. P. Code O. 6, R. 17. (1922) Lah. 394.

—S. 115—Amendment of plaint—Order allowing—Revision

An amendment of the plaint is in the discretion of the court and if wrongly allowed, the defendant could attack the order on appeal if the decision is against him. The High Court will not interfere in revision with the order especially when it does not change the character of the suit or cause material injustice to the defendant. (Odgers, J.) RAMA KRISHNA PILLAI v. KRISHNASWAMI PILLAI.

15 L. W. 667 : (1922) M. W. N. 521 : (1922) Mad. 321 : 68 I. C. 167.

—S. 115—Appeal—Conversion into revision.

The High Court is entitled in the exercise of its discretion to convert a second appeal into a revision and interfere. (Teunon and Abdul Majid, JJ.) MAHATAP DAS v. MADHU SUDAN SAHA. 64 I. C. 712.

—S. 115—Application for—Not necessary See (1921) DIG. COL. 206 MOULVI SYED RAZUR RAHMAN v. ATHAR HUSSAIN.

(1922) P. 368 : 64 I. C. 496.

—S. 115 and Sch. 11, para. 16—Award—Notice of objections not given—Effect,



C. P. CODE (1908), § 115.

Where a Court decides the objections to an award without notice to the objector of the date of hearing it acts with material irregularity and its order is liable to be revised (*Abdul Raoof, J.*) *DARBARI RAM v. BHUKHA RAM*. 64 I. C. 394.

64 I. C. 394.

—S. 115 and Sch. II, Para 16—Award—Rejection or—Misconduct—Private enquiry by arbitrator not improper when wide powers are conferred by parties—Interference in revision with refusal to pass a decree in terms of the award. See C. P. CODE SCH. II, PARA 15.

64 I. C. 934.

—S. 115 and Sch. II, para 16—Award—Revision—Competency of.

It a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, C. P. C., there is a revision against the decree (*Martineau, J.*) *DELHI CLOTH AND GENERAL MILLS, CO., v. FIRM KIDARI PERSHAD CHAUDI LAL*.

22 P. L. R. (1922) 4 U. P. L. R. (L) 15.

64 I. C. 363

—S. 115—Award—Revision—Minor parties—Want of sanction.

The absence of Court's sanction to a reference to arbitration on behalf of certain minor parties does not, of itself, render the award void but only voidable and if the court negatives the objection that the award is void for want of such sanction and passes a decree on the award, it is not open to revision under S. 115 C. P. Code, 40 M. 793 P. C. Ref. (*Kennedy, J. C. and Raymond, A. J. C.*) *EMNABAI v. FAKIR MAHOMED* (1922) *Sindh. 1*: 15 S. L. R. 163. 65 I. C. 50.

—S. 115 and Sch. II, para. 15—Award—Private inquiries authorised by agreement—Not—Misconduct—Order superseding award—Revision.

Where the parties to an arbitration agreed to abide by the arbitrator's decision in whatsoever manner he might see fit to arrive at it, and he made private inquiries into the dispute behind the backs of the parties, held, it did not constitute misconduct; in superseding the award in such a case, the court acted illegally and with material irregularity and hence the High Court could interfere in revision. (*Piggott and Walsh, JJ.*) *HUSAIN BAKHSH v. LACHHMAN DAS MATHRA DAS* (1922) *All. 69*. 20 A. L. J. 125.

—S. 115—"Decided"—New code and old code.

However modified in language, the word "decided" in S. 623 of the old Code of Civil Procedure is similar in its purport to the word "decided" in S. 115. (*Graves, J.*) *UDOY CHAND v. MULLA REASAT HOSSAIN*. (1922) *Cal. 58*.

—S. 115—Case decided—Leave to withdraw suit with liberty to sue—Revision See (1921) *DIG. COL. 199*. *SINGHAI RAJI LAL v. KANHAI*. 18 N. L. R. 30: (1922) *Nag. 84*.

—S. 115—Case decided—Meaning of—Order refusing stay of suit under S. 10 C. P. Code.

C. P. CODE (1908), S. 115.

An order of lower court refusing to stay the trial of a suit under S. 10 C. P. Code is not open to revision under S. 115 C. P. Code inasmuch as there is no "case decided". 42 A. 409; 60 P. R. 1897 (F. B.) foll. (*Martineau, J.*) *FIRM OF ISHAR DAS DHARAM CHAND v. FIRM OF BUTA MAL DURGA DAS*. 4 *Lah. L. J.* 425: (1922) *Lah. 55*: 67 I. C. 870.

—S. 115—Case decided—Order directing verification of pleadings—Order for costs.

A mere direction that the defendant should sign the pleas and verify them according to law would probably not be open to revision, but when that direction is accompanied by an order that the deft. is to pay a certain sum as costs the order is a decision of a "case" with which the High Court can interfere in revision. (*Martineau, J.*) *BALWANT SINGH v. TEJ BHAN*. 64 I. C. 207.

—S. 115—Case decided—Minority.

Where the defendant claimed to be a minor but refused to produce any evidence and the plaintiff swore that he was major, held, no revision lies from the order of the Judge in which defendant was held to be major there being before High Court no record of the suit or case decided in the court below. (*Piggott and Walsh JJ.*) *AMOLAK CHAND v. BHAGWAN DAS*. (1922) *All. 334*.

—S. 115—Case decided—Order Staying suit.

*Sembli*: There is no revision against an order of the lower court staying the trial of a suit. 42 A. 409, 42 C. 926; 27 M. L. J. 494; 15 C. W. N. 666 Ref. (*Abdul Raoof, J.*) *MELA RAM v. RIKHI SINGH*. 69 I. C. 111.

—S. 115—Case decided—Refusal to adjourn.

The refusal by a court to adjourn the hearing of a suit in order to enable the applicant to pay the court is not an order which should be revised by the High Court. (*Piggott and Walsh JJ.*) *CHAKHAN LAL v. KANHAIYA LAL*. 20 A. L. J. 1005.

—S. 115 and O. 21, R. 58—Claim to mortgaged property—Mortgage decree for sale—claim once allowed but disallowed on fresh application for sale. See (1921) *DIG. COL. 200*. *MAHABIR PRASAD SINGH v. NOGENDRA NATH MANDAL*. 68 I. C. 271.

—S. 115—Cr. P. Code, S. 476—Order of Civil Court directing, prosecution—Revision—Interference by High Court only under S. 115, C. P. Code See CR. P. CODE, S. 476. 24 O. C. 367.

—S. 115—Criminal Procedure Code, S. 476—Offence under S. 193, I. P. C.—Revision of order.

An order of a Judge passed under S. 476 Cr. P. Code directing the trial of a person under S. 193 I. P. C. is open to revision only under S. 115 C. P. Code. (*Ryves, J.*) *R. SIMEON v. EMPEROR*. (1922) *All. 438*: 66 I. C. 515: 23 Cr. L. J. 291.

—S. 115—Error of law—Interference. Error of law is no ground to exercise the powers of revision under S. 115 C. P. Code. (*Cuming, J.*)

C. P. CODE (1908), §. 115.

HARI CHARAN ROY CHAUDHURI v. BIRENDRA NATH SAHA. 35 C. L. J. 327.

—S. 115—Error of law—Construction of document.

A question as to the meaning and effect of a document is one of law with which the High Court will not interfere in revision. (*Richardson, J.*) RAM CHARAN MOHAJAN v. JIBAN CHANDRA SARMA. 64 I. C. 563.

—S. 115—Error of law—No ground for revision.

A mere error of law does not justify the court in interfering under S. 115 C. P. Code. (*Greaves, J.*) GOLAM SOBHAN v. ALI HOSSAIN BAHADUR. 65 I. C. 696.

—S. 115—Error of law—No ground for revision.

Where in the exercise of its jurisdiction the lower court, commits an error of judgment this is not a matter upon which revision can lie. (*Banerji, J.*) GANESH PRASAD SAHU v. DUKH HARAN SAHU. (1922) All. 441. 66 I. C. 509.

—S. 115—Error of law—Not a ground of revision.

Where a matter is entirely within the jurisdiction of the lower court, a mere error of law in arriving at a finding is no ground for revision by the High Court 41 C. 32 Ref. (*Newbould and Panton, JJ.*) RAJENDRA NATH ROY v. SHEIK ABDUL. 68 I. C. 430.

—S. 115—Error of law—Revision.

Ignoring an express provision of law is sufficient ground for revision. (*Hopkins, S. M. Fremantle, J.M.*) SAHDEO PRASAD v. RAM SAHAI, L R, 3 A. 257 (Rev.)

—S. 115—Error of law—Misconstruction of rules made by the High Court.

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts, is no ground for revision. (*Das and Adami, JJ.*) RAMKISHUN DAS v. BENI PRASAD. 3 Pat. L T, 314 : 65 I C 355.

—S. 115—Error of Law—Obvious mistake—Revision.

Where the finding of the Lower Court is vitiated by an obvious error the High Court can interfere in revision. (*Drake Brockman, J. C.*) MANGU LAL v. MT NANHI, 5 N. L. J, 1 : (1922) Nag. 104 : 67 I. C. 806.

—S. 115—Error of law—Res judicata—Revision. See (1921) DIG COL. 200. KEDAR NATH v. SUKHNATH SINGH. 64 I. C. 209.

—S. 115—Error of law—No revision.

Even if the lower court had committed an error of judgment or of law the High Court cannot interfere under S. 115 C. P. Code. (*Suhrawardy and Ghose, JJ.*) GURUDAS KUNDU CHOWDHURY v. DASARATHI HALDAR. 65 I. C. 512.

—S. 115 and O. 26, R. 4 — Examination of defendant on commission—Refusal of Court—Revision—Interference. See C. P. CODE, O 26 R. 4.

35 C. L. J. 78.

C. P. CODE (1908), §. 115.

—S. 115 and O 23, R. 1 — Execution application—Withdrawal—Sale of property by court notwithstanding—Revision.

Where the Court below rejected an application by the decree holder withdrawing the execution proceedings which he had initiated and proceeded to sell the properties in execution notwithstanding such withdrawal, the order of the Court is without jurisdiction and can be set aside in revision. The order however is not open to appeal. 4 Mad 217 ; 32 C. 146 ; 28 A. 72 foll. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI v. MAHESH KANT CHOWDHURY. 65 I. C. 122.

—S. 115—Execution sale—Deposit to set aside—Power to make—Revision.

Where the Court of execution allowed a reverser to make a deposit he was not entitled to make, it exercised a jurisdiction not vested in it by law or was acting in the exercise of its jurisdiction illegally or with material irregularity within the meaning of S. 115 of the Civil Procedure Code. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH NANDA v. BAIJYA NATH TRIPATHI. 26 C W. N. 167 : (1922) Cal. 95.

—S. 115 and O. 21, R. 89—Execution Sale—Setting aside—Deposit—Jurisdiction.

The High Court has jurisdiction to interfere with the wrong exercise by the courts below of powers vested in them under O. 21, Rr. 89 to 92 dealing with confirmation on setting aside of auction sale. The court has no jurisdiction to confirm the sale even when the judgment-debtors had complied with all the provisions of law and deposited the necessary amount within the time prescribed for that purpose (*Suhrawardy and Ghose, JJ.*) SANTOSH BALA DEBI v. RAM CHANDRA GHATI. 67 I. C. 286.

—S. 115 and O. 9, R. 13 — Ex parte decree—Order setting aside—Revision. See (1921) DIG. COL. 200. SHEIKH KALLU v. NADIR BAKSHI. (1922) All. 441 : 64 I. C. 527.

—S. 115 — Grounds for interference — Affidavit of pleader's clerk.

The High Court will not interfere in revision when the applicant has suffered no prejudice and the order complained against does not affect his interests. Nor would the High Court act on the affidavit of a pleader's clerk and interfere. (*Suhrawardy and Ghose, JJ.*) SURJA NARAYAN DAS v. AMIRUDDIN MAHOMED. 66 I. C. 127.

—S. 115 — Injunction — Temporary — Grant of—Interference in revision when justified See MAL. COMP : FOR TEN, IMP. ACT, S. 5. (1922) M. W. N. 303.

—S. 115—Interlocutory order—Decision as to Court fee—Error of law—Revision.

A decision of a subordinate Court determining the amount of Court fees payable by plff. is not open to interference in revision inasmuch as no case has been decided by the Court below 43 A. 564 foll. A mere error of law though a ground for second appeal does not justify revision. (*Prideaux, A. J. C.*) GOVIND v. DAJI. (1922) Nag. 128 : 65 I. C. 327.

C. P. CODE (1908), S. 115.

—S. 115—Interlocutory order—Finding on a preliminary issue—Revision. *See* (1921) DIG. COL 201 SHYAM SUNDAR *v* SHEOAMBAR BAN.

64 I. C. 92

—S. 115—Interlocutory orders—Interference in revision.

Where the record of a case has been sent for by the High Court, it would not be exercising a wise discretion to refuse to interfere on the mere ground that the order is an interlocutory one. Where considerable delay had already occurred and was likely to occur if a remand was ordered, the High Court disposed of the question in revision (*Chapman and Atkinson, JJ.*) NAURATAN LAL *v* WILFORD JOSEPH STEPHENSON (1922) Pat. 79 : (1922) P. 359

—S. 115 and O. 26, R. 2—Interlocutory order—Interference in revision—Examination of witnesses.

The High Court has power to interfere in revision with interlocutory orders not directly appealable so as to avoid irreparable damage or gross injustice. The High Court will not interfere with the discretion of the lower Court not perversely exercised. A dismissal of an application to examine witnesses on commission without considering whether their evidence would be relevant or not, is open to revision. (*Robinson, C. J. and Heald, J.*) S R M M. CHETTY *v* P. L. N. N. NARAYANAN CHETTY 11 L. B. R. 65. 64 I. C. 821.

—S. 115—Interlocutory order—Revision.

The High Court has jurisdiction to interfere with interlocutory orders in exceptional cases (*Leslie Jones, J.*) FIRM OF DAMRI SHAH-THAKUR RAM *v* FIRM RULIA MAL DOGAR MAL.

17 P. L. R. 1922 : 64 I. C. 387.

—S. 115—Interlocutory order—Revision when justifiable.

The High Court would exercise its revisional power in the case of interlocutory orders where otherwise irremediable damage would result to the parties. (*Wilberforce, J.*) FIRM OF DURGA PROSAD MUTSADDI LAL *v* FIRM OF RULIA MAL.

4 Lah. L. J. 176 : 65 I. C. 282 :

29 P. L. R. (1922) : 1922 Lah. 100.

—S. 115—Interlocutory order—Misjoinder of parties and causes of action—Interference.

The powers of the High Court in revision could be exercised in cases where the lower court held that a suit is bad for misjoinder of parties, nonjoinder of parties and misjoinder of parties and causes of action. The use of the revisional powers would be justified where the lower court has decided that the suit is not bad for misjoinder of parties and causes of action. 42 M. L. J. 43 ; 29 M. L. J. 53 ; 10 L. W. 652 ; 6 L. W. 9 ; 5 L. W. 207 foll. (*Venkatashubba Rao, J.*) VELAPPA NADAR *v* CHIDAMBARA NADAR

43 M. L. J. 277 : (1922) M. W. N. 316 :

16 L. W. 186 : (1922) Mad. 174.

—S. 115—Interlocutory order—Revision—Interference when justified—Posting of case for argument on preliminary issues.

C. P. CODE (1908), S. 115.

It is impossible to say that in no case whatever will the High Court interfere with an interlocutory order of the lower court. But interference must be exercised with great diligence, the general rule being against such interference. Interference will be justified if the order sought to be revised is in fact perverse or irreparable injury will be caused unless the revision is allowed. 9 M. 256 ; 15 M. L. T. 339 ; 5 L. Wt 207 ; 12 C. L. J. 505 ; 12 C. L. J. 519 ; 12 C. L. J. 525 ; 39 M. 195 F. B. Ref. Where the lower court posted a case for final hearing on preliminary issues of law, settled long before, the High Court refused to interfere as the party had a remedy by appeal in case of injury or inconvenience. (*Odgers, J.*) RAMAKRISHNA PILLAI *v* KRISHNASWAMI PILLAI. 15 L. W. 667 : (1922) M. W. N. 521 : (1922) Mad. 321 : 68 I. C. 167.

—S. 115—Interlocutory order—Revision—Appeal.

The High court refused to interfere in revision with an interlocutory order of the lower court directing a commissioner to ascertain mesne profit, as the applicant had a remedy by way of appeal from the final decree (*Spencer, J.*) HUSSAIN SAHIB *v* HAMMAD SAHIB. 16 L. W. 312 :

31 M. L. T. 180 (H. C.) : (1922) M. W. N. 562.

—S. 115 and O. 41, R. 25—Interlocutory order—Revision when competent.

The High Court would in the exercise of its discretion interfere with interlocutory orders only in exceptional cases. An order under O. 41, R. 25 not being a final order is subject to that rule. As the order in the present case was unnecessary the court set aside the order in revision. (*Broadway, J.*) ALLAH BAKHSH *v* LAL KHAN

67 I. C. 269.

—S. 115—Interlocutory order—Appeal.

In revision the High Court is not bound to interfere even in a case of defect of jurisdiction unless it is shown that there has been a failure of justice arising from such defect 36 P. R. 1902 foll. There is no appeal from an interlocutory order in a suit and if the appellate Court entertains such an appeal it assumes a jurisdiction not vested in it. (*Broadway, J.*) GANDA RAM *v* SUNDAR LAL.

67 I. C. 278.

—S. 115 and O. 6, R. 17—Interlocutory order—Amendment—Refusal—Interference.

Though the High Court would not generally interfere with interlocutory orders of the lower Courts yet if the interest of justice required the amendment which was refused the High Court may interfere. (*Scott Smith, J.*) JHARIA COAL COMPANY *v* DIWAN CHAND COMPANY

67 I. C. 335.

—S. 115—Interlocutory order—Direction as to the mode of taking accounts—Interference in revision—Government of India Act.

The High Court will not interfere under S. 115, C. P. Code or S. 107 of the Govt. of India Act with an interlocutory order unless it is shown to be so improper that unless it was varied or reversed immediately irreparable loss will result to the parties. The High Court refused to interfere with an order of the lower court giving directions

## C. P. CODE (1908), s 115.

as to the mode of taking accounts in a pending suit (*Miller, C.J. and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH v MAHARAJAH KESHO PRASAD SINGH 3 Pat. L. T. 638

—S. 115—Jurisdiction—Absence of Proceeding under O. 43 R. 23 instead of under O 43. R. 25—If justifies interference. See C. P. CODE O. RR. 53 AND 25. 64 I. C. 436.

—S. 115 and Sch. II, Para 16—Jurisdiction Defect in—Interference—Other remedy open

To justify interference by the High Court under S. 115, C. P. C. on the ground of want of Jurisdiction, the facts ousting Jurisdiction must be patent on the facts of the record. The High Court will be slow to interfere in revision unless the party applying to the Court has no other remedy 44 B. 595 foll. (*Kennedy, J. C. and Raymond, A. J. C.*) EMBABAI v. FAKIR MAHOMED. 15 S. L. R. 165 : 65 I. C. 50 (1922) S. 1

—S. 115—Jurisdiction—Erroneous decision on point of law—Revision.

Where a Court assumes jurisdiction to pass an order for an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court under S. 115 C. P. Code (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN v. MUTHU VELAPPA GOUNDAR. 44 M. L. J. 1 : 16 L. W. 848,

—S. 115—Jurisdiction—Failure to exercise—Omission to decree claim admitted.

Where the lower court dismissed the plaintiff's suit for rent without considering whether he was entitled to a decree for the whole or a portion of the claim on the admission of the defendant there is a failure to exercise jurisdiction with which the High Court will interfere in revision. (*Miller, C. J. and Mullick, J.*) RAJGIRI SINGH v. JADUNATH RAY. (1922) Pat 355.

—S. 115—Failure to exercise jurisdiction vested by law—Interference.

Failure to exercise jurisdiction vested by the Calcutta Rent Act, can be interfered with under S. 115, C. P. Code (*Greaves and Ghose, JJ.*) BASANTA CHARAN SINHA v. RAJANI MOHAN CHATTERJI. 26 C. W. N. 711,

—S. 115—Jurisdiction—Order without—Revision—Interference.

Under S. 115 C. P. Code it is competent to the High Court to act in revision *suo motu* as it is bound to set aside orders of lower courts passed without jurisdiction. 4 M. 217 ; 32 C. 146 ; 28 A. 72 foll. (*Jwala Prasad and Ross, JJ.*) CHAUDHRY RAM PD RAI v. MAHESH KANT. 3 Pat. L. T. 445 : 1 Pat. 232 : (1922) P. 525.

—S. 115 and O. 33, R. 5—Leave to sue in *forma pauperis*—Rejection of application—Revision.

Per *Walsh, J.* (*Piggott, J.* contra) :—An order rejecting an application for leave to sue in *forma pauperis* is not open to revision 19 A. L. J. 558 Rel. (*Piggott and Walsh, JJ.*) MAHADEO SAHAI v. THE SECRETARY OF STATE FOR INDIA.

44 All. 248 : 20 A. L. J. 55 : (1922) All. 1 : 65 I. C. 255.

## C. P. CODE (1908), s. 115.

—S. 115 and O. 23, R. 1—Leave to withdraw suit—Improper grant of Revision—Interference. See C. P. CODE, O 23, R. 1. 64 I. C. 556.

—S. 115 and O. 23, R. 1—Leave to withdraw suit—Order without recording reasons—Revision.

Where on an application for leave to withdraw a suit with liberty to bring a fresh suit the Court merely passed an order to the effect that it was allowed without considering or recording the grounds for granting such leave, the High Court in revision set aside the order. (*Banerji, J.*) RAHMAT ULLAH v. DHARAM SINGH. 20 A. L. J. 90 : L. R. 3 A. 93 : 64 I. C. 948 : (1922) All. 185.

—S. 115—Limitation—Delay.

As a general rule the High Court does not entertain revision petitions after 3 months, but the High Court may in a proper case excuse the delay in the exercise of its discretion. (*Deva Doss, J.*) YAGNASWAMI AIYAR v. CHIDAMBARANATHA MUDALIAR. (1922) M. W. N. 130 : 65 I. C. 732 : 16. L. W. 760 : (1922) Mad 63.

—S. 115—Irregularity—Appellate judgment vitiated by irregularity—Sumises and conjectures.

Where the judgment of the lower appellate Court is vitiated by inaccuracies and misunderstandings and it is entirely based upon them, the High Court would set it aside in revision, though it is reluctant to interfere on revision in arbitration cases. (*Wilherforce, J.*) THE FIRM OF KESAR MAL SHANKAR DAS v. THE FIRM OF HUKAM CHAND BADRI NATH. 67. I. C. 260.

—S. 115—Material irregularity—Want of Jurisdiction—Distinction between—Omission to decide material point.

When a court of law has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction and regularly and legally and no revision lies unless, that decision itself affects the court's own jurisdiction, but when having jurisdiction, the court has failed or refused to take up the point for decision, it has exercised jurisdiction irregularly and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be. Authorities reviewed. (*Wallace, J.*) AHMAD THAMBI MARAICAIR v. BASAVA MARACAYAR. 16. L. W. 898.

—S. 115 — Material irregularity — Dismissal for default—Revision.

Where on an application to set aside a dismissal for default, the lower court disbelieved the plaintiff's story and dismissed the application, there is no scope for revision, as the lower court could not be said to have acted illegally or with material irregularity. (*Le Rossignol, J.*) FARIDA v. KHAIRA. 3 Lah. 79 : (1922) Lah. 290.

—S. 115—Material irregularity—Failure to add receiver as party to suit or execution proceedings—Revision—Interference.

43 M. L. J. 211.

C. P. CODE (1908), S. 115.

—S. 115—*Material irregularity—Omission to consider point arising in the case.*

Where a Court omits to take into consideration a material point which arises in the case, its decision is liable to be revised. (*Maung Kin, J. J. SHWE HLA GYI v. SAN DWE.* 64 I. C. 361.)

—S. 115—*Material irregularity—Refusal to take evidence—Finding of fact*

On a point of fact a Court cannot come to a finding without taking any evidence, especially where there is no affidavit on the record and the parties are not agreed as to the facts (*Panton, J.*) *JABAN SAHA v. SEBAK MONDAL*

64 I. C. 85.

—S. 115—*Material irregularity—Refusal of hearing—Interference.*

Whenever the court below has refused to hear a party on the merits without just grounds, the High Court is entitled to interfere in revision (*MacLeod C. J. and Kanga, J.*) *BACHUBAI JHIRAD v. IBRAHIM ISAK.* 24 Bom. L. R. 744 : (1922) Bom. 207.

—S. 115 (c)—*Material irregularity—Decision on imaginary facts—Perversity.*

Where the decision of the court below was based not merely on a forced and impossible construction of the facts that were before the court, but on the importation of facts which were admitted by both parties not to exist, this is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by S. 115 (c) C. P. C. Code (*Hallifax A. J. C.*) *PANDURANG v. KALLU DAS* 65 I. C. 881.

—S. 115 (c)—*Material irregularity—Refusal to frame issue—Court fee—Valuation—Revision.*

Where the defendant in his written statement objected that the suit was grossly undervalued but the Court below instead of raising an issue thereon merely recorded the objection. *Held*, that the court below acted with material irregularity in refusing to raise an issue and decide it. (*Devadoss, J.*) *VENKATACHALLAM CHETTIAR v. KRISHNASWAMI THEVAN.* (1922) M. W. N. 692.

—S. 115—*Merits of the case to be looked into.*

Where no injustice has been caused by the irregular procedure of the Court below the High Court will not interfere in revision. (*Devadoss, J.*) *YAGNASWAMI AIYAR v. CHIDAMBARANATHA MUDALIAR.* (1922) M. W. N. 130 :

16 L. W. 760 : (1922) Mad. 63 : 65 I. C. 732.

—S. 115—*Misjoinder of causes of action—Revision—Interference.*

The High Court will in the exercise of its revisional jurisdiction interfere when the lower court has wrongly held a suit as bad for misjoinder of causes of action and directed him to elect which cause of action he would proceed with in the suit. 5 L. W. 207 ; 6 L. W. 9 ; 42 M. L. J. 97 foll. (*Oldfield and Venkatasubba Rao, JJ.*) *ARUNACHELLAM CHETTIAR v. ARUNACHELLAM CHETTIAR.* 43 M. L. J. 218 :

16 L. W. 175 : (1922) M. W. N. 453 : (1922) Mad. 436.

C. P. CODE (1908), S. 115.

—S. 115—*New point—High Court if can interfere in revision. See.* (1921) DIG. COL. 204. *HARIDAS CHAKUBHAI v. RATANSEY RAGHAVJI.* 46 Bom. 56 : (1922) Bom. 149 (B.)

—S. 115—*Other remedy open—Conclusion right, but procedure wrong—Interference.*

*Per Das J.* : The ordinary rule is that where an aggrieved party has other remedy available, the High Court is unwilling to interfere in revision.

*Per Bucknill, J.* : Where the right thing has been done in quite the wrong way, the sensible course is not to interfere. (*Das and Bucknill, JJ.*) *SYED ALI ZAMIN v. NAWAB SYED MOHAMAD AKBAR ALI* 1 Pat. 68 : 3 Pat. L. T. 406 : (1922) P. 315 : 65 I. C. 135.

—S. 115—*Other remedy open—Interference in revision.*

Although a High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, there is nothing in the law which prohibits such court from interfering where grave injustice might have been done. 10 All. 119 ; 36 P. R. 1887 ; 71 P. R. 1884, 15 P. R. 1874 Ref. (*Abdul Raoof, J.*) *RALLA RAM v. MT. RAJ.* 4 Lah. L. J. 71 : (1922) Lah. 63 : 87 I. C. 945.

—S. 115—*Other remedy open—Revision—Interference.*

The High Court will not interfere in revision when the aggrieved party has a remedy by suit open to him except in cases where there would be a very serious miscarriage of justice if the High Court did not interfere. (*Suhrawardy and Cuming, JJ.*) *GIRIBALA DAS v. PRIANATH PAL.* 65 I. C. 476.

—S. 115—*Other remedy open—Suit—C. P. Code, O. 21, R. 63—Revision.*

Where another remedy is open to a party, e.g. by a suit under O. 21, R. 63 C. P. Code the court will not entertain an application for revision. (*Banerji, J.*) *BASDEO SAHAI v. SARASWATI.* 64 I. C. 469.

—S. 115—*Other remedy open—Suit—Spec. Rel. Act, S. 9—Interference in revision.*

Revision should not ordinarily be granted, even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But where the decree of the Court below is manifestly wrong, and the slower remedy by a regular suit would still leave the applicant suffering injustice and undue hardship, the Court should exercise the revisional powers in its favour. (*Hallifax, A. J. C.*) *RAMCHANDRA v. SHRIDHAR.* 5 N. L. J. 151 : 65 I. C. 351 : 18 N. L. R. 71 : (1922) Nag. 115.

—S. 115—*Pauper application—Order admitting—If revisable.*

No application in revision lies against an order admitting an application for leave to sue *in forma pauperis*. (*Piggott and Walsh, JJ.*) *KANDHATA SINGH v. MT. KUNDAN.* 20 A. L. J. 471 : (1922) All. 208 : 67 I. C. 641.

C. P. CODE (1938), S. 115

—S. 115 and O. 6, R. 17—Pleadings—Amendment—Legal representative of deceased plaintiff allowed to set up a claim not open to original plaintiff—Revision—Interference See C. P. CODE O. 6, R. 17.

15 L. W. 72

—S. 115—Point not in issue—Decision on—Effect.

Where the courts below decided the suit on a point not in issue between the parties, the orders are without jurisdiction and can be revised (*Hopkins, S. M. and Fremantle, J. M.*) JAHANGIRA v. MT. LACHHI KUAR.

L. R. 3 A. 219 (Rev.)  
4 U. P. L. R. (B. R.) 47

—S. 115—Powers under—Not so wide as under S. 25 Provincial Small Cause Courts Act. See PRO. SM. C. C. ACT, S. 25.

L. R. 3 All. 17.

—S. 115—Powers of—High Court—Liberal construction.

The powers of the High Court under S. 115, C. P. Code, should be liberally utilised especially when the applicant has no remedy. (*Kennedy, J. C. and Madgaon Kar, A. J. C.*) NARAINDAS v. JASSOMAL.

15 S. L. R. 135 • 65 I. C. 37

—S. 115—Proceedings under S. 36 of the legal Practitioners Act—Power of High Court to interfere. See LEG. PRACT. ACT, S. 36.

16 L. W. 795

—Ss. 115 and 73—Rateable distribution—Erroneous order—Revision—Interference in. See C. P. CODE, Ss. 73 AND 115.

26 C. W. N. 169

—Ss. 115 and 151 and O. 41, R. 23—Remand—Improper order—Revision—Interference by High Court, See C. P. CODE, O. 41, R. 23.

30 M. L. T. 314.

—S. 115 and O. 41, Rr. 23 and 27—Remand—Improper order—Revision—Interference when justified.

Where an appellate court being of opinion that the plaintiff appellant had not been given a reasonably sufficient opportunity for adducing evidence and instead of allowing additional evidence under O. 41, R. 27 C. P. Code remands the case for retrial, the irregularity in procedure is not such as to justify interference in revision, 44 C. 929; 37 M. L. J. 536 Ref. (*Ayling, O. C. J. and Odgers, J.*) SHEIK MAHOMED MARACAYAR v. RANGASAMI NAIDU.

31 M. L. T. 182 (H. C.)  
16 L. W. 515

—Ss. 115, 153 and O. 21 R. 94—Sale Certificate—Amendment—Notice.

If a Court amends a sale certificate, without giving notice of the application to the judgment debtor or other persons interested it acts with material irregularity. (*Deva Dass, J.*) YAGNASWAMI AIYAR v. CHIDAMBARANATHA MUDALIAR.

(1922) M. W. N. 130 : 65 I. C. 732 :  
16 L. W. 760 : (1922) Mad. 63

—S. 115 and O. 21, R. 66—Sale proclamation—Fixing of valuation—Parties not heard—Revision—Interference See C. P. Code, O. 21 R. 66.

65 I. C. 360.

C. P. CODE (1908), S. 115.

—Ss. 115 and 10—Stay of suit—Refusal by lower Court—Interference in revision.

Where a subordinate Court proceeds with the trial of a suit in contravention of S. 10 C. P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit, though interlocutory, is open to revision by the High Court 42 A 409 dist. (*Phillips, J.*) RAMA CHANDRAM PILLAI v. NEELAMBAL ACHI.

16 L. W. 607.

—S. 115—Subordinate court—Election inquiry—Sub Court holding an enquiry into election under the Madras Dt. Municipalities Act is a Court Subordinate to the High Court See MAD DT. MUNICIPALITIES ACT, Ss 18 & 28.

16 L. W. 898.

—S. 115—Subordinate Court—Sub judge trying an election petition.

A sub-judge trying an election petition questioning the validity of the election of a municipal commissioner under the Madras District Municipalities Act is not a Court subordinate to the High Court within S. 115 C. P. Code. Consequently the High Court has no jurisdiction to interfere with the order of a Sub-court refusing to try an election petition 21 B 279 foll; 38 M. 581 Ref. (*Devadoss*) DEIVANAYAGAM PILLAI v. P. T. S. DIWAN MOHIDEEN ROWTHER.

16 L. W. 827.

[This view is no longer law.]

[See 16 L. W. 898 Ed..]

—S. 115—Subordinate Court—District Judge—Trial of elections—Material irregularity.

A District Judge trying the validity of an election under the Madras Local Boards Act XIV of 1920) is not acting as a *persona designata* but as a court. His orders are judicial and liable to interference in revision by the High Court. The mere fact that the order of the District Judge is declared to be "final" merely means that it could not be questioned by way of appeal but it does not exclude the exercise of revisional Jurisdiction by the High Court, (*Krishnan and Venkatasubbarao, JJ.*) RAMASWAMI GOUNDAN v. MUTHU VELAPPA GOUNDAR.

16 L. W. 8 48.

—S. 115—Substantial justice—Interference Mandatory injunction.

The question of substantial justice arises more truly where a case has been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient ground for interference on revision unless injustice has been caused thereby or the petitioners have been prejudiced. (*Harrison, J.*) THE LAHORE ELECTRIC CO. v. BOMBAY MOTOR AND CYCLE CO.

67 I. C. 742

—S. 115—Order allowing suit to be withdrawn—If open to revision.

An order allowing a suit to be withdrawn with liberty to bring a fresh suit, if improperly made, is capable of being revised by the High Court, (*Abdul Qadir, J.*) GHULAM RASUL v. MT. RAMZAN BHI.

68 I. C. 758.

C. P. CODE (1908), S. 122.

—S. 122—*Powers of High Court.*

The High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to S. 122, but he has no power to alter the period of limitation provided by the Limitation Act (*Abdul Raouf, J.*) MADAN GOPAL T. MALWA RAM.

68 I. C. 777

—Ss. 132 and 133 and O 26, R. 1—Pardana-shin lady—Right to be examined on commission See (1921) DIG. COL. 207. KHITI PAT ROY v. DHARANI MOHAN MOOKERJEE. 64 I. C. 228

—Ss. 141 and 144—*Applicability of—Restitution proceedings.*

Proceedings under S. 144, C. P. Code, are not proceedings in execution. Consequently S. 141, C. P. Code applies to them. 40 M. 780 diss. (*Rafique and Lindsay, J.J.*) JIWA RAM v. NAND RAM 44 A. 407 : 20 A. L. J. 226 :

L. R. 3 A. 209 : (1922) All. 223. 66 I. C. 144.

—S. 141 and O 9, R. 9—*Applicability to proceedings under O. 9, R. 9—Appeal*

It is extremely doubtful whether S. 141, C. P. Code, applies at all to proceedings under O. 9, R. 9, C. P. Code, and even if it does apply, S. 141 cannot operate to give an appeal from an order not otherwise appealable under O. 43, R. 1, 17 A. 106, Ref. (*Sanderson, C. J. and Richardson J.*) HARA KUMAR MITTER v. MURARI MOHAN BOSE.

36 C. L. J. 184

—S. 141 and O. 9, R. 9—*Execution proceedings—Dismissal for default—Restoration.*

S. 141, C. P. Code, does not apply to execution proceedings, and the Court cannot restore under O. 9, R. 9, C. P. Code, an application for execution which has been dismissed for default. (*Halifax, A. J. C.*) HARLAL v. NARAYAN. 18 N. L. R. 152 :

64 I. C. 420.

—S. 141 and O 9 R. 9—*Execution—Proceedings—Dismissal for default—Restoration—Inherent power.*

S. 141 C. P. Code has not the effect of extending the provisions of O. 9, R. 9 C. P. Code to execution proceedings or of authorising the Court to set aside a dismissal of an execution petition for default. But the Court may, in a proper case in the exercise of its inherent power restore the execution application and with such restoration the attachment will revive. (*Halifax, A. J. C.*) SHANKERRAO v. MANIKRAO. 68 I. C. 643.

—S. 141—*Scope of—Provisions of S. 10—If apply to arbitration proceedings.*

S. 141, C. P. Code is wide enough to make the provisions of S. 10 apply to arbitration proceedings. (*Raymond, A. J. C.*) FIRM OF JAI NARAIN BABU LAL in the matter of. (1922) Sind. 6 ;

66 I. C. 796.

—S. 144—*Applicability of—Restitution—Costs of separate proceedings—Direction for repayment.*

S. 144, C. P. C., is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal. Provided the decree is varied or reversed the section applies

C. P. CODE (1908), S. 144.

however the reversal or variance has been effected. Where an order of abatement of the lower court was set aside in separate proceedings in the High Court and not on appeal, the lower court has power to order restitution of costs paid to the representatives of the original plff. though such representative was not a party to the suit. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) SITALAKSHMIAMMAL v. KRISHNASWAMI IYER.

(1922) M. W. N. 186 : 65 I. C. 797 :

16 L. W. 587 : (1922) Mad. 70.

—S. 144—Application for mesne profits—Reversal of decree—Nature of question relates to execution, discharge or satisfaction of decree. See COURT FEES ACT, SCH II, ART. 11.

18 N. L. R. 15.

—S. 144—*Application for restitution—Where to be made—Separate suit, if lies.*

Where an ejectment decree is passed by a Revenue court and duly executed, but afterwards the decree was reversed in appeal, any application for restitution must be made to the Revenue Court as "the court of first instance." No separate suit is maintainable in respect thereof. (*Mears, C. J. and Banerji, J.*) KASHI PRASAD SINGH v. BALBHADDAR SINGH. 44 A. 283 :

20 A. L. J. 133 L. R. 3 All. 97 (Rev.) :

(1922) All. 71 : 65 I. C. 798.

—S. 144—Decree or order—Order for rateable distribution—Reversal on appeal—Not a decree or order—No right to rateable distribution. See C. P. CODE, Ss. 73 AND 47.

15 L. W. 421.

—Ss. 144 and 151—*Execution sale—Distribution of proceeds among several decree holders rateably—Sale subsequently set aside—Right to refund of the purchase money.*

In execution of a decree certain properties were attached, brought to sale and purchased by the appellants who were strangers to the decree. The proceeds of the sale were rateably distributed among the respondents who were creditors holding decrees against the same judgment debtor. Subsequently certain claimants who had unsuccessfully intervened in the execution proceedings obtained a decree in a claim suit that the properties belonged to a trust and therefore not liable to sale in execution of the decree and recovered possession of the properties with mesne profits from the appellants. The appellant thereupon applied for refund of the purchase money which had been distributed rateably among the various decree holders. *Held*, neither S. 144 nor S. 151 of the C. P. Code authorised the Court to order the refund sought by the appellants and their application was unsustainable. 24 I. C. 384, dist. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) RAJA RAO v. ANANTHANARAYANAN CHETTY. 42 M. L. J. 308 : 15 L. W. 303 :

(1922) M. W. N. 255 : (1922) Mad. 228 :

67 I. C. 369.

—S. 144—*Execution sale—Setting aside—Repayment of purchase money—Payment of encumbrances by purchaser.*

An execution sale was confirmed by the courts in India but set aside on appeal by the Privy

## C P CODE (1908), S. 144.

Council after a lapse of 9 years. In the interval the auction purchasers had obtained possession of the property sold and had also paid off certain incumbrances thereon. The sale price paid into Court by the auction purchasers had been distributed to various decree-holders. After the decision of the Privy Council the judgment-debtors applied for restitution under S. 144 C. P. C. The auction purchasers claimed a refund of the purchase money paid by them as well as the value of the incumbrances discharged by them. *Held* that the judgment-debtors were entitled to possession only on their payment to the purchaser the amount of the purchase money less the mesne profits derived by the purchasers in the interval. The interest on mesne profits was allowed to be set off against the interest on the purchase price. The purchasers having discharged the incumbrances of their own accord and without any order of court, they were entitled to the benefit of the security but not to a refund of the amounts as a condition precedent to their surrendering possession. (*Lord Carson*) *JAI BERHAM v. KEDAR NATH MARWARI*.

(1922) P. C. 269 : 49 I. A. 351. (P. C.)

—S. 144—Execution sale—Subsequent reduction of decree amount—Effect of.

The sum due to a decree holder under the decree of the first Court was Rs. 7,695. In execution of the decree 19 items of property were sold for Rs. 10,357 in all. Five items of the property were purchased by the decree holder himself. Subsequent to the execution sale the appellate Court modified the decree by reducing the amount to Rs. 7,495. Thereupon the judgment debtor applied for restitution by redelivery of the five items purchased by the decree holder. It was found that the sale of every item including the last was necessary to realise the amount of the appellate decree, though if the properties had been sold in a different order and the five items had been reserved to be sold last, their sale would have been unnecessary to realise the amount of decree on appeal. *Held*, that there had been no case made out for restitution, as the position of the judgment debtor as regards the sale of the five items was in no way affected by the variation in the decree. Such prejudice as the judgment debtor had suffered was due not to the variation in the decree, but to the terms in the order in execution regulating the order in which the items were to be sold. (*Ayling and Venkatasubba Rao, JJ.*) *SUNDARA RAMA REDDI v. ENUGA RAGHAVA REDDI*. 42 M. L. J. 315 : (1922) M. W. N. 141.

16 L. W. 355 : (1922) Mad. 96 : 68 I. C. 516

—Ss. 144 and 151—Inherent power—Judgment-debtor dispossessed under wrong order of Court subsequently set aside—Duty of Court to restore possession. See C. P. CODE, Ss. 151 AND 144. 64 I. C. 732.

—Ss. 144 and 151—Inherent power—Order for repayment of money mistakenly paid out.

S. 144, C. P. Code does not define the full measure of the power of the Court to make an order for restitution. The section may be taken as a guide to determine in what class of cases an order for restitution may be made, so that complete justice may be made, between the parties

## C P. CODE (1908), S. 144

concerned and they may be restored to the status *quo ante*.

It is competent to the execution court, in the exercise of its inherent power, to make an order for restitution to prevent what would be essentially a mis-carriage of justice, even in cases not comprised within the terms of S. 144 of the Code of Civil Procedure : 15 C. L. J. 187 Ref.

The Court has inherent power to recall money improperly paid out. 11 C. L. J. 533 Ref. (*Mookerjee and Panton, JJ.*) *RAI CHARAN BHUIYA v. DEBI PRASAD BHAKAT* 26 C. W. N. 408.

35 C. L. J. 53 : 64 I. C. 864 : (1922) Cal. 28.

—Ss. 144 and 141—Nature of—Not proceedings in execution—S. 141 C. P. C. applies to restitution proceedings. See C. P. CODE, Ss. 141 AND 144. 20 A. L. J. 226.

—S. 144—Object of—Restitution—Acts done prior to decree.

The object of S. 144 C. P. Code is that any thing done in execution of a decree reversed on appeal, should, as far as possible, be done ; and that the party who has been finally victorious should be placed in the position which he would have occupied, if the erroneous decree had not been made. The section does not cover relief in respect of acts done before the decree and not under the decree. (*Shadi Lal, C. J.*) *CHHABER SINGH v. RADHU RAM*. 4 Lah. L. J. 333 : 68 I. C. 807.

—S. 144—Proceedings under—Nature of—“Party” meaning of.

Proceedings under S. 144, C. P. C., are not proceedings, although they are in the nature of proceedings in execution to enforce directly or indirectly the final decree. The section is very wide in terms. It includes matters which an execution court or appellate court could not ordinarily deal with, and the word “party” is not used in the section in the sense of “party to the suit” but must mean “party to the application”. (*Walsh and Ryves, JJ.*) *BRIJ LAL v. DAMODAR DAS*. 44 All. 555 : 20 A. L. J. 456 : 4 U. P. L. R. (A) 74 : (1922) All. 238 : 66 I. C. 545.

—S. 144—Reversal of decree—Effect on execution sale—Restoration of property—Loss—Compensation.

Where the decree holder has purchased under the decree, the reversal of the decree in appeal involves the setting aside of the sale. Although the sale is not formally set aside it may be treated as a nullity and if the property purchased at the sale can be restored, it must be restored together with any loss suffered by the applicant arising out of his having been deprived of the profit earning capacity of the property or anything like interest upon money or mesne profits upon land, which he might have enjoyed if it had been left in undisturbed possession. Where the property cannot be restored the original decree-holder must make good the loss. It is difficult in many cases to assess the loss. (*Walsh and Ryves, JJ.*) *SHAIKH MD. HABIB ULLAH v. SYED MD. SHAFI*. L. R. 3 A. 443.

—S. 144—Suit for damages—Maintainability of.



C. P. CODE (1908), S. 144.

Where restitution cannot be obtained by application under S. 144 (1) C. P. Code there is no bar to the institution of a suit. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. (*Stuart and Kanhaiya Lal, JJs.*) ARJUN SINGH v. PARBATI  
44 All. 687 : (1922) All. 465 : 20 A. L. J. 636.  
L. R. 3 A. 408

—S. 144—Suit for restitution—If can be converted into an application. *See* C. P. Code Ss 47 AND 144.  
67 I. C. 319.

—S. 145—Surety—Execution against—Discretion of court. *See* (1921) Dig. Col. 210. ABDUL HUSSEIN ESSUFALLI v D. J. MISTRI & Co.  
64 I. C. 648.  
46 Bom. 702 : (1922) Bom. 340

—S. 145—Surety—Liability of—Execution proceedings—Mode of enforcing liability.

Where a condition is imposed on a surety under an order of Court the surety can be compelled to fulfil that condition in execution proceedings under S. 145, C. P. Code, without any second formal order being passed against the principal.

Similarly in the cases contemplated by clauses (a) and (b) of S. 145 there would be no necessity for a second formal, or even informal order to the principal to perform the decree or restore the property. The surety could be proceeded against as soon as the decree is capable of execution, or the property becomes liable to restitution or the condition required fulfillment. The words "under an order of the Court," in clause (c) of S. 145, which applies equally to the payment of money and the fulfilment of a condition, must in each case refer to the original order of the Court. They do not refer, in respect of the condition, to the original order imposing it, and, in respect of the payment, to a second order to be passed in subsequent proceedings. (*Halifax, A. J. C.*) AMOLAK SAO v KASHINATH.  
64 I. C. 430.

—S. 145—Surety for production of Judgment debtor—Failure to produce—Judgment-debtor sentenced to imprisonment in a criminal case—Knowledge of surety that Criminal case was pending—Liability of surety.

A judgment debtor was arrested in execution of a decree for money. He was released from custody on the execution of a bond by a surety undertaking to produce the judgment debtor whenever the court required or on failure to do so, to pay the decretal amount. At the time when he executed this bond the surety knew that criminal proceedings for embezzlement were pending against the judgment-debtor at the instance of the decree-holder. On the date on which the judgment-debtor was to have been produced in court he was sentenced in the criminal case to a term of imprisonment, and the surety therefore failed to produce him. On the question whether the surety was released from his obligation under the bond as the performance thereof had been rendered impossible by circumstances beyond his control : *Held*, that as it could not be said that the surety could not have contemplated the possibility

C. P. CODE (1908), S. 144.

or perhaps even the probability, of the judgment-debtor being sent to jail, he could not be deemed to have been discharged from his obligations under the surety bond by the circumstance of the imprisonment of the judgment-debtor (*Ryves and Gokul Prasad, JJs.*) RAMESHWAR DAS v SRI LAL.  
(1922) All. 390 : 44 All. 174 : 65 I. C. 375.

—S. 146—Time fixed by compromise decree—Extension of.

Where a compromise decree fixes the time for the doing of an act and does not provide that the act is to be done with the assistance of the Court, the Court cannot extend the time on any ground, legal or equitable. (*Daniels, J. C.*) ILAHI RAZA-KHAN v. MT. TAIBA BEGAM  
9 O. L. J. 53:  
66 I. C. 273.

—S. 146—Transferee of decree—Right to apply for execution—Recognition by Court—Necessity for. *See* C. P. CODE, O. 21, R. 16.  
(1922) Pat. 256.

—S. 148—Power of Court to extend time—Time fixed by decree

The Court has no power to extend the time allowed by a decree for the payment of money under S. 148 C. P. Code. If the decree provides for the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to non-payment, the enforcement of the penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree. In other words, if it provides that the right of the decree holder to obtain possession shall be extinguished, in case a certain condition is not carried out within a certain period, that right becomes extinct on the failure to comply with that condition and cannot be revived by any subsequent act of the court or party at default. (*Kanhaiya, Lal, J. C.*) BADAL v CHHATTAR SINGH.  
23 O. C. 74  
(1922) Oudh 131 : 66 I. C. 205.

—Ss. 148 and 142—Extension of time—Rejection of plaint—Restoration.

Once an order rejecting a plaint is set aside in review the Court has full power, under Ss. 142 and 148 of the C. P. Code, to extend the time for payment of the deficit court fee and the plaint having been originally filed within the period of limitation the suit was not barred (*Newbould, J.*) SURENDRA PRASAD LAHIRI CHOUHDURY v. ATTABUDDIN AHMED  
26 C. W. N. 391.  
(1922) Cal. 234.

—Ss. 148 and 151—Pre-emption decree—Time fixed for payment—Expiry of—Extension of time—Power of Court.

If no payment of the purchase money has been made within the time fixed by a pre-emption decree, it is not competent to the court to extend the time either under S. 148 or S. 151 C. P. Code. 60 P. R. 1913 : 35 A. 582 foll. (*Wilberforce, J.*) NATHU KHAN v. GULAB KHAN.  
64 I. C. 242.

—S. 149—Extension of time—Grounds for—Bona fide mistake

A court would not in its discretion under S. 149, C. P. Code, grant time for deficiency in court-fee

## C. P. CODE (1908), S. 149

to be made up unless it is satisfied that some grounds existed for the exercise of its discretion and the principal ground would ordinarily be that a *bona fide* mistake had been made. 42 I. C. 675; 41 I. C. 398; 1 Lah. L. J. 69 foll. (*Scott-Smith and Wilberforce, JJ.*) LOKH RAM v. RAMJI DAS. 3 Lah. L. J. 370

—S 149 and O. 7, R. 11—*Plaint—Deficiency of Court fee—Subsequent payment—Effect—Difference between suit and appeal.*

Where a plaint is filed in time but with an insufficient court fee, and the deficiency is made good under O. 7, R. 11, no question of limitation arises. The law is otherwise as regards memoranda of appeal. 3 Pat. L. J. 74 ref. to. (*Couitt and Macpherson, JJ.*) DEONATH SAHAI v. RADHA KANT PRASAD. 3 Pat. L. J. 142; (1922) P. 56.

—S 149—*Undervaluation deliberately made—Extension of time for payment of deficient court fee*

Where an appellant deliberately omits to pay the necessary court-fee and grossly undervalues his claim he is not entitled to any indulgence under S 149 C. P. Code, 49 I. C. 871, 3 P. L. J. 74; 41 I. C. 398; 1 Lah. 234 Rel. (*Abdul Raouf and Harrison, JJ.*) TIKKAN RAM v. BOSA RAM. 4 U. P. L. R. (Lah.) 77; 67 I. C. 106.

—S 149—*Court-fee—Extension of time for payment—Sufficient cause.* See (1921) DIG. COL. 22. FATTEH SINGH v. BABU RAM. 67 I. C. 130.

—S. 150 and O. 9, R. 13—*Ex parte decree—Application to set aside—Transfer of territorial jurisdiction—Application to be made to which Court.*

Subsequent to the passing of an *ex parte* decree by the District Munsif's Court, Penakonda, the properties which were the subject matter of the suit, were under a territorial re-distribution of jurisdiction transferred to the jurisdiction of the District Munsif's Court of Anantapore. On an application made thereafter in the District Munsif's Court of Anantapore to set aside the *ex parte* decree, held that Court had jurisdiction to set aside the decree under O. 9, R. 13 read with S. 150 of the C. P. Code.

The wording of O. 9, R. 13 which declares that an application to set aside an *ex parte* decree may be made to take away the power of a Court that has territorial jurisdiction over the subject matter of a suit to set aside an *ex parte* decree passed by another Court that originally tried the suit

*Per Krishnan, J.*—S. 150 of the C. P. Code applies not merely to cases where the whole of a business of a Court with reference to the whole of its jurisdiction is transferred to another Court but also to cases of partial territorial adjustment of jurisdiction and the transfer of the business with reference to that part alone to another Court. (*Spencer and Krishnan, JJ.*) SRINIVASA RAO v. HANUMANTHA RAO. 42 M. L. J. 344.

15 L. W. 458; 65 I. C. 727. (1922) Mad. 10; (1922) M. W. N. 349; 31 M. L. T. 79 (H. C.)

—S. 150 and O. 39, R. 2 (3)—*Injunction—Disobedience—Application for contempt—Transfer of venue.*

## C. P. CODE (1908), S. 151.

The court of M. passed an injunction order under O. 39, R. 1 C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D. for punishing the opposite party for contempt for disobeying the injunction. Held that the Court of D. had jurisdiction to entertain the application for punishment for alleged contempt. 26 C. W. N. 216 diss. 39 M. 907 foll. (*Krishnan and Venkatasubba Rao, JJ.*) MOUNA GURUSAMY NAICKER v. SHEIKH MAHOMEDHU RAWTHOR. 43 M. L. J. 713; (1922) M. W. N. 743; 16 L. W. 743.

—S. 150—*Transfer of business—Assignment of business within local limits of one subordinate Court to another by the Dt. Judge—Bengal Assam and N. W. P. Civil Courts Act, S. 13 (2).*

A decree was passed by the third Subordinate Judge's Court in respect of a claim the cause of action whereof arose within certain local limits. Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge's Court by the District Judge under Sec. 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887.)

Held, That the fourth Subordinate Judge's Court could not entertain an application to execute the decree

An "assignment" of business under S. 13 (2) of Act XII of 1887 is not the same thing as "transfer" of business within the meaning of S. 150 of the Civil Procedure Code (*Chatterjee and Chotzner, JJ.*) MUNSI MD KAZEM ALI v. MUNSHI NIAMUDDIN AHMED. 26 C. W. N. 216; (1922) Cal. 41.

—Ss 151 and 152—*Amendment—Decree—Executing Court.*

It is not competent to a court to amend the decree of another court transferred to it for execution, even though the error may be obvious. (*Spencer and Ramesam, JJ.*) KORALLA BUCHILINGAM v. KORALLA SATYANARAYANAMURTHI. 15 L. W. 301; 65 I. C. 710. (1922) Mad. 186.

—S. 151—*Applicability of—Compromise decree—Setting aside—Mistake or fraud of agent—Remedy of party.* See C. P. CODE O. 47, R. 1. 43 M. L. J. 290.

—S. 151—*Application under—Treated as one for review.* See C. P. CODE O. 47, R. 1. 31 M. L. T. 132 (H. C.)

—S. 151—*Consolidation of suits—Inherent power—Mutation proceedings.*

Separate mutation applications in respect of separate mahals are required but the court has inherent power *ex debito justitiae* to consolidate the suits and try them. (*Hopkins, S. M. and Fremantle, J. M.*) RUDAR SINGH v. TEJ SINGH, L. R. 3 A. 423 (Rev.); 4 U. P. L. R. (B. R.) 87.

—S. 151—*Consolidation of suits—Consent of parties.*

A court has inherent power to consolidate suits and this jurisdiction can be exercised even without the consent of the parties. 17 C. W. N. 526

C. P. CODE (1908), S. 151.

Ref. (*Coutts and Dass, JJ.*) QAZI MAHOMED AFZAL  
v. MAHKUMAR MAHTON, 3 Pat. L. T. 534 :  
(1922) P. 566 : 67 I. C. 1000

—S. 151—Decree-holder permitted to bid on conditions—Failure to fulfil conditions—Powers of court to refuse to confirm sale, See C. P. CODE, O. 21, RR. 72, 86, AND 92.

1 Pat. 235.

—S. 151—Deposit in Court—Withdrawn by person having no right or title—Order for refund—Inherent power. See C. P. CODE, O. 21, R. 2.  
(1922) Pat. 53,

—S. 151—Execution application—Dismissal for default—Restoration—Grounds for. See C. P. CODE, O. 9 R. 9 AND S. 151,  
(1922) Oudh. 201

—S. 151 and O. 9, R. 13—*Ex parte* decree—Inherent power to set aside—Application filed after time prescribed by Art. 164, Lim. Act.

An application under O. 9, R. 13 to set aside an *ex parte* final decree in a mortgage suit which was filed long after the time limited by Art. 164 of the Limitation Act, was dismissed by the 1st Court on the ground that notice was duly served. The Dt. Judge while agreeing with the finding of the 1st Court as to the service of notice acted under S. 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed, it was barred by time.

Held, that S. 151 of the Code cannot be used in that way

Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside an *ex parte* decree, the Court would not be entitled, by purporting to act under S. 151 of the Code, in effect to extend that period.

43 Mad 94 (F. B.) foll. (*Coutts and Ross, JJ.*)  
AYODHYA MAHTON v. MUSSAMMAT PHUL KUEK.  
(1922) Pat. 61 : 65 I. C. 341.

—S. 151—*Ex parte* decree—Setting aside—Period of limitation—Extension of—Inherent powers of court, See C. P. CODE O. 9, R. 13.  
1 Pat. 277.

—S. 151—Expunging remarks from judgment of lower court,

Where the judgment of a subordinate court has not been brought before the High Court on appeal or revision, the High Court has no power to expunge adverse remarks on the character and credibility of a witness, from the judgment of the subordinate court. (*Gokul Prasad and Stuart, JJ.*)  
DUNN v. EMPEROR.

44 All. 401 : 20 A. L. J. 261 : L. R. 3 A. 66 Cr.  
(1922) All. 107 : 4 U. P. L. (A.) 165 :  
66 I. C. 1005 : 23 Cr. L. J. 349,

—S. 151—Inherent power—Dismissal of execution application for default—Restoration.

The executing court has inherent power to restore to file an application for execution dismissed for default and thereupon the attachment revives  
35 A 331 : 45 B. 648 Ref. (*Halifax, A. J. C.*)  
SHANKER RAO v. MANIK RAO, 68 I. C. 643

C. P. CODE (1908), S. 151.

—S. 151—New form of procedure if can be introduced.

A court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian law. (*Newbould and Cuming, JJ.*)  
GOUR CHANDRA GOSWAMI v. NABADWIB. MUNICIPALITY  
(1922) Cal 1 (1)

—S. 151—Rectification of mistake—Company—Representation—Defect in—Effect of decree or order.

Where a corporation or a company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competent to the proper officer to apply for vacating that order and after hearing the person through whom the corporation or company can legally act. In such a case it cannot be said that the corporation or company is not a party simply because a wrong person represents it.

It is open to a court to act under S. 151, C. P. C., and set aside the order passed under the above circumstances and it is not necessary to proceed by way of separate suit. But a stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of S. 151 or appeal to the inherent powers of the court to do justice. (*Kumarasami Sastri, J.*)  
PERUMAL MOOPAN v. VENKATACHARIAR.

42 M. L. J. 563. 15 L. W. 586 :  
(1922) M. W. N. 268 : 31 M. L. T. 35 (H. C.)  
(1922) Mad. 177 : 68 I. C. 910.

—S. 151—Rectification of mistake—Ignorance of fact.

The Court has inherent power, in fact it is its duty, to rectify mistakes in judicial orders arising from the ignorance of the court or of its subordinate officers (*Halifax, A. J. C.*)  
MAROTI SONAR v. CHINTAMAN SONAR.

69 I. C. 112.

—S. 151—Recalling an order passed by the predecessor under—Whether beyond jurisdiction and invalid.

If an order of a Sub-Judge in execution is erroneous the proper course for the party aggrieved is to apply to the High Court under S. 115 Civil Procedure Code. It is well settled that the Court has inherent power to recall an order which has not been perfected but no power whatever to recall one which has been perfected. Therefore a successor has no power to recall the perfected order of his predecessor. 12 Ch. D. 88 and 10 C. L. J. 396 follid. (*Coutts and Das, JJ.*)  
HIRO SINGH v. KAZI SYED AHMAD HUSSAIN.

(1922) P. 204.

—S. 151—Remand—All the issues fully tried and decided by trial court—Appellate court coming to a different conclusion on one issue—Remand—Impropriety of. See C. P. CODE, O. 41, R. 23.

30 M. L. T. 314.

—S. 151—Remand—Powers of Court under. See C. P. CODE, O. 41, R. 23.

35 C. L. J. 345.

## C. P. CODE (1908), S. 151

—S. 151—Restitution—Execution sale—Distribution of proceeds among several decree-holders rateably—Execution sale set aside in a claim suit—Stranger purchaser—Right to refund of the purchase money. See C P CODE SS 144 AND 152. 42 M. L. J. 308.

—Ss 151 and 144—Restitution—Inherent power—Delivery of possession under mistake.

Where a judgment debtor is dispossessed under an erroneous order of Court and that order is set aside in a proceeding to which the court auction purchaser is a party it is the duty of the Court to order restoration of possession to the judgment debtor 41 M. 467 Rel. (Kotwal, A.J.C.) SHRIKISAN v. SUNDARBAI 18 N. L. R. 24: 64 I. C. 732: (1922) Nag. 82

—Ss. 151 and 144—Restitution—Inherent power in cases not covered by S. 144 C P Code—Direction to refund money paid out of court. See C. P. Code SS. 144 AND 151. 35 C. L. J. 53

—Ss. 151 and 141—Restitution—Power of court to order—Inherent power—Scope of.

The inherent power of a court to grant a restitution will be exercised in the ends of Justice, that is to say, where this is the only legal method by which the applicant can obtain his dues (Ayling and Venkatasubba Rao, JJ.) VARADA RAMASWAMI v. UMMA VENKATARATNAM, 42 M. L. J. 473: 30 M. L. T. 178: (1912) M. W. N. 184: 15 L. W. 421: (1922) Mad. 99: 67 I. C. 546.

—S. 151—Restoration—Execution application—Dismissed for default.

A Court has inherent jurisdiction under S. 151 C. P. Code to restore to the file, an application for execution which has been dismissed for default if it is necessary in the interests of justice and to prevent abuse of process of Court. (Hallifax, A. J. C.) HARLAL v. NARAYAN, 64 I. C. 420: 18 N. L. R. 152

—S. 151—Retrial—Power of Appellate Court to order—Power when to be exercised, See C. P. CODE O. 41, Rr. 23 AND 25. 64 I. C. 599.

—S. 151—Revival of suit—Suit dismissed for want of letters of administration—Subsequent production of letters.

The Court below, instead of staying a suit for production of the letters of administration, dismissed it giving liberty to the plff. to apply to have the dismissal set aside on obtaining letters. Subsequently the plaintiff obtained letters of administration and succeeded in setting aside the dismissal of the suit which was then tried and decreed. On an application in revision by defendant, Held that the lower Court should have properly speaking stayed the further trial of the suit pending the production of the letters of administration, that the order of the lower Court was really a means of suspending the suit and at the same time discharging it from the list of suits on file that the merits of the case were entirely in favour of the plaintiff and therefore the High Court would not interfere in revision

## C. P. CODE (1908), S. 152.

(MacLeod, C. J. and Coyajee, J.) KHUSHAL SINGHI v. UMANSINGH 24 Bom. L. R. 738: (1922) Bom. 210.

—S. 151—Scope of.

The inherent powers of a court are not to be used to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation. (Oldfield and Venkatasubba Rao, JJ.) GANAPATHI MUDALIAR v. KRISHNAMACHARI, 43 M. L. J. 184: 16 L. W. 178: 31 M. L. T. 135 H. C.: (1922) M. W. N. 514: (1922) Mad. 417.

—S. 151—Scope of. See (1921) DIG. COL. 214. BHAGWAN SINGH v. SHEONATH SINGH, 64 I. C. 217.

—S. 151—Scope of—Power when exercised.

The power mentioned in S. 151 C. P. Code must be used very sparingly and only in the last resort, if only because of the great danger of mistake as to what the justice of a given case may be, and the same result can here be achieved in accordance with the letter as well as the spirit of the law. By its very terms S. 151 C. P. Code does, in certain specified circumstances nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist. The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the court. (Hallifax, A. J. C.) DEBILAL v. KRISHNAJI, 67 I. C. 296: (1922) Nag. 125: 5. N. L. J. 265.

—S. 151—Scope of.

The Court has inherent power to do justice between the parties under S. 151 of C. P. Code. (Das and Adami, JJ.) CHOWDHURI CHINTAMONI MAHAPATRA v. SRIMATI MONMOHINI DEBI, 1 Pat. 149: (1922) P. 409.

—S. 151—Scope of—Inherent power of court

Where there is express statutory provision on the point in controversy there is no room for the application of the doctrine of inherent power. (Marineau, J.) FIRM OF KAHNA MAL BANARSI DASS v. BISHANDAS, 40 P. L. R. 1922.

—S. 151—Inherent power—Scope of.

An order under S. 151 C. P. Code is to be made when the ends of justice require it or to frustrate an abuse of the process of Court. (Raymond, A. J. C.) FIRM OF JAI NARAIN BABU LAL in the matter of. (1922) S. 6: 66 I. C. 796.

—S. 151—Scope of—Extension of limitation—Power of Court.

S. 151 C. P. Code must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. (Chevis, J.) KHAIRATI v. UMAR DIN, (1922) Lah. 266: 66 I. C. 270

—S. 152—Amendment—Mistakes in decree and judgment—Mistakes in plaint—Correction of.

C. P. CODE (1908), S. 152.

Errors in judgments and decrees can be corrected at any moment, and if those errors follow from clerical mistakes committed in the plaint or other proceedings it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it, if the real points at issue are not affected thereby, 12 A. L. J. 185; 17 O. C. 256 toll (*Kanhaiya Lal, J. C.*) PAHALWAN SINGH v. GANGA BAKSH SINGH. 66 I. C. 693

—S. 152—Amendment of decree—Delay—No difference between decree and judgment—Time for review over.

Where the time for reviewing a judgment and decree is long past and there is no difference between the decree and judgment, the court will not amend the decree so as to omit a clause as to personal liability, (*Spencer and Odgers, JJ.*) MUNIAPPACHETTY v. MANGATHAYAMMAL, 15 L. W. 393 : (1922) Mad 192

—S. 152—Amendment of decree—Discretion—Principles guiding—Intervention of rights of third parties action in good faith—Effect—Sale in execution of decree—Subsequent application for its amendment—Parties—Purchaser if necessary party.

The exercise of the power of amendment under S. 152 C. P. C. is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. A purchaser at a sale held in execution of a decree which is subsequently sought to be amended is a necessary party to the application for its amendment on the general principle that persons, whom it is desired to bind by proceedings can and must be impleaded in them and the order allowing the amendment is not binding on him, if they are not so impleaded (*Oldfield and Ramesam JJ.*) NARAYANA AYYAR v. BIYARI BIVI, 43 M. L. J. 559 : (1922) M. W. N. 731. 16 L. W. 623

—S. 152—Applicability of—Errors of law—Power of Court to review without an application.

A court cannot review its own order until an application is made. S. 152 C. P. C. relates to clerical or arithmetical mistakes in judgments or errors arising from any accidental slip or omission, but not to mistakes of law. (*Hopkins, S. M.*) RAM PRASAD v. HAR LAL.

L. R. 3 A. 1 (Rev.)

—S. 152 and O. 47, R. 1—Review—Amendment—No arithmetical error—Appeal. See (1921) DIG. COL. 216. RAMJI LAL v. GIANI, 4 U. P. L. R. (Lah) 54 : 66 I. C. 992.

—S. 153—Appellate Court—Arithmetical Mistake or obvious error in plaint and decree—Duty to amend.

Where in a suit on a mortgage the name of the village in which the mortgaged property was described and the mistake is discovered on appeal, it is the duty of the appellate Court to allow an amendment of the plaint and thus rectify a clerical mistake. (*Ryves and Gokul*

C. P. CODE (1908), O. 1, R. 3.

*Prasad, JJ.*) BHAGIRATHI SHUKUL v. CHANDRA HARIKAR PATTAK. 20 A. L. J. 159 : L. R. 3 A. 115 : (1922) All. 81 : 66 I. C. 208.

—S. 153—Applicability of—Dismissal for default—Restoration application—Section not applicable. See C. P. CODE, O. 9, RR. 9 and 13. (1922) Pat. 5.

—S. 153—Sale certificate—Amendment—Notice to judgment-debtor—Necessity for—Omission—Irrregularity. See C. P. CODE Ss 115, 153 ETC (1922) M. W. N. 130.

## First Schedule

—O. 1, R. 1 and 2—Joinder of plaintiffs—Alternative relief—Suit by two sets of pliffs.

Where pliffs 1 and 2 claimed the entire subject matter and their sisters pliffs. 3 and 4 claimed a portion of the subject-matter of the suit in a certain contingency and the suit was prayed on the ground that the defendant was unlawfully detaining the moneys due to the plaintiffs, *Held*, that the suit was not bad for misjoinder of parties and causes of action. The right to relief claimed was in respect of or arose out of the same act (*ie*) the act of the unlawful detention of the moneys by the defendant. The right to relief was alleged to exist in the alternative in the first or second set of pliffs. in regard to a portion of such relief. There was a common question of fact to be tried and decided, the unlawful withholding of the moneys. The case therefore fell within O. 1, R. 1 and 2 C. P. Code (*Venkatasubba Rao, J.*) VELAPPA NADAR v. CHIDAMBARA NADAR.

43 M. L. J. 277 : 16 L. W. 186 : (1922) M. W. N. 316 : (1922) Mad 174.

—O. 1, R. 1—Suit to set alienation—Necessary parties—Transferee pendente lite—Non-joinder of—Effect.

In a suit for setting aside an alienation of properties belonging to a religious endowment a person to whom plaintiff had conveyed a portion of the properties at a time when he had neither title nor cause of action to sue, need not be joined as co-plaintiff in the action. Nor is a transferee pendente lite a necessary party to the suit. (*Das and Bucknill, JJ.*) MAHANT RAMRUP v. LAL CHAND MARWARI. 1 Pat. 475 : 3 Pat. L. T. 352 : (1922) P. 243 : 67 I. C. 401.

—O. 1 R. 3—Joinder of parties as defendants—Scope of the rule—Cause of action against some of the defendants arising out of the Jurisdiction—Effect of.

The plaintiff had distinct and separate causes of action against the first and second defendants.

The cause of action against the first defendant arose within the jurisdiction and that against the second defendant and arose outside the jurisdiction of the court in which plff. sued both the first and second defendant. *Held* that the court had no jurisdiction to try the suit as against the second defendant and that the joinder of both the defendants in the same suit was not permitted by O. 1 R. 3 C. P. Code. O. 1 R. 3 C. P. C. relates to a joinder of parties and it assumes the existence of a suit in a proper forum, the court having jurisdiction to try the suit. If the Court

C. P. CODE (1908), O. 1, R. 8.

has such jurisdiction, then O. R. 3 might come into play. (*Woodroffe and Richardson, JJ*)  
BENGAL AND NORTH WESTERN RAILWAY CO  
LTD v SADARAM BHAIRODAN.

49 Cal 895 : 27 C. W. N. 82

—O. 1, R. 8—*Suit for declaration of public right of way—Nature of special damage.*

A suit for a declaration that a certain pathway was public one, can be maintained with the permission of court under O. 1, R. 8, C. P. Code—If permission is granted, recourse need not be had to S. 92 of the Code

In such a case, plaintiff can succeed without proof of special damage (*Panton, J*) HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTHY.

26 C W N 587

—O. 1, Rr. 8 and 10—*Suit for partition by minor sons against their father—Decreeholders impleaded as defts—Setting aside decree Mis-Joinder—Appeal. See* (1921) DIG, COL. 217 SHANMUKA NADAN v. ARUNACHALA CHETTY,

45 Mad. 194 : 42 M. L. J. 97.

30 M. L. T 172 (H. C.) : (1922) Mad 332.

—O. 1 R. 8—*Caste dispute—Suit by some members—Leave to sue—Sanction of majority*

Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste O. 1, R. 8 C. P. Code applies to the case. It is not necessary for the persons asking for leave under O. 1 R. 8 C. P. C to obtain formally beforehand the authority of those whom they are seeking to represent. Nor need they summon a caste meeting before bringing the suit.

Per *Napier, J* : *Semble*, If the plaintiffs are unable to prove that they have got a support of the majority of the caste they cannot succeed in getting the relief which they seek. Such a plea may be taken in defence. (*Napier and Krishnan JJ*.) SIVATHAL PERIYAVA NADAR v. NANA CHUNA VELMURUGA NADAR.

30 M. L. T. 47 (H. C.) 64 I. C. 618.

—O. 1, R. 8—*Community—Resolution authorising President to file suits—Institution of suit by President in his own name—See* (1921) DIG COL. 218. ATMARAM BABAJI v. NARAYAN ARJUN DERE.

46 Bom. 132 : 64 I. C. 555.

—O. 1, R. 8—*Leave to sue in representative capacity—Omission to issue notice and advertisement—Effect.*

The court in granting permission to sue to two plaintiffs on behalf of all the residents of a locality directed the plffs to advertise and give notice to all the residents of the locality as regards the suit. But the notice and advertisement were not issued. Held that (1) the omission to issue notice was not fatal to the suit and would not result in the dismissal of the suit (2) that the publication of notice was peremptory and must be complied with under O. 1, R. 8 (3) and that the case should be remanded to the trial court for issuing of notice and retrial of the suit. (*Banerji Piggott and Walsh, JJ*) SHYAM LAL v. MT. LALLI.

44 A. 231 : 20 A. L. J. 73 : L. R. 3 A. 75 : (1922) All. 16 : 65 I. C. 259 (F.B.)

C. P. CODE (1908), O. 1, R. 9.

—O. 1, R. 8—*Representative suit—Members of a Community—Suit for declaration that property is waqf property.*

It is competent to certain persons alleging themselves to be members of the Shia community to institute a suit for a declaration that certain property in the possession of the defendants is waqf property over which the defendants had no proprietary right. To such a suit the sanction of the court under O. 1, R. 8, C.P.C. is not required.

7 All. 188 ; 32 All. 631. 24 Cal. 385 ; 35 All. 197 Ref. (*Kanhaya Lal, J. C. and Daniels, A. J. C*) SADIQ HUSAIN v. KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN,

9 O. L. J. 111.  
4 U. P. L. R. (O. C) 25 : (1922) Oudh. 1 : 66 I. C. 90.

—O. 1, Rr. 9 and 10—*Addition of parties—Necessary and proper parties—Distinction between Limitation.*

The court cannot, by its decree, affect the rights of those who are not parties to the suit. If therefore no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and should be dismissed. If however the rights of the parties actually before it can be determined in the suit bearing the rights and interests of others unaffected, there is no reason why, even if other parties might properly have been added, the court should not determine the matters in controversy between the parties actually present. There is a distinction between necessary and proper parties to a suit. Two conditions must be satisfied in order that a defendant may be considered a necessary party, namely, first, there must be a right to some relief against him in respect of the matter involved in the suit, and secondly, his presence is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit. 16 C. L. J. 358 Rel. *Miller C. J. and Mullick, J.* SITAL PRASAD ROY v. ASHO SINGH, (1922) Pat. 326.

—O. 1, R. 9—*Joinder of parties—Non-joinder—Test of—Court not to travel beyond claim made in the suit.*

In determining the question of non-joinder the court must confine itself to the claim before it.

The present deft. No. 2 had filed a suit against P. in which he obtained a decree against him. At that time the deferce was that the present deft. No. 1 had really paid rent to H. which was then claimed as being payable to P. but the defence was not believed and a decree was passed in favour of H. Thereafter the present plaintiff P. and his daughter, the mulgenidars of a Dewas then, filed the present suit in the same court to recover the rent that would be payable by deft. No. 1 to them. The court found that the rent was due by deft. No. 1 to the plaintiffs and passed a decree against him. But as it appeared from the evidence that as a matter of fact deft. No. 1 paid this amount previously to H, the court directed H to be joined as defendant No. 2 and after impleading him as a deft the court held that deft. No. 1 had paid the rent to deft. No. 2 and the ultimate decree was passed by the court in favour of deft. No. 1 against deft. No. 2. Had that the procedure of the lower court was

C. P. CODE (1908), O. 1, R. 9.

irregular that the only question appropriate to the suit was whether debt, No. 1 was liable for the amount claimed by the plaintiffs, and that the questions as between debt No. 1 and debt No. 2 were not appropriate to the suit (*Shah, A C J and Crump J.*) *HARICHANDRA v. HUMMA VITHOBA.* 24 Bom. L. R. 1318.

—O. 1, R. 9—*Land recorded as Gairmazrua Am—Suit for declaration of title to—General public, whether necessary parties.*

A suit for declaration of title to land entered in the Survey Khatian as *Gairmazrua Am* is not bad for non-joinder of parties, if the general public are not made parties to it. (*Coutts and Das, JJ.*) *BABU TRILOKE PRASAD SINGH v. LALA UMANAND LAL.* (1922) P. 447.

—O. 1, R. 9—*Necessary party—Suit and appeal.*

Under O. 1, R. 9 C. P. Code a person who is a necessary party to the suit is a necessary party to the appeal. (*Ross, J.*) *JITENDRANATH CHATTERJEA v. JHAKU MANDAR.* 3 Pat. L. T. 456.

(1922) P. 4 66 I. C. 780

—O. 1, R. 9—*Non-joinder—Landlord and tenant—Suit in ejectment by manager—Denial of title—Joinder of other family members.*

In a suit by plaintiff, as representing the senior branch of a jagirdar family to eject the defendants who had executed a lease in favour of the plff. the defendants denied the plaintiff's title and pleaded non joinder of the members of the junior branch. *Held* the defendants were in no way prejudiced by the plaintiff suing alone and in no case could there be any chance of their being troubled by any other suit filed by the other members of the family; consequently there was no substance in the plea of non joinder and the appellate court could not interfere on that ground (*Macleod, C.J. and Coyajee, J.*) *GANGARAM BHIKU MAHADEV v. BAPUSAHEB DAULATRAO MAHADEV.* 24 Bom. L. R. 826 (1922) Bom. 354.

—O. 1, R. 9—*Non-Joinder—Necessary parties—Proper parties—Distinction between.*

There is a distinction between the non-joinder of proper persons but not necessary parties and non-joinder of parties whose presence is essential. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their own father. At the same time they may be proper parties and on an appeal the appellate Court can direct the lower Court to bring them on record and give them separate allotments if they so desire. (*Das and Adami, JJ.*) *DIGAMBAR MAHTON v. HANRAJ MAHTON.*

1 Pat. 361 : 3 Pat. L. T. 238 (1922) P. 96 : 67 I. C. 156.

—O. 1, R. 9—*Non joinder of parties—Dismissal of suit on appeal—Ejectment suit against persons jointly interested—Withdrawal against some—Effect of.*

Where the proprietors of a village sued to eject three persons, from a piece of land alleged to be *shamilat* and finding it difficult to serve one of them with notice of suit withdrew their claim as against that defendant, the trial court passed a decree for two thirds of the lands sued for. But

C. P. CODE (1908), O. 1, R. 10.

the appellate court dismissed the suit on the ground of the non-joinder.

*Held* in second appeal that the claim having been expressly limited to the interests of the defendants on record the suit could not be dismissed on the ground of the non-joinder, (*Scott Smith, J.*) *BHURA v. MATU.* 60 I. C. 6.

—O. 1, R. 9—*Non-joinder objection as to—Procedure to be followed* See C. P. CODE, S. 99 AND O. 1, R. 9, 42 M. L. J. 133.

—O. 1, R. 9—*Scope of*

O. 1 R. 9, provides that no suit shall be defeated by reason of non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The notion that a decree holder can seize property which belongs to a stranger and hold it by reason for example, of the fact that one of his judgment-debtors is keeping out of the way so as to prevent any possibility of service being effected upon him in the suit after an order of dismissal of the claim by the execution court, is so contrary to one's sense of justice that one would decline to accept it as being the law. The failure to join such a party is covered by O. 1, R. 9. (*Walsh, J.*) *MT MARYAM BIBI v. RAM DAS* (1922) All. 404.

—O. 1, R. 10—*Addition of plff—Original plff. having no cause of action—Addition of party.*

When a suit is instituted in the name of a wrong person as plff by a bonafide mistake, the Court has power to substitute the name of the right persons as plffs and this power is not excluded in cases where the person originally had no right to institute the suit. The words of O. 1, R. 10 "where a suit has been instituted in the name of a wrong person as plaintiff" are comprehensive enough to include cases where the original plff. had no cause of action and their interpretation must not be restricted to cases where the plff. has some right to sue. 30 M. 419; (1902) 2 K B 485 Rel. (*Raymond, J. C.*) *FIRM OF GERIMAL HARRISON v. FIRM OF RAGUNATH KALIANJI.* 66 I. C. 873.

—O. 1, R. 10 (1)—*Scope of—Institution of suit by person not entitled to continuance by proper persons.*

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a bonafide mistake. 30 M. 419-43 M. 707 Rel (*Spencer and Venkatasubba Rao, JJ.*) P. T. P. RARAPPAN *KIDAVU v. UNNICHENAN.* 16 L. W. 826.

—O. 1, R. 10—*Scope of—Scheme suit—Withdrawal of—Power of Court to transpose parties and adjudicate on the merits.* See (1921) DIG. COL. 220. *SYED MAHOMED SIRAJUDDIN SAHIB v. SYED SHAH GULAM JAILANI SATAR SAHIB.* 30 M. L. T. 31. (H. C.)

—O. 1, R. 10—*Second Appeal—Transposition of parties—New case.*

In a second appeal pending in the High Court the plaintiffs appellants applied to transfer defts. Nos. 4 and 5 with their consent to the category of plffs, for continuing the suit for their benefit

## C. P. CODE (1908), O. 2, R. 2

as well as defts 4 and 5 Held that the application could not be granted as if granted it would be necessary for the added plaintiffs to discard the entire evidence on the record and succeed on a case which was contradictory to the evidence put forward. (*Mookerjee and Cuming, JJ.*) JAGABANDHU SAHA v HARI CHANDRA SIL.

36 C. L. J. 92 : (1922) Cal. 459.

—0. 2, R. 2—*Alienation by Hindu widow—Separate suits by reversioners to avoid different alienations—No bar.*

A Hindu reversioner's right to challenge the validity of one alienation made by a Hindu widow is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of one and the same title. Each alienation by the widow gives rise to a separate and distinct cause of action and a suit to impeach one is no bar under O. 2, R. 2 C. P. C. to a subsequent suit to impeach another alienation. (*Wazir Hasan, A. J. C.*) BAHADUR SINGH v. SULTAN HUSAIN-KHAN. (1922) Oudh 171 : 66 I. C. 455.

—0. 2, R. 2—*Annuity—Instalments—Omission to sue for instalments which had accrued due—Effect of*

On 28—6—1917 plff brought a suit against defts for recovery of the instalment of an annuity which had fallen due from 1—1—1914 up to 1—1—1917. On 31—7—1917 the suit was dismissed by the court on the ground that the suit was premature because an appeal was pending with respect to a certain sale deed. The parties however were absent on that date. The plff. applied to the court under O. 9, R. 4 C. P. C. to set aside the dismissal but the application was rejected. Against the order of rejection plff. filed an appeal but on 2—3—1918 that appeal was withdrawn and dismissed. Meantime the instalment of the annuity which fell due on 1—7—1917 had become payable and a suit was brought on 22—12—1917 for its recovery and decreed on 2—4—1918. In a subsequent suit plff claimed arrears of annuity from 1—1—1914 up to 1—7—1919. Held that when the plff brought the Suit on 22—12—1917 in respect of the half yearly instalment of the annuity which had become payable on 1—7—1917 he was bound to include in his claim a claim for all other instalments which had become due up to that date and with respect to which a claim would have been within limitation, and that the present suit was barred by O. 2, R. 2 by reason of the prior suit decreed on 2—4—1918. Plff cannot be heard to say that he was in any way protected against the operation of O. 2, R. 2 C. P. C. by the fact that he had an appeal pending in the District Court at the time the second suit was filed. After the appeal was withdrawn any protection, which might have accrued to the plff. by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1914 to

## C. P. CODE (1908), O. 2, R. 2.

1917 (*Lindsay and Kanhaiya Lal, JJ.*) ABDUL KARIM KHAN v MAHOMED JAU.

44 A. 663 : 20 A. L. J. 590 L. B. 3 A. 480 : (1922) All 379 : 68 I. C. 970.

—0. 2, R. 2—*Applicability to proceedings in revenue court.*

O. 2 R. 2 C. P. Code which requires that every suit shall include the whole of the claim which plaintiff is entitled to in respect of the cause of action is applicable to proceedings in revenue Courts for recovery of arrears of rent. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission (*Mookerjee and Cuming, JJ.*) PRATAB CHANDRA JANA v. SECRETARY OF STATE. 35 C. L. J. 304, (1922) Cal. 101 : 67 I. C. 375.

—0. 2, R. 2—*Causes of action different—Mortgagor authorising mortgagee to sue either for interest due or for possession in case of default in payment of interest—Suit for interest—Subsequent suit for possession See (1921) DIG COL. 221 PARMESHRI DAS v. FAKIRIA. (1922) Lah. 230.*

—0. 2, R. 2—*Cause of action—Difference of—Prior suit on Mortgage—Inconsistent claim in later suit.*

Where the prior suit was based on the ground that the mortgaged property had been sold in execution of a simple money decree free of the mortgage, it does not bar a subsequent suit on the same mortgage on the allegation that the land was sold subject to the mortgage in execution of the money decree (*Brown, A. J. C.*) MAUNG KYIN PEIN v MA PWA ME.

4 U. B. R. (1921) 62 : 64 I. C. 953 (1922) U. B. 1.

—0. 2, R. 2—*Causes of action—Mortgage—Interest—Payable in monthly instalments—Default—Option—Suit for interest—Subsequent suit for principal*

Where the time stipulated for payment of the principal is one year after the date of the mortgage but interest is made payable monthly, a default in the payment of interest gives rise to a cause of action and a suit for interest alone does not bar a subsequent suit for principal (*Brown, A. J. C.*) MAUNG KYIN PEIN v. MA PWA ME.

4 U. B. R. (1921) 62 : 64 I. C. 953. (1922) U. B. 1.

—0. 2, R. 2—*Causes of action—Splitting of—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.*

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah, A. J. C. and Crump, J.*) BHAN DATT KHADE v PATLU MALU SABLE. 24 Bom. L. R. 1157.

—0. 2, R. 2—*Cause of action—Suit by mortgagee for possession—Second suit for possession.*

Where a mortgagee obtains a decree for possession on the basis of the mortgage, no further suit for possession could be maintained unless it could be shown that possession had been taken



## C. P. CODE (1908), O. 2, R. 2.

under the decree and the judgment creditor has been subsequently dispossessed (*Leslie Jones and Dundas, JJ*) *HAR CHAND SINGH v. NARAIN SINGH*, 67 I. C. 281

—O. 2, R. 2—Cause of action—Splitting of—Simple mortgage—Fixed term—Option to sue for interest alone—Suit for interest after expiry of term—Second suit for principal and interest

If a mortgagee to whom a cause of action to realise the whole mortgage security, has accrued exercises the option given to him by the document and sues for interest alone, he must be deemed to have relinquished his claim for further relief, under Order 2, Rule 2 of the Code of Civil Procedure and a second suit for principal and interest is not maintainable 15 I. A. 156; 12 I. A. 116; 21 Bom. 267 Ref. (*Lord Buckmaster*) *MUHAMMAD HAFIZ v. MIRZA MUHAMMAD ZAKARIYA*.

44 All. 121; 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 65 I. C. 79; 24 Bom. R. 341; 15 L. W. 377; L. B. 3 P. C. 73; 30 M. L. T. 224; 3 Pat. L. T. 279; (1922) P. C. 23; 49 I. A. 9 (P. C.)

—O. 2, R. 2—Distinct causes of action—Suit for share—Test of.

The question whether there is a bar by O. 2, R. 2 C. P. Code has to be decided with reference to the identity of the causes of action in the two suits and that question has to be determined with reference to the allegations made by the plff. in either suit. In determining this question the Court is not in any way concerned with the defences which were raised in the suits or with the character of the relief which was sought (*Lindsay and Khanharya Lal, JJ*) *SHAIKH ABUL RASHID v. MT. QUDRAT UN NISSA*.

L. B. 3 A. 587; (1922) A. 510

—O. 2, R. 3—Landlord and Tenant—Rent—Default in payment—Arrears—Ejection—Cause of action distinct See (1921) DIG. COL. 222. *KHUSI RAM v. ABDUL GHAFUR KHAN*.

4 Lah. L. J. 17; (1922) Lah. 118.

—O. 2, R. 2—Mortgage and lease—Suit for rent—Subsequent suit on mortgage bar.

Where deft. mortgaged certain properties to plff. with possession directing him to set off the rent against the interest due on the mortgage, and the plff. sued the deft. as lessees for arrears of rent and obtained a decree a subsequent suit on the mortgage for recovery of the mortgage money and interest for the remaining period is not barred. 19 A. 496, 26 M. 662 ref. (*Le Rossignol and Campbell, JJ.*) *MAHOMED HUSSAIN v. ABDUL GHAFUR KHAN* 3 Lah. 1; 65 I. C. 102; (1922) Lah. 111.

—O. 2, R. 2—Omission to sue—Effect of Subsequent suit.

Where a person alleging to be the heir of another sues for the recovery of a portion of the estate from another alleged to be in wrongful possession of the same, the omission to sue for the remainder operates as a bar to a subsequent

## C. P. CODE (1908), O. 2, R. 2.

suit for the recovery of the same (*Kotwal, A. J. C.*) *BHULMAL SHEOLAL v. ZUNKARI*.

65 I. C. 338.

—O. 2, R. 2—Partition—Dismissal of prior suit for possession—Subsequent suit for partition.

Where a purchaser of the share of a co owner in a specific plot of land brings a suit for possession of that specific land and the suit is dismissed on the ground that the partition alleged by the plaintiff as between his vendor and the defendant was not proved a subsequent suit for partition of the entire plot is not barred by O. 2, R. 2, C. P. Code as the causes of action in the two suits were different.

In the first case the cause of action was exclusion from joint possession by a cosharer. In the second the cause of action was the right of every cosharer to bring an action against his other cosharers for partition. (*Twomey, Kt., C. J. and Ronson, J.*) *MAUNG LU THA v. MAUNG PO. U.* 64 I. C. 174.

—O. 2, R. 2—Partition—Successive suits—Maintainability of—Omission to get relief—Effect of. See (1921) DIG. COL. 223 *GULABCHAND CHOTIRAM MARWADI v. RAMNATH CHOTIRAM*.

46 Bom. 327; 64 I. C. 995; (1922) Bom. 119.

—O. 2, R. 2—Partition suit—Decree—Subsequent suit for accounts for a period prior to partition—It lies. See PARTITION.

24 Bom. L. R. 302.

—O. 2, R. 2—Same transaction—Mortgage and lease—Suit for rent—Suit on mortgage.

Where at the time of the execution of a mortgage deed a lease is granted in favour of the mortgagor under which the latter is to continue in possession on payment of a monthly rent, in default of which payment the mortgagor was to be ejected, the mortgage and lease do not form part of the same transaction. Consequently a suit for recovery of the rent due does not debar a suit for the principle amount of the mortgage though the rent was to be applied towards the interest on the mortgage. 69 P. R. 1918; 19 P. R. 1910 Ref. (*Abdul Raoof, J.*) *BHAGWAN DAS v. JALAL DIN*. 69 I. C. 54

—O. 2, R. 2—Scope of Causes of action—Different Suits on. See (1921) DIG. COL. 224. *MAHARAJAH OF COOCH BEHAR v. RAJA MAHENDRA RANJAN RAI CHAUDHURI*.

66 I. C. 923

—O. 2, R. 2—Suit for declaration of right—Subsequent Suit for possession—Maintainability

Where a person entitled to claim a share in an estate sued for and obtained a mere declaration of his right and did not ask for possession, a subsequent suit for possession is barred by O. 2, R. 2 and S. 11 Expl. IV C. P. C. (*Hallifax and Pridcaux, A. J. C.*) *SUBHAN ALI v. IMAMI BEGAM*. (1922) Nag. 129; 65 I. C. 194.

—O. 2, R. 2—Suit for dower—Separate suit for share of inheritance—Maintainability of.

## C. P. CODE (1903), O. 2 R. 2.

*Per Lindsay J. (Kanhaiya Lal J. dissenting)*  
A suit by an heir of a deceased Mahomedan Lady for a share of the inheritance of certain Zemindari estate is a bar to a subsequent suit against the lady's husband for a share of the dower due to the deceased (*Lindsay and Kanhaiya Lal, JJ.*) SHEIKH ABDUL KASHID v. MT. QUDRAT UN-NISSA. (1922) All. 510 : L.R. 3 A. 587

—O. 2, R. 2—*Suit for inheritance—Decree—Subsequent suit for a portion of the estate.*

Defendants obtained a succession certificate to the estate of a deceased person and obtained a decree on a bond executed to the deceased by a debtor and also collected other debts due to his estate. Plaintiffs claiming to be the heirs of the deceased sued debt. for possession of the estate and obtained a decree but they omitted to include the decree on the bond aforesaid though they were aware of its existence. In a subsequent suit for a transfer of the decree from the defendant. *Held*, that the suit was barred by the provisions of O. 2, R. 2 C. P. Code. (*Kotwal, A. J. C.*) BUDH MAL v. MT. ZUNKARI 18 N. L. R. 136.

—O. 2, R. 2—*Suit for profits—Omission of claim under misapprehension—Subsequent suit—No bar.*

O. 2, R. 2 of the C. P. Code does not debar a plff. from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact, half yearly. (*Mears, C. J. and Banerji, J.*) BABU NIGAL SINGH v. MST. NAJUBAN. 4 U. P. L. R. (A.) 16 : 65 I. C. 585.

—O. 2, R. 5—*Partnership between plaintiff's father and defendant—Subsequent partnership between plaintiff and defendant with old assets—Plff. obtaining letters of administration to his father's estate—Suit by plff. to recover father's share in the first partnership and his own share in the second—Not bad for misjoinder.*

Plff's father who was divided from the plff was carrying on a business in partnership with the first defendant which lasted till the plff's father's death. Subsequent to the plaintiff's father's death the plaintiff and the first defendant carried on business with the old partnership assets the plaintiff subsequently obtained letters of administration to his father's estate. He as administrator brought the present suit for the accounts of the partnership between his father and the first defendant. He also claimed in the same suit his share in the partnership between himself and the first defendant.

Such a suit does not offend the provisions of O. 2, R. 5, C. P. Code and it comes within the exception specified in the rule as the plaintiffs personal claim in respect of the partnership with himself "arises with reference to the estate in respect of which he is suing as administrator."

The words "arise with reference to" in the exception to O. 2, R. 5 are very general and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. The expression "arises with reference to" should not be read as being equivalent only to 'arises against or on

## C. P. CODE (1903), O. 3 R. 4.

behalf of." *Tiadegar v. Roberts* (1914) 1 K. B. 283 dist. (*Oldfield and Venkatasubba Rao, JJ.*) ARUNACHELLAM CHETTIAR v. ARUNACHELLAM CHETTIAR. 43 M. L. J. 218 : 16 L. W. 175 : (1922) M. W. N. 453 : (1922) Mad. 436.

—O. 2, R. 7—*Cause of action—Joinder of—Objection—Waiver.* See (1921) DIG. COL. 225 MIDNAPORE ZEMINDARY CO., LTD. v. NARESH NARAIN RAO. 49 Cal. 37 : 65 I. C. 833 : (1922) Cal. 345.

—O. 3, R. 1 and 2—*Recognised agent—Pleader duly appointed—Pleader appointed by person having power of attorney—Execution petition signed by such agent if valid.* See 1921 DIGEST COL. 236 TIRUVENGADASWAMI AIYANGAR v. PAVADAI PILLAI 26 C. W. N. 376 : 24 Bom. L. R. 606 : (1922) P. C. 225.

—O. 3, R. 2—*Power of attorney—Special power—Suit filed by Mukhtear—Irregularity—Immaterial defect—C. P. Code, S. 99.*

Plff. instituted a suit for recovery of possession of land from defendants and the plaint was filed by a Mukhtear holding a special power of attorney from plff. and not a general power of attorney as required by O. 3, R. 2 (a) as amended by the Rules made by the High Court of Bombay. The defendants objected that the suit was not properly instituted but the courts below overruled the plea and decreed the suit. *Held* on second appeal, that the irregularity if any, was cured by S. 99 C. P. Code and that the decree of the court below should be affirmed. (1886) P. J. 63 foll. (*Shah, A. C. J. and Crump, J.*) GANAPATHY NANA POWAR v. JIVANABAI. 24 Bom. L. R. 1302.

—O. 3 R. 4—*Duties of pleader—When terminate.*

*Per Sanderson, C. J.* Unless and until the conditions specified in O. 3, R. 4 C. P. Code are complied with, the duties and obligations of the pleader will remain.

*Per Mookerjee, J.* A pleader must be duly appointed before he can appear, act and plead in a case. (*Sanderson C. J., Woodroffe and Mookerjee JJ.*) EMPEROR v. RAJANI KANTA BOSE. 49 Cal. 732 : 35 C. L. J. 356 : 26 C. W. N. 589.

—O. 3 R. 4—*Pleader—Authority to represent client—Termination of—Return of plaint.*

So far as the client is concerned, the appointment of a pleader is not determined until all proceedings in the suit are ended. The return of a plaint for presentation to the proper court does not put an end to the authority of the pleader and if the plaint is presented to the proper court on the same day the pleader can act in the case. (*Hallifax, A. J. C.*) DEBI LAL v. KRISHNAJI. (1922) Nig. 125 :

5 N. L. J. 265 : 67 I. C. 296.

—O. 3 R. 4 (1)—*Pleader—Appointment—Vakalat—Signing of, after filing in Court.*

Where a pleader's name appears in a Vakalat he is competent to sign and accept the vakalat even though it has already been accepted and filed in Court by another pleader also retained by the party. The Court has no power to refuse permission to the pleader whose name appears

## C. P. CODE (1908), O 3 R. 5.

on the vakalat to sign it and appear for the party. R 46 (f) of Ch. XI of the General Rules and Circular Orders provides for a vakalatnamah already filed in Court being subsequently accepted by a pleader or vakil whose name appears in the vakalatnamah at the time when it was filed. All that is necessary is that there should be an endorsement of acceptance in proof of acceptance 5 C W N 816; 20 C, W N, 283; 20 C. W 287 Ref (Jwala Prasad, J.) KUNJ BEHARI SINGH v. SHEO-DAHIN PANDEY. 3 Pat L. T. 447 :

(1922) P. 504 : 68 I C. 659

## —O. 3 R. 5—Service on pleader—Effect—Duty of pleader.

Any process served on a pleader in a case is presumed to be communicated to his client. After accepting a brief, it is the pleader's duty to attend to his clients interest unless his engagement is legally determined. (Lyle, A. J. C.) SHEO SAIG SINGH v. AUSAN. 9 O.L.J. 170 : (1922) Oudh 75.

—O 4. R. 1—Plaint—Vakil patra—Signed by pliffs servant who was not his recognised agent—No proper presentation. See (1921) DIG COL. 226 UTTAM VITTALDAS v. THAKORDAS PARSHOTTAMDAS. 46 Bom 150 :

(1922) Bom 113 : 68 I. C. 217

## —O. 5, R. 13—Ex parte decree—Application to set aside—Non service of summons.

If it is not shown that sufficient attempt was made to personally serve the summons, and if it is not shown that the person who has been described as a cousin of the appellant was a person who was sufficiently authorised to receive the summons, the appeal to set aside an ex parte decree must succeed on the ground of non-service of summons. (Woodroffe and Ghose, JJ.) ROMESH CHANDRA v. DURGA CHARAN.

(1922) Cal. 128

—O. 5 R. 15—Mode of service—Service on son when sufficient to bind father—Conditions necessary. See BENGAL TENANCY ACT, S. 46

26 C. W. N. 359

## —O. 5, R. 17—Service by affixure—Temporary absence.

Service by affixure during the temporary absence of the party to be served with a notice, on the outer door of his house where his wife was living is sufficient service within the meaning of O. 5, R. 17. (Oldfield and Ramesam, JJ.) KASIVISVANATHAM CHETTY v. SOMASUNDARAM CHETTY. 42 M. L. J. 422 :

(1922) M. W. N. 173 : (1922) Mad. 93.

## —O. 5 R. 17—Service of notice—Ladies—Notice tendered to adult member—sufficiency of.

Where a notice was ordered to two ladies and it was tendered to an adult male resident of their house who was closely related to them and he refused to take the notice whereupon it was affixed to their door Held, that the service was sufficient. (Daniels, A. J. C.) MT. BASHIRAN v. BISHAMBHAR NATH. 9 O. L. J. 439 :

(1922) Oudh, 268.

## —O. 5, Rr. 17 and 19—Service of summons—Affixure to outer door—Propriety of—Return of process server,

## C. P. CODE (1908), O. 6. R. 17.

The petitioner at the hearing of an application to set aside an ex parte decree alleged that the summons had not been affixed on the outer-door of his house as stated in the return but the court refused to enquire into the matter and dismissed the petition. Held, that the disposal of the petition was irregular and the court must enquire and come to a conclusion on the evidence (Kumara-swami Sastri, J.) KARUTHAN AMBALAM v. DORASWAMI AYYANGAR 16 L. W. 444.

## —O 5, R. 17—Service of summons—Personal service—Necessity for—Diligence.

Where there is an agent empowered to accept service on behalf of the defendant or any other person on whom service can be made, it is not incumbent on the serving officer to make such diligent efforts to effect personal service as in a case where there is nobody else on whom service can be made (Hallifax, A. J. C.) MADAN SINGH v. KESHEO PRASAD 5 N. L. J. 41 :

(1922) Nag 105 : 65 I. C. 44.

## —O 5, Rr. 18, 10—Identification of person sought to be served—Identifier if should be supplied by party.

It is not incumbent on a party to provide an identifier for the purposes of O. 5, R. 18 C. P. Code. The identifier may be a person in the village knowing the defendant. (Jwala Prasad and Ross, JJ.) NAGENDRA NATH GHOSH v. SAMBU NATH PANDE. 3 Pat. L. T. 498 :

65 I C 49.

## —O 5, R. 19 and O. 9, R. 13—Ex parte decree—Finding that service was sufficient not recorded—Effect of

Where a Small Cause Court without recording any order under O 5, R 19 Civil Procedure Code and without finding that the service was sufficient decreed the suit *ex parte*, Held, that the *Ex parte* decree must be set aside. (Ramesam, J.) PERINGADI ABDU RAHIMANHAJI v. KARUVAN-TAKATH MOIDIN. 15 L. W. 17.

## —O. 5 R. 22—Bombay High Court—Service of summons by post—Retrial when ordered.

The service of summons by post is allowed to litigants as a matter of convenience. The Court should allow the defendant a retrial, if after the decree has been passed against him on evidence that the summons was sent by registered post and returned refused, he appears and denies that the packet had ever been delivered to him by the postal authorities. (Macleod, C. J. and Shah, J.) SUNDER SPINNER v. MAKAN BHULA. 46 Bom. 130 : 23 Bom. L. R. 908 : 1922 Bom. 377 :

64 I. C. 386.

—O 6, R. 4—Pleadings—Fraud—Allegations and proof—Difference between—Effect of. See (1921) DIG COL. 227, SATISH CHANDRA GHOSE v. KALIDASI 26 C. W. N. 177 :

(1922) Cal 202 : 68 I. C. 577.

—O 6 R. 17—Amendment of plaint—Defence of limitation—Change of the nature of 35 C. L. J. 25,

C. P. CODE (1908), O. 6, R. 17.

—O. 6, R. 17—Amendment—Change of case—Late stage—Improper grant of leave to amend—Interference on appeal, *See* (1921) DIG. COL. 227 TOHLU MAL v BUTA. 67 I. C. 132.

—O. 6, R. 17—Amendment of plaint—Fact subsequent to institution of suit—Power to take note of—Appellate Court

Courts have power in certain circumstances to grant a decree in a case where the cause of action arose subsequently to the filing of the plaint. An appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to provided it is not based on the new title which accrued after the action (*Broadway and Martineau, JJ*) TARA CHAND v. ABDUL AHAD. 67 I. C. 894

—O. 6, R. 17—Amendment of plaint—Specification of boundaries—Order of amendment without notice—Effect of.

Where the boundaries of properties described in the plaint are amended without notice to the defendants but the amendment has in no way prejudiced them, effect should be given to it. (*Shamsul Huda, J.*) SHEIKH AKUB ALI v ASKAR ALI BEPARI. 64 I. C. 305.

—O. 6, R. 17—Amendment of pleadings—Avoidance of—Multiplicity of suits

The main object of allowing an amendment of the plaint is to avoid multiplicity of suits, when the dispute can be settled in the suit already instituted without unfairness to either party. (*Hallifax, A. J. C.*) SHEOBAKSH SINGH v. SETH JAGANNATH. 64 I. C. 99

—O. 6, R. 17—Amendment of plaint—Suit in *forma pauperis*—Costs of application—Order for payment of. *See* C. P. CODE, O. 33 R. 13. 24 Bom. L. R. 924

—O. 6, R. 17—Amendment of pleadings—Duty of Court to allow all amendments—Application before framing of issues—Refusal to amend—Order if binding on successor.

A Court should always grant leave to amend unless it is satisfied that the party applying was acting mala fide or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless may have been the omission, the amendment should be allowed if it could be made without injustice to the other side. (*Scott Smith, J.*) JHARIA COAL COMPANY v. DIWAN CHAND & Co. 67 I. C. 335.

—O. 6, R. 17—Pleadings—Amendment—Cause of action arising subsequent to suit—Second appeal.

The High Court in second appeal will not allow an amendment of the plaint so as to allow the plaintiff to sue on a cause of action which has arisen subsequent to the suit. (*Sanderson, C. J. and Chotzner, J.*) MOBARAK MOLLA v. HECHAMUDDI MULLA. 65 I. C. 214.

—O. 6, R. 17—Pleadings—Amendment—Claim for pre-emption—Custom—Contract—Amendment of pleadings not to be allowed in second appeal. *See* PRE-EMPTION. 20 A. L. J. 15.

C. P. CODE (1908), O. 6 R. 17.

—O. 6, R. 17—Pleadings—Amendment—Legal representative of deceased plaintiff—Introduction of inconsistent case.

In a suit for redemption of a mortgage, the mortgagor being the owner of an impartible estate the plaintiff died and his legal representative sought to amend the plaint, by including a cause of action for a declaration that the mortgage was not binding on him, the successor to the estate. *Held*, that the amendment could not be allowed.

It is not open to the legal representative of a deceased plaintiff, to seek to include in the plaint, by way of an amendment, a claim or relief, which the original plaintiff himself could not have asked for. The proper course for the legal representative is to file a separate suit for such a relief.

The wide powers of amendment given under the Code of 1908 are always subject to the rule that by means of an amendment the subject matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another (1921) M. W. N. 396 *Ref.* (*Kumaraswami Sastri, J.*) INAGANTI VENKATARAMA ROW v VENKATALINGAMA NAYANIM BAHADUR VARU.

42 M. L. J. 43 : (1922) M. W. N. 42 :  
15 L. W. 72 : 30 M. L. T. 204 (H.C.) :  
(1922) Mad. 49 : 68 I. C. 703.

—O. 6, R. 17—Pleadings—Amendment—Limitation—New cause of action—Principles guiding Court, *See* (1921) DIG. COL. 230. MA E GYWE v. MA LE WA. 64 I. C. 29.

—O. 6, R. 17—Pleadings—Amendment—Subsequent events—Declaratory relief—Prayer for possession.

An amendment in the pleadings should be made if thereby the real and substantial question can be raised between the parties and multiplicity of legal proceedings can be avoided. If a plaintiff sues for a mere declaration and in the altered condition of things it so happens that a declaration will be useless and a second suit for possession will be necessary it is open to the trial court to order an amendment of the plaint by the addition of a prayer for possession. (*Simpson and Wajir Hasan, A. J. C.*) HAMID MIRZA BEG v. AHMAD MIRZA BEG. 90, I. J. 359 : (1922) Oudh 266 : 4 U. P. L. R. (O. C.) 89 ; 68 I. C. 986.

—O. 6, R. 17—Powers of amendment—Plaint based on a specific contract—Failure to establish contract—Allegation of another and independent contract—If amendment can be allowed. *See* (1921) DIG. COL. 229, MA SHWE MYA v. MAUNG MO HNAUNG. 30 M. L. T. 23 (P. C.) : 48 Cal. 832 : 24 Bom. L. R. 682 : (1922) P. C. 249 (P. C.).

—O. 6, R. 17—Scope—Revision.

Where the plaintiff, whose suit based on an insufficiently stamped hundi was dismissed, applied for leave to amend his plaint as he wished to sue on the original consideration and the court refused leave. *held* in revision the amendment should have been allowed, (*Martineau J.*) SUNDAR DAS v. PURAN SINGH. (1922) Lah. 394.

C. P. CODE (1908) O. 6, R. 17.

—O 6, R. 17—*Appellate Court—Powers of—Amendment of grounds of appeal.*

The court has full discretion under the C P Code to allow the amendment of pleadings at any stage and if the grounds of appeal are not clear, there is no reason why an appellate Court should not direct an appellate court to amend them. (*Scott-Smith and Abdul Raoof, JJ.*) MT. RAM PIARI v. SULTAN BAKSH. 3 Lah. 382

—O. 7—*Production of documentary evidence—Late stage of the case*

The C. P. Code, no doubt, compels the parties to produce all the documentary evidence in their possession or power on which they intend to rely at the first hearing of the suit. The rule was enacted to prevent fraud by the late production of suspicious documents and no suspicion can attach to certified copies of public documents and such documents may be received in evidence though they have not been produced at the first hearing (*Das and Adam, JJ.*) DWARKA PRASAD v. JAI BARHAM. (1922) P. 322 : 67 I. C. 686.

—O. 7, R. 1—*Plaint—Presentation of—Institution of Suit.* See (1921) DIG. COL. 231 MAHARAJAH OF COOCH BEHAR v. RAJA MAHENDRA RANJAN RAI CHAUDHURI 66 I. C. 923.

—O. 7, R. 6—*General relief—Grant of declaration—Suit for possession.*

Where a plaintiff prays for such general relief as the court might grant if his prayer for possession is refused, it is open to the court to grant him a declaration of his title though he fails to obtain the specific relief prayed for. (*Le Rossignol and Martineau, JJ.*) MOHAN LAL v. MAYA MAL. 4 Lah. L. J. 393.

—O 7, R. 6—*Limitation—Exemption from—Plea of—Inconsistent averments.*

Where the plff. satisfies the requirements of O 7, R. 6 of the C. P. Code by stating in the plaint the ground showing how his plaint is within limitation, he ought not to be debarred from taking another and even an inconsistent ground to get over the bar of limitation. (*Dhobley, A. J. C.*) ONKARLAL v. RAJ MAHOMED. 17 N. L. R. 209 : 65 I. C. 279.

—O 7, R. 6—*Limitation—Saving of—Acknowledgment—Plea in defence.*

It is open to the plff. to show in reply to the defence set up that his claim was within time by reason of the acknowledgments of the defendants. Such a plea in rebuttal is not inadmissible under O 7, R 6 C P Code, (*Kanhaiya Lal, J. C.*) RAM AUTAR v. BENI SINGH 25 O. C. 89 : (1922) Oudh 135 : 68 I. C. 196.

—O. 7, R. 6—*Plaint—Failure to set up acknowledgment as saving limitation—Effect.*

Where the plaintiff did not set up in his plaint, as required by O. 7, R. 6, an acknowledgment, within the meaning of S. 19 of the Limitation Act which would bring his suit within time, he cannot be allowed to raise it. (*Scott-Smith and Campbell, JJ.*) UTTAM CHAND v. MT. THAKUR DEVI 4 Lah. L. J. 190 : 3 Lah. 233 : (1922) Lah 39.

C. P. CODE (1908), O 8, R. 2

—O 7, R. 10—*Absence of jurisdiction—Return of plaint—Dismissal of suit improper*

It is the duty of a court to return the plaint for presentation to a proper court and not to dismiss the suit if it holds that it has no jurisdiction to entertain it, (*Ryves and Stuart, JJ.*) RAM JAS SINGH v. BABU NENDAN SINGH. 44 All. 686 : (1922) All. 424.

—O. 7, R. 10—*Order by Munsif returning, plaint to be presented to Small Cause Court—Finality of.* See (1921) DIG. COL. 232. MOULVI SYED RAZUR RAHMAN v. ATHAR HUSSAIN. (1922) P. 368 : 64 I. C. 496.

—O 7, R. 11—*Plaint filed in time, but deficient Court fee—Subsequent payment—Effect on limitation—Difference between suits and appeals.* See C. P. CODE, S. 149 AND O. 7, R. 11 3 Pat. L. T. 142.

—O 7 R. 11—*Provisions of, mandatory—Deficient court fee—Procedure—Objection when to be raised.*

The provisions of O 7, R. 11 C. P. C. are mandatory and they require that where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. 38 B. 41. 2 Pat. L. J. 74 Ref. The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial because the provisions of the rule can be brought into operation at any stage of the suit. 12 A. 553; 18 M. 338; 47 C. 376, 34 C. 20 Rel. (*Mookerjee and Cumming, JJ.*) RADHA KANTA SAHA v. DEBENDRA NARAYAN SAHA. 49 Cal. 880.

—O 7, Rr. 14 and 18 (2)—*Filing of documents—Documents produced by plaintiff in answer to case set up by defts—Necessity for filing before first hearing*

Where the plaintiff produces certain documents in rebuttal of a case set up by the defts. he need not enter them in the list prescribed by O 7, R 14 C. P. Code nor need he file them before the first hearing under O. 7, R. 18 (2) C. P. C. Where the trial court refused to admit certain receipts tendered in evidence to prove the plaintiff's parentage which was denied by the defendant, on the ground they were not filed under O. 7, R 18 (2), C. P. Code, Held the trial court was wrong in its procedure and it should have allowed the plaintiffs to prove the documents at the trial. (*Miller, C. J. and Mullick, J.*) MANBODH MISSIR v. BHAIRO MISSIR (1922) Pat. 300 : 4 U. P. L. R. (Pat) 97.

—O. 8—*Scope of,*

O. 8, C. P. C. only provides for set off in suits for recovery of money but makes no provision for counter claim (*Newbould and Cumming, JJ.*) GOUR CHANDRA GOSWAMI v. THE CHAIRMAN OF THE COMMISSIONER OF THE NABADWIP MUNICIPALITY, DISTRICT NADIA. (1922) Cal. 1 (1)

—O. 8, R. 2—*Pleadings written statement Defence of limitation—Appeal—Plea raised for the first time—Power to entertain.* See (1921) DIG. COL. 233 SECRETARY OF STATE v. ANANDA MOHAN ROY. 86 I. C. 287.

C. P. CODE (1908), O. 8, R. 3.

—O. 8, R. 3—*Execution of document—Fraud, etc. not set up—Absence of issue—Court's powers.*

Where the defendants admitted execution of a document but did not plead fraud or undue influence and no issue was raised regarding the same, it is not open to courts to find that the defendants were not aware of the contents of the document. (*Mullick and Atkinson, JJ*)  
SADANAND TEWARI v. DEB NATH MANJHI.

(1922) Pat. 154 (1922) P. 184.

—O. 8, R. 3—Mortgage by manager of Hindu family—Necessity for rate of interest—No specific plea as to effect of. See HINDU LAW JOINT FAMILY. 3 Pat. L. T. 367.

—O. 8, R. 6—*Set-off—Counter—Claim—Distinction—Claim for unliquidated damages—Omission to plead—Amendment*

Under O. 8, R. 6, C. P. C. it is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. But the C. P. Code does not exclude what is called an equitable set-off provided the defendant's cross-demand arises out of the same transaction as the plaintiff's claim. 2 M. H. C. R. 296, 303 foll.

Under R. 118 of the Bom. High Court Rules a defendant may set up by way of set-off or counter claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not. Nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule; the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter claim, however, need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement. Counter claim does not afford any defence to the plaintiff's claim: it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff, as effectually as an independent action. The above distinction between a set-off and counter claim has an important bearing on the question of limitation, for if the statute of limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action; it is not enough to prove that it was barred at the time when it was pleaded. In the case of a counter claim, it is enough for the plaintiff to prove that the counter claim was barred when it was pleaded. *Walker v. Clements* (1850) 15 Q. B. 1046, *McGowan v. Middleton* (1883) 11 Q. B. D. 464; 7 A. 204; 42 M. 873 Rel. (*Mulla, J.*) NAJAN AHMED HAJI ALI v. SACMAHOMED PEERMAHOMED. 24 Bom. L. R. 998.

—O. 8, R. 6—Set-off—Barred debt—Suit for partition among members of joint family. See (1921) DIG. COL. 234 SUBRAYA BHANDARY v. JANARDHANA BHANDARY. 30 M. L. T. 15.

—O. 8, R. 6—Set-off—Counter claim—Equitable set-off—Difference between—Suit for dividend—Right to set off damages.

A set-off and counter-claim are governed by rules of procedure, and a person can only plead

C. P. CODE (1908), O. 9, R. 4.

by way of set-off or counter claim that which is permitted by those rules. A set-off can be pleaded as a defence and can only arise where the claim to set off one against the other whether by plaintiff or defendant, exists in the same right. A set-off can also be the subject matter of a separate action or a counter claim. In a suit by a shareholder for recovery of dividends declared by the company it is not open to the directors to claim by way of set-off damages due from plaintiff in respect of alleged breaches of contract (*Macleod, C.J., and Coyajee JJ.*) VITHALDAS GULABDAS SETH v. THE HYDERABAD SPINNING AND WEAVING CO. LTD.

24 Bom. L. R. 328; 67 I. C. 328.

—O. 9—*Applicability of.*

In all cases where there is default in appearance, at all events at the first hearing where on the original date fixed in the summons or on some later date to which that hearing is adjourned, the modes of disposing of the suit directed by O. 9 apply and the decision is *ex parte*. This is subject to the special provisions of O. 9, R. 7.

*Per Miller, C.J. (obiter)* Where a party has once appeared, either personally or otherwise, to conduct the case at the first hearing, but subsequently withdraws or fails to appear the decision would not be *ex parte* but *inter partes*. 35 Cal. 1022 and 14 C. L. J. 603 read to (*Dawson Miller, C.J. and Coutts, J.*) MAHANT DAMODER DAS v. RAJKUMAR DAS. 1 Pat. 188; (1922) P. 485.

—O. 9, Rr. 2 and 4—*Dismissal of suit—Payment of process fee—Summons not served.*

Where the plaintiff had paid the process fee on such a date when there was sufficient time for the service of summons being effected before the date of hearing, the suit cannot be dismissed under O. 9, R. 2, C. P. Code. The High Court can interfere in revision and set aside the dismissal even though the plaintiff can sue afresh. (*Abdul Raouf, J.*) RALLA RAM v. MT. RAJ.

4 Lah. L. J. 71; (1922) Lah. 63; 67 I. C. 945.

—O. 9, R. 3—*Dismissal of suit under—Application for restoration—Notice to opposite side.*

Notice of application for restoration of a suit dismissed under O. 9, R. 3 in the absence of both the parties need not be sent to the other side.

(10 A. L. J., 399 foll.) (*Daniels, J.C.*) RAMJI LAL v. KESHO RAM. 24 O. C. 347;

9 O. L. J. 52; 64 I. C. 767.

—O. 9, Rr. 3, 8, 9 and O. 17, Rr. 2 and 3—*Hearing—Significance of—Date fixed for return of notice—Dismissal of suit for plaintiff's default of appearance. See (1921) DIG. COL. 234 SHEIK ABDUL RAHMAN v. SHIB LAL SAHU.*

6 Pat. L. J. 650; (1922) Pat. 81; 4 U. P. L. R. (Pat.) 13; (1922) P. 252.

—O. 9, R. 4—*Application—Notice of to debt.*

On an application under O. 9 R. 4 of the Code notice to a debt is unnecessary. 10 A. L. J. 399 foll. (*Daniels, J.C.*) RAMJI LAL v. KESHO RAM. 24 O. C. 347; 9 O. L. J. 52; 64 I. C. 767.

—O. 9, R. 4—*Dismissal for default—Duly authorised agent—Presence of.*

G. P. CODE (1908), O. 9, R. 6.

Where there is a duly authorised agent with a registered power of attorney present in Court for the hearing of a suit, it is not competent to the court to dismiss the suit for default of appearance of the party under O. 9 R. 4 C. P. C. (*Jwala Prasad, J.*) KUNJ BEHARI SINGH v. SHEODHIN PANDEY. 3 Pat. L. T. 447 : (1922) P. 504 : 68 I. C. 659.

— O. 9, Rr. 6, 7 and 11—*Non-appearance of one defendant—Order that proceedings as against him be ex-parte—Subsequent appearance—Order if should be set aside.*

The mere fact that on a particular date on which the case had been taken up for hearing M one of the defendants was not present and an order was made that proceeding should be taken against her *ex parte* on that date does not preclude him from appearing at a later stage in the suit and it was not necessary for M to have that order set aside. If a decree had been passed *ex parte* against M, he could not appear at any subsequent stage of the suit and was bound by the decree and the only way in which M could proceed was to have the decree set aside (*Banerji, J.*) MANNU v. TULSI 20 A. L. J. 39 : 64 I. C. 958 L. R. 3 A. 579 (1922) All. 33

— O. 9, R. 6 and O. 17, R. 2—*Scope of Procedure.*

Both under O. 9, R. 6 and O. 17, R. 2 the procedure is the same where the defendant fails to appear at the first hearing, whether that hearing takes place on the day fixed in the summons as contemplated by O. 9, R. 6 or at a later date to which the hearing may be adjourned, which is contemplated by O. 17, R. 2. In either case what is contemplated is the procedure on the first day on which the hearing of the suit, as distinguished from interlocutory proceedings, takes place. (*Dawson Miller, C. J. and Coultis, J.*) MAHANT DAMODAR DAS v. RAJ KUMAR DAS 1 Pat. 188 : (1922) P. 485

— O. 9, R. 7—*Non-appearance of defendant—Declaration ex-parte—Subsequent appearance before decree—Procedure.*

Where on the date fixed for the first hearing of the suit the defendant did not appear and the Court declared him *ex parte* it is open to him to appear on a subsequent hearing and to ask for leave to file a written statement and to examine witnesses. (*Banerji and Stuart, JJ.*) BHAGWAT PRASAD TEWARI v. MAHOMED SHIBLI. 20 A. L. J. 270 : L. R. 3 A. 225 : (1922) All. 110 ; 66 I. C. 892.

— O. 9, R. 8 and O. 17, R. 2—*Adjournment of hearing—Absence of plaintiff—Dismissal for default—Postponement of hearing.*

Where the plaintiff and his pleader are both absent on the date of an adjourned hearing the Court cannot hear the case on the merits under O. 17, R. 2. It can only dismiss the case under O. 9, R. 8 or postpone the hearing under O. 17 R. 2. (*Banerji, J.*) RUKAM v. TARA CHAND. 20 A. L. J. 123 : L. R. 3 A. 68 : 65 I. C. 775 : (1922) All. 68.

— O. 9, R. 8—*Dismissal for non-appearance—Counter Claim by defendant—Procedure.*

G. P. CODE (1908), O. 9, R. 8.

Where a plaintiff's claim was admitted in part by the defendant subject to a counter-claim, but when the suit was called on the plaintiff being absent the suit was dismissed as a whole.

*Held*, the suit ought to have been decreed to the extent the defendant admitted liability; the counter claim can be considered only if the defendant comes forward to prove it, (*Kincaid J. C. and Kenedy A, J. C.*) KHEMCHAND DARYANOMAL v. MENGHOMAL CHUTAKMAL 15 S. L. R. 172 : 66 I. C. 789.

— O. 9, R. 8—*Appearance—What amounts to.*

Where the party and his pleader appear, but the pleader asks for a pass over to consult his leader, and when the case is later called on, no one appears and is dismissed for default, it must be held the plaintiff had not appeared within the meaning of the rule. 3 P. L. J. 355 and 5 P. L. J. 17 foll. (*Coults and Adams, JJ.*) BASDEO NARAIN SINGH v. HARAK NARAIN SINGH. 68 I. C. 942.

— O. 9, Rr. 8 and 13—*Dismissal of suit for default after framing of issues—Appeal—Remand—Propriety of.*

After the framing of issues in a suit the court disposed of it in these words: "The plaintiffs are absent. The suit is dismissed with costs." The plaintiff appealed against the decision and the appellate court remanded the case for fresh disposal after taking evidence. *Held*, that the disposal of the suit by the trial court was under O. 9, R. 8 C. P. C. and that its order could be displaced only under O. 9, R. 9 or an appeal from an order under that provision. (*Oldfield and Venkatasubba Rao, JJ.*) VELAYUTHA MUDALIAR v. SUNDARESAM PILLAI. (1922) M. W. N. 483 : (1922) Mad. 416.

— O. 9, R. 8 and O. 17, Rr. 2 and 3—*Scope of Failure to appear—Procedure.*

O. 17 C. P. Code deals generally with adjournments. Under O. 17 R. 2 where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit under O. 9 C. P. Code. In all the cases which come under O. 9 C. P. C. the party against whom a decree or order is passed in default of his appearance, can apply to the court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily if a case appears on the board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the court must refer to O. 9 C. P. Code so as to ascertain the proper procedure to be followed and there is no necessity whatever to have any recourse to O. 17, R. 3.

Where the hearing of a suit had not commenced and the plff. did not appear on the adjourned date, the suit should be dismissed under O. 9 R. 8 C. P. C. and not under O. 17 R. 3 C. P. C. In the case of a dismissal under O. 17 R. 3 C. P. C. the remedy is by way of appeal or review and in the case of a dismissal under O. 17 R. 2 the party can apply to set aside the dismissal under O. 9 R. 9 or R. 13 C. P. Code.

Courts should exercise extreme caution when on an adjourned date the parties or any of them

C. P. CODE (1908) O. 9, R. 9.

fail to appear. They should in the first place have recourse to O. 17 R. 2 rather than O. 17 R. 3 and even in cases where O. 17 R. 3 can be considered to apply, that is to say. Where the case has been part heard and an adjournment granted, it would not be in accordance with justice to refuse a party who had failed to appear on the adjourned date at the time fixed, the chance of having the suit restored, 20 B. 736, 743 foll. (*Macleod C. J. and Shah, J.*) RATANBAI SHIVLAL LOHAR *v.* SHANKAR DEOCHAND LOHAR. 24 Bom. L. R. 775 68 I. C. 514

—O. 9, R. 9 and O. 43, R. 1 (c)—Application to set aside dismissal of suit for default—Application dismissed for default—Subsequent application—Order on, not appealable See C. P. CODE O. 43, R. 1 (c) 36 C. L. J. 184

—O. 9, R. 9 and S. 151—*Applicability to execution proceedings—Strong grounds necessary.* Order 9 rule 9 has no application to execution proceedings, the reason being that fresh applications can be filed.

Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application as would be required for an application for review. (*Ashworth, J. C. and Simson, A. J. C.*) NAGESHWAR PRASAD *v.* JAI NARAYAN. (1922) Oudh 201.

—O. 9, R. 9—*Dismissal for default—Fresh suit when barred.*

The operation of O. 9 R. 9 C. P. Code is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed (*Kanhaya Lal and Sulaiman, JJ.*) BALKISHAN *v.* AGHUBAR DAVAL. L. R. 3 A. 435.

—O. 9, R. 9—*Dismissal for default—Restoration—Grounds for.*

When a suit has been dismissed for default or decreed ex parte, some indulgence and consideration should be shown to the party seeking restoration, the object of the law being to secure, within reasonable limit as to public convenience, that every party should have a hearing. (*Hopkins, S. M. and Fremantle, J. M.*) RAM SARUP *v.* JAMNA SAHU. L. R. 3 A. 336 (Rev.)

—O. 9, R. 9—*Dismissal for default—Restoration—Reasonable cause.*

Where owing to the illness of the legal practitioner engaged by a party there is no appearance for him when the case was called on and the suit is dismissed for default, it must be restored in the absence of any evidence to show that the party knew of his pleader's illness or had reason to suspect he would not appear. (*Hopkins, S. M. and Fremantle, J. M.*) CHOTU MAL *v.* KUNDAN SINGH. 4 U. P. L. R. (B. R.), 92.

—O. 9, R. 9 and 13—*Ex parte decree—Application to set aside—Dismissal for default—Subsequent application—Review—C. P. Code O. 47, R. 1.*

Where a suit was decreed *inter partes* against some defendants and *ex parte* against other defendants and the latter applied to set aside the *ex parte* decree but their application was

C. P. CODE (1908) O. 9, R. 13.

dismissed for default. Held that a further application under O. 9, R. 9 asking that the dismissal of their former application under O. 9, C. P. C. for default be set aside, is not maintainable. + P. L. J. 135 (F. B.) followed. O. 47 C. P. Code, does not apply when the order passed is by an officer other than the officer who made the original order.

S. 153, C. P. C., has no application as the dismissal order was not an error or defect in the proceedings (*Roe and Jwala Prasad, JJ.*) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH (1922) Pat. 5 : (1922) P. 121.

—O. 9, R. 9—Order restoring suit—If appealable—Not a 'judgment' within the meaning of cl. 15 of the Letters Patent. See LETTERS PATENT (CAL) CL. 15. 49 Cal. 616.

—O. 9, R. 9—Parties—Exoneration of certain debts.—Restoration of suit.

Where the plff. exonerates certain debts from liability and the suit is subsequently dismissed for default, it cannot be restored as against the exonerated debts (*Kanhaya Lal, J. C.*) NAGESHWAR *v.* BHAGY DOBEY. 25 O. C. 67 : (1922) Oudh 160 : 68 I. C. 246.

—O. 9 R. 13—*Appearance—What amounts to—Sufficient cause.*

The word "appearance" as used in the C. P. Code has a well recognised meaning and implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. Where therefore a pleader appears and asks for an adjournment, which is refused but has no instructions to represent the client for the purpose of the suit, there is no appearance within the meaning of the Code, even though the party was present in person in court. (*Dawson Miller, C. J. and Coultis, J.*) MAHANT DAMODAR DAS *v.* RAJ KUMAR DAS

1 Pat. 188 : (1922) P. 485.

—O. 9, R. 13—*Application barred—If ground for setting aside—Inherent powers—If can be resorted to.*

The fact that a certain application which had been decreed ex parte was barred by time, is not a ground for setting aside the ex parte decree under O. 9, R. 13.

The inherent powers of a court under S. 151 C. P. C. cannot be called in aid to set aside an ex parte decree or to extend the time thereof. 43 Mad. 94 follid. (*Coultis and Ross, JJ.*) AJODHYA MAHTON *v.* MT. PHUL KUER. 1 Pat. 277 : (1922) P. 479.

—O. 9, R. 13—*Application to set aside ex parte decree—Fresh vakalat unnecessary.*

A pleader duly appearing in a suit is not obliged to file a fresh vakalatnama for the purpose of an application to set aside an ex parte decree in the suit. Ch. IV of the Bombay Manual of Civil Circulars does not lay down that an application to set aside an ex parte decree is not an application connected with the suit. (*Macleod, C. J. and Kanga, J.*) BACHUBAI JHIRAD *v.* IBRAHIM ISAK. 24 Bom. L. R. 744 : (1922) Bom. 207.



C. P. CODE (1908) O. 9, R. 13.

—O. 9 R. 13—*Ex parte decree—Application to set aside—Dismissal for default—Refusal to re-admit—Appeal if lies*

No appeal lies from an order of the first court refusing to re-admit and re-consider an application for the setting aside of an *ex parte* decree and restoration of the suit in which the said decree had been passed, which application had been dismissed for default. (*Piggott and Walsh, JJ.*) SHAIKH SHARIF HUSAIN v. MIRZA HAIDAR HUSAIN L. R. 3 A. 323.

—O. 9 R. 13—*Ex parte decree—Application to set aside—Summary disposal—Revision*

Where an application by a deft to set aside an *ex parte* decree is summarily rejected without giving the defendant an opportunity to substantiate his allegations, the order of rejection is illegal and liable to be set aside in revision. (*Hopkins S. M., and Burn, J. M.*) SAMPAT SINGH v. BIR BAHADUR SINGH

L. R. 3 A. 38 (Rev.)

—O. 9, R. 13—*Ex parte decree—Application to set aside—Sufficient cause for non-appearance.*

On an application to set aside an *ex parte* decree the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. Once the court is satisfied that he did try to be present in court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible, it is the duty of the court to set aside the *ex parte* decree, mulcting in proper cases, the defendant in costs. The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside. (*Sir Walter Schwabe, C. J. and Wallace, J.*) ARUNACHELLA IYER v. SUBBARAMIAH.

43 M. L. J. 632 :

31 M. L. T. 257 H. C. : 16 L. W. 583 :  
(1922) M. W. N. 600. 68 I. C. 971.

—O. 9, R. 13—*Ex parte decree—Confirmation on appeal—Jurisdiction of trial Court to set aside decree.* See (1921) DIG. COL. 239. MAHABALI PRASHAD v. BALBHADAR SINGH 64 I. C. 303.

—O. 9, R. 13—*Ex parte decree—Minor deft.—Non-representation—Effect of.*

It is not competent to a minor deft to apply to set aside an *ex parte* decree on the ground that he was not represented in the suit. On his own showing the minor was not a party to the suit and a person not a deft. cannot apply to set aside the *ex parte* decree. 37 M. L. J. 399 ; 24 A. 383 ; 37 A. 179 ; 39 A. 8. Ref. (*Kotwal, A. J. C.*) PERMANAND v. LAKHMI CHAND. 66 I. C. 460.

—O. 9, R. 13—*Ex parte decree—Non-appearance owing to illness—Appeal—Remand.* See (1921) DIG. COL. 239. JETHA LAL GIRDHAR v. VARA LAL.

46 Bom. 184 : (1922) Bom. 267,

—O. 9, R. 13—*Ex parte decree—Setting aside—Application—Forum—Transfer of territorial jurisdiction after decree and before application.* See C. P. CODE, S. 160, AND O. 9, R. 13.

42 M. L. J. 344.

C. P. CODE (1908) O. 9, R. 13.

—O. 9, R. 13—*Ex parte decree—Setting aside—Decree ex parte against one defendant Confirmed on appeal—Application to be made to which Court.*

An application to set aside a decree passed *ex parte* against A and confirmed in his presence on an appeal preferred by another defendant, does not lie in the appellate court but ought to be filed in the first court. Where the decree of the first court was passed on 8-2-1919 and the application to set it aside was made only in 1921, held that the application was barred. (*Oldfield and Ramesam, JJ.*) PALANIAPPA CHETTY v. SUBRAMANIA CHETTY

42 M. L. J. 12 : 30 M. L. T. 151 (H. C.) :  
(1922) Mad 33 : 66 I. C. 59.

—O. 9, R. 13—*Ex parte decree—Setting aside—Limitation—No inherent power to extend period of limitation prescribed by art. 164.* See C. P. CODE, S. 151 AND O. 9, R. 13.

(1922) Pat 61.

—O. 9, R. 13—*Ex parte decree—Application to set aside dismissed for default—Order refusing to restore*

Where an application to set aside a decree was dismissed for default and the court refused to set aside the order of dismissal and restore the application, held no appeal lies against the order. (*Piggott and Walsh, JJ.*) SHARIF HUSSAIN v. HAIDAR HUSSIN.

20 A. L. J. 519 :

(1922) All. 337 : 67 I. C. 320.

—O. 9, R. 13—*Ex parte decree set aside on payment of costs—Costs not paid in time—Procedure*

On a petition to set aside an *ex parte* decree, the defendant who was ordered to deposit in Court the decree amount and costs but he neither carried out the order of the trial court nor of the appellate court to deposit the costs within the time fixed, held in revision, that the appellate court ought to have dismissed the appeal on non-payment of costs for payment of which time should have been fixed before disposal of the appeal. (*Kanharalal, J. C.*) SUKHAJ v. BINDA BAKSH.

(1922) Oudh 14

—O. 9, R. 13—*Ex parte decree—Minor defendant—Guardian ad litem not properly appointed—Effect of—Non-representation.*

Where the allegation of an applicant applying under O. 9 R. 13 C. P. Code is that he was a minor and that he was not represented by a guardian when the *ex parte* decree was passed an application under O. 9 R. 13 C. P. Code is incompetent. 31 A. 572, 37 M. L. J. 399 ; 24 A. 383 ; 37 A. 179 ; 39 A. 8. Ref. (*Kotwal, A. J. C.*) SETH PAKMANAND v. LAKHMICHAND.

18 N. L. R. 138.

—O. 9, R. 13—*Ex parte order—Setting aside.*

Until a suit is actually called on, a party is entitled to appear and defend. It may be that he is guilty of delay, and if that is the case he may be mulcted in costs. But if he does appear before the suit is heard, then he has a right to be heard. (*MacLeod C. J. and Coyajee J.*) RADHABAI v. ANANT PANDURANG.

(1922) Bom. 345 (1)

C. P. CODE (1908) O. 9, R. 13

— O. 9, R. 13—*Final decree ex parte—Partition suit—Decree passed without notice to defendant—Setting aside.*

When a court adjourns a pending suit it is its duty to give notice of the adjourned date to the parties or their pleaders. Where after the preliminary decree in a partition suit the court appointed a Commissioner for division by metes and bounds and on his report being received passed a final decree without notice to the defendant, the ex parte decree is bad and should be set aside. (*Piggott and Walsh, JJ.*) DURGAPRASAD v. HET RAM. 20 A. L. J. 912 : L. R. 3 A. 626

— O. 9, R. 13—*Mortgage—Ex parte final decree—Setting aside.*

The proceedings in a mortgage suit after the passing of a preliminary decree and a final decree are proceedings in the suit which continues until a final decree is passed. On an application by the plff. in a mortgage suit for the passing of a final decree it is not strictly necessary that notice should be given to the mortgagee's debt. If the Court passes a final decree without such notice, it is not an illegality or irregularity and the Court is not bound to set aside the ex parte final decree. At the same time it is open to the debt, on showing sufficient cause under O. 9, R. 13 for his absence to apply to set it aside. (*Hallifax, A. J.*) C) ANNAJI v. FAKIRA

(1922) Nag 175 : 67 I. C. 282.

— O. 9, R. 13—*Separate suit when lies—Fraud*

Where plaintiff alleged that defendant purposefully served summons on a wrong person and did not give plaintiff's father's name though he knew it, and impleaded plaintiff as a partner of a firm, though he knew that he was not and got an ex parte decree, held: that a separate suit will lie to set aside the ex parte decree. (*Madgaonkar, A. J. C.*) SHIRAM v. FIRM OF DATARAM MUNSHIRAM (1922) Sind 20.

— O. 9, R. 13 and O. 43, R. 1 Cl. (1)—*Small cause suit—Ex parte decree—Application to set aside—Rejection by successor of the Judge having no small cause powers—Appeal*

A suit was decreed ex parte by a Munsif exercising small cause powers. His successor who was not invested with such small cause powers set it aside on the application of the debt. Held, that the decree, being final the order rejecting the application to set aside was not appealable. (*Banerji, J.*) HIRA LAL v. JHUNNI LAL.

20 A. L. J. 208 : L. R. 3 A. 124 : (1922) All 50 : 65 I. C. 967.

— O. 9, R. 13—*Proviso—Suit to obtain possession of properties from separate sets of defendants—Ex parte decree—Application to set aside—Form of order.* See (1921) Dig. Col 241 NARAYANASWAMI IYER v. DORASWAMI PATHAR.

65 I. C. 343

— O. 10, R. 1—*Pleadings—Filing of Subsequent to plaint and written statement.*

The proper way of clearing up the pleadings after the plaint and written statement have been filed is that prescribed by O. 10, R. 1 C. P. Code the provisions of which are per-emptory. The

C. P. CODE (1908) O. 11, R. 15

Court must, under that rule, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their pleaders and it is of the utmost importance for the purpose of doing justice between the parties that this oral examination should be duly and carefully carried out by the court. (*Daniels and Lyle, A. J. C.*) ANJUMAN-UN-NISA v. ASHIQ ALI.

(1922) Oudh 178 : 66 I. C. 222.

— O. 11, R. 2—*Interrogatories—Who can be served with—Ex parte defendant—Defendant having same interest as plaintiff.* See (1921) Dig. Col. 241, KRISHNA AIVAR v. MADHAVA PANIKKAR. 30 M. L. T. 26.

— O. 11, R. 12—*Discovery—Suit for damages against public body.*

In a suit against a public body and generally in cases where the establishment of the plaintiff's claim depends on documents in the defendant's possession, the defendant must allow inspection of the relevant documents, to which the plaintiff has no access. (*Walsh and Stuart, JJ.*) THE MUNICIPAL BOARD, AGRA v. ASHARFI LAL

44 A. 202 20 A. L. J. 1 : (1922) All. 1 : 65 I. C. 984.

— O. 11, R. 12—*Documents—Discovery—Production in court—Admission in evidence.*

Where the court directs a document to be produced under O. 11 R. 12 and 14, it does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit on the side of the party relying on it. (*Broadway and Abdul Raoof, JJ.*) JUGALKISHORE v. ATTRA, 4 Lah. L. J. 385.

— O. 11, Rr. 14, 18, 21—*Order of production—Effect of non-compliance—Defence if can be struck off—Powers of court how and when to be exercised*

The non compliance with an order under O. 11 R. 14 for the production of account books does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. The grounds on which the discretion is given to a court for striking off the defence are given in O. 11, R. 21.

An order under O. 11, R. 21 can be passed only after the court has directed discovery under O. 11, R. 12 or inspection of documents under O. 11, R. 18. A strict compliance with the provisions of these latter is necessary in every case before defence is struck off. (*Rafique and Piggott, JJ.*) THE LYALPUR SUGAR MILLS & Co v. THE RAM CHANDRA GUR SAHAI COTTON MILLS & Co.

44 All. 565 : 20 A. L. J. 422 : L. R. 3 A. 317 : 4 U P L R (A) 139 : (1922) All. 235 : 67 I. C. 73.

— O. 11, Rr. 15 and 18—*Inspection of documents—Documents referred to in the plaint—Not material to the case.* See (1921) Dig. Col.

C. P. CODE (1908) O. 11, R. 18.

242. L. AND I. RAPAPORT v. KALLIANJI HIRA CHAND 66 I. C. 8.

—O. 11, R. 18—Order of inspection—When to be passed—Strict compliance with provisions necessary. See C. P. CODE O. 11, R. 14, 18 AND 21. 20 A. L. J. 422.

—O. 11, R. 21—Court's discretion, to strike off defence—Non compliance with orders for discovery or inspection—Powers when to be exercised See C. P. CODE O. 11 R. 14, 18, 21. 20 A. L. J. 422

—O. 11 R. 21 and 14—Documents—Production and inspection of—Non-compliance with order—penalty—Notice to produce—Sufficiency of.

Where books relating to a partnership, the business of which was carried on in different places are ordered to be produced, to penalise the failure for non-production of one out of many books by striking the defence out, is an extreme measure. The penalty provided in O. 11, R. 21 should only be imposed in extreme cases and as a last resort. 58 P. R. 1898; 59 P. R. 1892; 9 C. 923; 38 A. 5; 5 Pat L. J. 550; 14 C. 768 Ref. In an order for the production or for the inspection of books and documents, a general description would be sufficient so long as that description would suffice for the identification of the document or book sought to be produced or inspected, (*Broadway, J.*) RAM NATH v. PRABHU DAYAL. 65 I. C. 661.

—O. 13, R. 2—Documents — Production of in evidence.

Parties should summon the documents on which they rely or file certified copies of these in cases in which such copies are admissible in evidence. A record should be summoned only to clear up some doubt or difficulty with regard to the procedure in the case, to which it refers if this cannot be settled otherwise. (*Hopkins, S. M.*) RAM PRASAD SHUKUL v. KRISHNA PRASAD SHUKUL. L. R. 3 A. 70 (Rev.)

—O. 13 R. 9—Application for return of documents—Nature of

Proceedings for return of documents are purely ministerial. No question can arise therein which would necessitate the taking of evidence on oath (*Newbould and Ghose, JJ.*) GIRIJANANDA KALI MITRA v. EMPEROR. 26 C. W. N. 660

—O. 14, R. 1—Issues—Duty of Court to raise only on pleadings.

In the absence of any averment in the plaint or denial in written statement an issue which does not arise on the pleadings need not be raised (*Scott Smith, J.*) FATEH MAHOMED v. IMAN-UD-DIN. 2 Lah. L. J. 183; 68 I. C. 106.

—O. 14, R. 2 and O. 15, R. 3 (1)—Issues of law—Preliminary issues of law—Trial on—Procedure.

The power to order trial on preliminary issues is contained in O. 14 R. 2, and O. 15 R. 3 (1) C. P. Code. O. 14 R. 2 C. P. Code clearly applies when on settlement of issues the Court thinks there are issues of law upon which the case of some part thereof may be disposed of; then there issues are to be tried first and settlement of

C. P. CODE (1908) O. 17, R. 3.

issues of fact may be postponed. O. 15 R. 3 (1) C. P. Code applies after issues have been framed and allows the court to determine issues of law, it satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit. There is no reason to confine the power of the Court to try certain issues as issues of law to the date of first hearing. 20 C. L. J. 426, 19 C. W. N. 1193 Ref. (*Odgers, J.*) RAMAKRISHNA PILLAI v. KRISHNASWAMI PILLAI. 15 L. W. 667; (1922) M. W. N. 521; (1922) Mad. 321; 68 I. C. 167.

—O. 15 R. 3—Preliminary issues—Trial of—Scope of rule. See C. P. CODE, O. 14 R. 2 AND O. 15 R. 3. 15 L. W. 667.

—O. 16 R. 1—Right of parties to summon witnesses—Discretion of Court—Adjournment of the case.

Under O. 16 R. 1 C. P. Code a Court has no discretion in the matter of an application for Summonses on witnesses if such application be made before the day of hearing. The hearing may not be concluded on the date fixed and an adjournment may take place in the usual course of the progress of the trial and the Court cannot refuse to allow any of the parties to reap the benefit of such an adjournment in the matter of giving evidence. 5 N. L. R. 181, 9 W. R. 530 Ref. There is nothing in the C. P. Code which expressly or impliedly, declares that witnesses must necessarily be summoned before the day fixed for the first hearing of the suit. (*Batten, J. C. and Halifax, A. J. C.*) BHAGCHAND v. MUSAJI. 68 I. C. 272.

—O. 16, R. 2—Application for summons to witness—Not bona fide made to secure evidence—Power of Court.

Where an application for Summons on witnesses is made not for the purpose of securing more evidence but for the purpose of delay, the Court is justified in refusing the application. (*Hopkins, S. M.*) MD YAWAR v. HAR BAKSH SINGH. 4 U. P. L. R. (B.R.), 93.

—O. 16, R. 4—Order for payment of expenses of witnesses—Execution—Sale of land.

An order in a suit that plf. should pay a certain sum as expenses for one of his witnesses, cannot be executed by sale of plf's immovable property. O. 16, R. 4, C. P. Code is not to be treated as a short and summary procedure for realisation of the expenses of a witness in addition to other modes of execution of orders prescribed by the Code. O. 16 R. 41 C. P. Code does not authorise the realisation of the amount by sale of immovable property but the amount must be levied only in the manner therein prescribed. (*Chatterjea and Panton, JJ.*) MD. WARISH SADAGAR v. RAHAMAN ALI MEAH. 26 C. W. N. 877.

—O. 16 R. 19 and 21—Scope of Sec. C. P. CODE O. 26, R. 4. 35 C. L. J. 18.

—O. 17, R. 2—Adjournment of hearing—Plaintiff and pleader absent on adjourned date.

C. P. CODE (1908), O. 17, R. 2.

Court cannot hear case on the merits—Procedure See C. P. CODE O. 9, R. 8 and O. 17, R. 2.

20 A. L. J. 123.

———O. 17, Rr. 2 and 3 — *Adjournment of suit for production of witnesses—Default—Pleader moving for withdrawal and on refusal for adjournment—Declining to proceed as having no instructions and leaving Court—Order of dismissal—Construction.*

Adjournment of a suit was granted to plaintiffs for producing witnesses: but on the adjourned date they were absent and their pleader applied for permission to withdraw the suit with liberty to file a fresh suit which was refused. A further adjournment was then asked for and being refused, the pleader said he had no instructions to do anything further in the case, and left the court. An order was made dismissing the suit and on an application for restoration being made the question arose whether the dismissal was under O. 17, R. 2 or O. 17, R. 3.

*Held Per Walsh J.*—Under whatever form, the Judge may make an order disposing of a case or however he may misunderstand what he is doing or whatever mistaken language he may use in disposing of the case, the court has to look at the actual facts as things were at the time and decide under which rule the order was made.

Where a party does not personally appear even though his counsel originally instructed is there, if he has failed to supply his counsel with materials or funds, and the counsel states he has no further instructions, although the situation may be drawn into the express words of O. 17, R. 3, it ought to be treated as a default by the plaintiff for want of appearance under O. 17, R. 2, for the counsel no longer represents him and in that sense the Counsel is not present, while the plaintiff himself is absent. *Held* on the facts of the case, the dismissal was under O. 17, R. 3.

*Per Piggott, J.*—The plaintiffs not being present and the pleader having said he had no instructions to do anything further in the case left the court, a point had been reached at which it was literally true that the plaintiffs were absent neither appearing in person nor by counsel authorised to act on their behalf. The dismissal was under O. 17, R. 2 and an application for restoration lay. (*Walsh and Piggott, JJ.*) LAL JANGPAL SINGH v. RAJA KUSHALPAL SINGH.

20 A. L. J. 97.

———O. 17, R. 2—Scope of. See C. P. CODE O. 9, R. 6 AND O. 17, R. 2.

1 Pat 188.

———O. 17, Rr. 2 and 3—Scope of — *Adjourned date—Failure of parties to appear—Procedure—Duty of Court to act under O. 17, R. 2 rather than under O. 17, R. 3 C. P. Code.* See C. P. CODE O. 9, R. 8 AND O. 17, Rr. 2 AND 3.

24 Bom. L. R. 775.

———O. 17, Rr. 2 and 3—Scope of — *Default of plaintiff—Effect of—Failure of suit on pleadings—No jurisdiction to take defendant's evidence.*

When there are materials in the record on which the Court can decide the case, the matter

C. P. CODE (1908), O. 17, R. 3.

falls properly under O. 17, R. 3 and not under O. 17, R. 2, C. P. Code.

But where plaintiff has adduced no evidence, and his case fails on the pleadings the Court has no business to proceed to record the defendant's evidence so as to give himself jurisdiction to act under R. 3. 34 Cal. 235 rel.

Where the plaintiff's case was opened, and his witnesses being absent, a day's adjournment was allowed, and on the adjourned date a fresh adjournment was applied for and refused and the Court recorded the depositions of defendant's witnesses and dismissed the suit on the merits.

*Held* that the dismissal under O. 17, R. 3 was without jurisdiction and. O. 17, R. 2 was applicable to the case. (*Dass and Ross, JJ.*) SASHIBHUSANKUMAR v. DWARKA PRASAD MARWARI.

3 Pat. L. T. 64: (1922) P. 2.

———O. 17, R. 3—Default of party—Power of Court to decide on merits. See (1921) DIG. COL 244. LAXMAN UPENDRA SHAMBOG v. MANJUNATH DAMODHAR.

64 I. C 289.

———O. 17, R. 3 and O. 9, R. 13—*Def't absent—Decree—Application to set aside dismissed—Appeals from order and decree—First appeal dismissed and second allowed—Procedure.*

At the hearing of a suit the defendant being absent the trial court proceeded under O. 17, R. 3 on the merits and decreed it. The defendant applied to have the decree set aside but the application was rejected. He then appealed from the order and the decree. The appellate court dismissed the former appeal but declared in the case of the second that the trial court had no power to decide the case on the merits in the absence of the defendant and that the decree was only an *ex parte* decree.

*Held*, the order of the appellate court in the latter appeal was both in the substance and in form open to question. By the pleader saying that he was unable to proceed with the hearing, it cannot be said that the pleader had withdrawn himself; and the decree passed in that suit cannot therefore be regarded as an *ex parte* decree which could be set aside in the manner laid down in O. 9, R. 13. In form the order passed by the lower court was similarly open to objection. It was not open to the Judge, who heard the appeal, to take the view that the decree was an *ex parte* decree after he had dismissed the appeal which had been filed from an order refusing to set it aside, on the ground that the decree was one dealing with the suit on the merits. If he was satisfied that there was sufficient excuse for his absence, he could have passed an order setting aside the decree passed by the court of first instance and remanded the suit. If he was not satisfied that there was sufficient reason for his absence, it was still necessary for him to have examined the suit on the merits and determined whether the decree passed by the court of first instance was proper or not. (*Kanhaiya Lal J.*) SARJU PRASAD v. GUJADHAR LAL (1922) All. 497.

———O. 17, R. 3 Scope of.

O. 17, R. 3 does not contemplate a case of default in appearance but a case in which a

## C. P. CODE (1908), O. 18, R. 15

party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. The court may in such a case proceed with the suit notwithstanding the default, but the decision is not *ex-parte*. (*Dawson Miller, C. J. and Coutts, J.*) MAHANT DAMODAR DAS v. RAJ KUMAR DAS 1 Pat 188 : (1922) P. 485.

—O. 18, Rr. 15 and 16—Non-compliance with—Effect of—Perjury—Trial for—Admissibility of deposition. See PENAL CODE, S. 193.

68 I. C. 36

—O. 18, R. 18—Local inspection—Result of investigation to be recorded—Local investigation.

The law as to local inspection is that, when a court bases its judgment on the result of the local inspection held by it, it ought to enter, the result of such investigation on the record in order to enable the parties to adduce evidence in respect thereof. Where however the Court inspects the locality merely to ascertain the correctness of a map filed by the plaintiff, the omission to put into writing the fact of the local investigation does not prejudice the parties (*Suhrwardy and Cum- ing, JJ.*) HAKI CHARAN CHAKRABURTHY v. JITENDRA NATH GANGULY 65 I. C. 601.

—O. 19, R. 1—Affidavit—When admissible in evidence See (1921) DIG. COL. 244 KRISHNA AYYAR v. MADHAVA PANIKKAR 30 M. L. T. 26 (H. C.)

—O. 20, R. 1—Notice of Judgment—Posting of notice on notice board announcing result of appeal—Compromise before delivery of Judgment. See (1921) DIG. COL. 245 T. RIGOPALA NAGIAH v. SESHAMMA. 65 I. C. 82.

—O. 20, R. 4—Judgment—Contents of—Unsatisfactory—Remand.

Where the judgment of a trial court is meagre, unsatisfactory and unintelligible, the appellate court could remand the case for the recording of a proper judgment after hearing arguments afresh. (*Shadi Lal and Wilberforce, J.*) HARBHAG WAN v. AHMAD. 4 Lah. L. J. 55 : (1922) Lah. 122

—O. 20, R. 4—Judgment—Materials for—Personal inspection by Judge.

Where a Judicial officer decides a dispute solely on knowledge gained by him on personal inspection and without any reference to the evidence in the case, the judgment is liable to be set aside in revision. (*Woodroffe and Ghose, JJ.*) ABDUL HUG v. MAHOMED DIN. 67 I. C. 302

—O. 20, R. 4—Judgment—Small Cause Court—Contents of judgment.

A Judge of Small Cause Court need not state more than the points for decision and the decision thereon *seriatim*. (*Suhrwardy and Cum- ing, JJ.*) BAUL CHANDRA ADDYA v. SHEIKH ABDUL MATLEB. 67 I. C. 851.

—O. 20, R. 4—Small Cause suit—Judgment—Requirements of.

Under O. 20, R. 4 a Judge in a Small Cause suit may reduce his remarks to a minimum and they need not contain more than the points for deter-

## C. P. CODE (1908), O. 20, R. 12.

mination and the decision thereon; but this minimum must be intelligible. (*Bucknill, J.*) SRIMATI SURADIANI DEBI v. HARI CHARAN MAHTON. 3 Pat. L. T. 122 (1922) P. 337 : 64 I. C. 226.

—O. 20, R. 4—Judgment of Small Cause Court—Contents of.

O. 20 R. 4 C. P. Code is self-contained and a judgment of a Small Cause Court need not contain more than the points for decision and the decision thereon. 12 L. W. 285 dissented from. (*Spencer and Krishnan, JJ.*) KOPPA KURUP v. VELAYI CHETTICHAR 42 M. L. J. 583 : 15 L. W. 642 : 31 M. L. T. 124 (H. C.) (1922) Mad. 360.

—O. 20, R. 7—Date of decree—Decree drawn up after judgment.

The date of a decree is the date on which judgment is pronounced. This is so even if the decree is drawn up subsequently and the decree must be deemed to have come into existence on the date when the judgment was pronounced. (*Kotral, J. C.*) NARAIN v. RAMDULARE. (1922) Nag. 113 : 66 I. C. 7.

—O. 20, R. 11—Scope of—Refers to order passed by the Court which passed the decree and not executing Court. See C. P. CODE, S. 48 (b) AND O. 20 R. 11. 2 Pat. L. T. 80.

—O. 20, R. 12—Decree for possession—Mesne profits—Duty of appellate Court when mesne profits not ascertained—Procedure.

In cases falling within O. 20, R. 12 of the C. P. Code the proper course for the appellate Court to take is not to remand the suit where it finds that a person is entitled to possession but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to the mesne profits in cases where the lower Court has not dealt with the question. Where an appellate court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject matter of the preliminary decree is not warranted. (*Kumaraswami Sastri and Devadoss, JJ.*) SUBBE GOUNDAN v. KRISHNAMACHARI. 45 Mad. 449 : 42 M. L. J. 372 : 30 M. L. T. (H. C.) 217 : 15 L. W. 537 : (1922) M. W. N. 269 : (1922) Mad. 112 : 68 I. C. 869.

—O. 20, R. 12—Mesne profits—Application for ascertainment of—Forum. See (1921) DIG. COL. 245, SURAJ PRASAD PANDEY v. SOMRA MAHTO. 68 I. C. 903.

—O. 20, R. 12—Mesne profits—Calculation of—Confirmation of decree on appeal. See (1921) DIG. COL. 245. RAJA SASI KANTA ACHARJYA BAHADUR v. SANDHYA MONI DASIA. 26 C. W. N. 483 : 65 I. C. 4.

—O. 20, R. 12—Suit for possession by heir—Enquiry into mesne profits.

Where a person claiming as heir to an estate obtains a decree for possession against an alienee from the widow of the last male owner, the preliminary decree should direct an enquiry into mesne profits from the date of suit till delivery of possession. (*Wilberforce and Martineau,*

C. P. CODE (1908), O. 20, R. 18.

JJ.) MUSSAMMAT NISIB UN-NISA v. MT. AHMADI UN-NISA. 2 Lah 383 : 66 I C 494

—O. 20, R. 18—*Suit for partition—Preliminary and final decrees—Determination of mesne profits—Difference between old Code and new—Interlocutory order—Order ascertaining shares and their rights—Appeal*

Under the C. P. Code of 1882 there was but one decree in a suit for partition, the decree passed after the report of the commissioners making the actual division. The order certaining the several parties interested in the property to be divided and their several rights therein, though treated as a decree in practice and styled as such, was not a preliminary decree but was only an interlocutory order. On an interlocutory application made by plaintiff in a suit for partition under the Code of 1882, for appointment of a commissioner and for the taking of other necessary steps in the suit in pursuance of the order ascertaining the several parties interested in the suit property and their several rights therein, the court passed an order negating the plaintiff's right to profits in his share of the properties on the ground that the preliminary decree did not award to him such profits though he had prayed for them in the plaint. Held that the order was not appealable, being an interlocutory order and that the plaintiff was not therefore precluded in his appeal from the final and only decree in the suit from contesting its validity. (*Oldfield and Venkatasubba Rao, JJ*) T. RAMASWAMI AIYAR v. T. SUBRAMANIA AIYAR 43 M. L. J. 406 : 16 L. W. 297

—O. 21—*Applicability of—Sale under administrative order.*

The provisions of O. 21, C. P. Code do not apply to a sale of property under administrative orders. (*Marineau J.*) FIRM OF KAHNA MAL BANARSI DASS v. BISHAN DAS.

40 P. L. R. 1922

—O. 21, R. 1.—*Decree—Payment of money into court—Order for payment—No notice to decree holder.*

Where money paid into Court by a Judgment-debtor is ordered to be paid out to persons other than the decree-holder and the latter applies for payment of the money to him on the ground that he had no notice of the application for payment on which the court passed the order, it is not competent to the court to direct the decree-holder to file a suit for the amount and the persons who drew the money out of court to furnish security. It should have treated the application of the decree holder as one to set aside the *ex parte* order authorising payment to be set aside. (*Walsh and Stuart, JJ.*) BITHAL DAS v. JIWAN RAM

20 A. L. J. 353 : L. R. 3 A. 331 : 4 U. P. L. R. (A) 89 : (1922) All. 190 : 66 I C. 744.

—O. 21, R. 1—*Deposit of decree amount—No notice to decree holder—Execution sale—Validity of.*

Where the judgment debtor deposits the decree amount in Court with the permission of the Court it is the duty of the Court to give the

C. P. CODE (1908), O. 21, R. 2.

notice required by O. 21, R. 1 cl (2) to the decree holder. If the Judge orders notice it is then necessary for the judgment debtor to pay the necessary process fee. But even if he did not pay the Court was bound to inform the decree holder of the payment when he applies for execution of the decree. (*Hullifax, A C J.*) NARAYAN v. GANPATRAO. 67 I C. 242.

—O. 21, R. 2—*Application for certifying payments out of court—Nature of—Order dismissing—Appealability* See C. P. CODE, S. 47. (1922) Pat. 200.

—O. 21, R. 2—*Certification—Execution of decree—Payment out of court*

A statement in an execution application that payments towards satisfaction of the decree were made out of Court, does not amount to an application for certification. 45 C. 630; 23 C. W. N. 320, foll. (*Walmsley, J.*) DWARIKA NATH PAUL v. BIRIN RISHI.

(1922) Cal 200 : 64 I. C. 32

—O. 21, R. 2—*Certification of part payment—Payment out of Court—Limitation—Lim Act, S. 20.*

Part payments towards a money decree may be certified by the decree-holder in an application for execution.

The part payments and the certification must however be made before the application for execution is barred by limitation. Although the decree-holder may either apply to certify payments before the execution or may do so in his application for execution the provisions of section 20 of the Limitation Act are in no way affected. (*N. R. Chatterjee and Suhrawardy, J.*) MADAN. MOHAN BANIKYA v. HARU LAL KUNDU.

26 C. W. N. 534 : 35 C. L. J. 566 : 64 I. C. 72.

—O. 21, R. 2—*Decree satisfied by one of the Judgment debtors—Payment by another Judgment debtor into court—Money drawn out by decree-holder—Liability to refund.*

Where one of the judgment debtors paid the decretal amount to the plaintiff decree-holder and had the payment certified under the provisions of O. 21, R. 2 C. P. C. and subsequently another judgment-debtor not knowing that the decree holder's claim had been satisfied, paid the money into Court and it was taken out by the decree-holder and having subsequently discovered that the decree had previously been satisfied by one of his co-debtors, made an application to the executing Court for a refund of the money. The lower courts decided that as the matter had been disposed of the executing court had no jurisdiction. Held that the executing Court had jurisdiction to entertain the application notwithstanding the fact that the decree had in fact been executed before. 24 All. 291 foll. (*Dawson Miller, C. J.* and *Jwala Prasad, J.*) GOPAL RAI v. RAMBHANJAN RAI. 1 Pat 336 : (1922) P. 166 :

3 Pat. L. T. 754 : (1922) Pat. 53 : 4 U. P. L. R. (Pat.) 17 : 65 I. C. 307.

—O. 21, R. 2—*Execution—Agreement to satisfy claim entered into prior to decree—Agreement not pleaded in suit—Not a bar to execution.*

C. P. CODE (1908), O. 21, R. 2.

See (1921) DIG. COL. 247. KOONAMNENI MALLAYA v. KANNegANTI CHINNA KOTAYA. 64 I. C. 148

—O. 21, R. 2—Execution of decree—Power of Court—Satisfaction—Admission by decree-holder.

Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution, having disappeared the Court's powers in execution also cease and the confirmation of the sale, which is a proceeding in execution, should not be ordered 35 Bom. 516, 10 All. 332 (ref. *Kotval, A. J. C.*) NILKANTH v. YESHWANT. 18 N. L. R. 134; 65 I. C. 331.

—O. 21, R. 2—Execution—Payment to decree holder out of Court—Payment not certified by Court—Effect of such payment. See (1921) DIG. COL. 248. ELLIS ENAS PAVLOO GHARRY v. KITTER PHILIP GOWRYA. 46 Bom. 226; (1922) Bom. 380; 64 I. C. 490.

—O. 21 R. 2 and O. 34, R. 2 and 3—Mortgage decree—Private adjustment notified by judgment-debtor—Recognition by court.

O. 21, R. 2 C. P. C. applies even to a final decree in a mortgage and such a decree, like any other, is capable of adjustment. Where the judgment debtor has given information to the court that the decree has been adjusted the court is bound under O. 21, R. 2 (2) to issue a notice to the decree holder to show cause why the adjustment should not be regarded as certified. (*Hallifax, A. J. C.*) LACHMAN SINGH v. MARDAN SINGH 68 I. C. 443 (1).

—O. 21, R. 2—Question relating to execution—Uncertified adjustment—Power to recognise—Fraud.

The provisions of O. 21 R. 2 (3) are not to be rendered nugatory by the application of the general provisions of S. 47 C. P. Code. O. 21, R. 2 C. P. Code was enacted to prevent the courts being flooded with false defences to applications for execution setting up a payment or adjustment in part or in whole, which would be made merely to gain time. The decree holder is bound to certify an adjustment, and the judgment debtor is also given a right to apply to the court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment debtor, and he does not deserve the consideration of the Court if he fails to make the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court. There is no reason why this should not apply also in the case of an alleged fraud. (*Robinson, C. J. and Macgregor, J.*) P. R. P. L. CHETNEY FIRM v. G. LON. POUL. 1 Bur. L. J. 226.

—O. 21, R. 2—Satisfaction of decree failure of decreeholder to certify—Remedy of judgment debtor—Damages.

Where a decree-holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the court and executes the decree and realises the money due under it, the judgment-debtor may sue for recovery of the money paid

C. P. CODE (1908), O. 21, R. 2

out of Court as on a failure of consideration or for damages for breach of an express or implied promise to certify payment. (*Maung Kin, J.*) MAUNG MYO v. MAUNG KHA. 1 Bur. L. J. 207.

—O. 21, R. 2—Satisfaction of decree—Record of satisfaction—Application by decree holder—No prescribed form—Application for execution—Recital of part payment—Sufficiency of—Application by decree holder governed by art. 181 and not by art. 134. See LIMITATION ACT, ARTS. 74 AND 181. 26 C. W. N. 529.

—O. 21, R. 2—Scope of—Non-certification due to fraud—Operation of S. 47 not affected. See C. P. CODE S. 47 AND O. 21, R. 2. 1 Bur. L. J. 43.

—O. 21, R. 2—Uncertified adjustment—Executory oral contract—Executing court if can recognise.

An adjustment of a decree on the basis of an oral agreement set up by the judgment debtor but denied by the decree holder and not yet performed by either party could not be set up so as to bar execution of the decree. The remedy of the judgment-debtor was by a suit for specific performance of the alleged oral agreement. An inchoate contract cannot be pleaded in bar of execution under O. 21, R. 2 and the judgment debtor cannot insist on the contract being completed and then pleaded in bar of execution. (*Piggott and Walsh, JJ.*) LACHMI DAS v. BABA KALI KAMLI WALA RAMNATH.

44 A. 258; 20 A. L. J. 65; L. R. 3 A. 61; 64 I. C. 990; (1922) All. 13.

—O. 21, R. 2—Uncertified payments—Execution against surety of judgment debtor.

A surety for the judgment debtor is bound so long as the judgment-debtor is bound. The judgment debtor is bound so long as any payments which he may have made are not certified to the court and consequently the surety cannot set up such payments in bar of execution against him. (*Woodroffe and Ghose, JJ.*) ONKARMAL AGARWALA v. NRITYA GOPAL CHAKI.

67 I. C. 885 (2).

—O. 21, R. 2 (1)—Scope of—Payment to decree holder—Application to certify—Form of

O. 21, R. 2 (1), C. P. Code, deals with a case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The application need not be distinct from an application for execution of decree. (*Mookherjee and Panton, JJ.*) BAILEY MAHAMMAD SAHI v. AITANMAL.

35 C. L. J. 71; 26 C. W. N. 529; (1922) Cal. 30; 68 I. C. 780.

—O. 21 R. 2 Cls. (2) and (3)—Application for certifying payment—Where to be made—Procedure.

An application under O. 21, R. 2 cl. (2) for certifying payment may be made either to the court which passed the decree or the court which was executing the decree; such an application if within time, cannot be thrown out on the ground that it was not certified under O. 21, R. 2 cl. (3). The application being made for the purpose of having the payment certified, until that question is decided the stage of cl. (3) does not arise.

C. P. CODE (1908) O. 21, R. 2.

(*Jwala Prasad and Bucknill, JJ.*) J. DUNANDAN SINGH v. SHEONANDAN PRASAD  
(1922) Pat. 200. 3 Pat. L. T. 487, (1922) P. 276 :  
68 I. C. 645

—O. 21, R. 2 (3)—*Satisfaction of decree—Not certified to court passing decree—Attaching court if bound to recognise.*

Where satisfaction of a decree is not certified to or recorded by the court passing the decree, it is not open to another court attaching the decree at the instance of a third person to recognise the satisfaction and refuse to proceed with the execution 36 M. 357; 42 M. 338. 10 L. W. 179, 5 L. W. 644. Rel. (*Ramesam, J.*) ARUNACHALAM CHETTIAR v. PANGHALI PADAYACHI.

(1922) M. W. N. 189. 65 I. C. 830 :  
16 L. W. 290. (1922) Mad. 68.

—O. 21, R. 11—*Execution application—Omission to specify amount of decree and costs—Not a step-in-aid.* See LIMITATION ACT, ART. 182 CL. (5). 65 I. C. 120.

—O. 21, R. 11 (f)—*Omission to mention date of prior application—Effect.* See LIM. ACT, ART. 182 (5). (1922) Sind. 29.

—O. 21, R. 14 (b)—*Pre-emption—Satisfaction of decree—Limitation*

If the decree holder in a pre-emption suit fails to deposit the decretal amount on the last day fixed, it being Sunday, he does not comply with the decree as the payment on the next Monday is beyond time. Then automatically under O. 21, R. 14 (c) his suit for pre-emption stands dismissed. All 47 followed. (*Ryves, J.*) FATEH MAHOMED CHAUDHURI v. M. SITA CHAUDHRAIN. (1922) All. 278

—O. 21, R. 15—*Partition decree—Joint decree—Share awarded to defendant.* See LIM. ACT, ART. 182. 16 L. W. 292.

—O. 21, R. 16—*Assignment—Bona fides—Determination of—Application for execution*

If the assignee of a decree does not make an application for the execution of the decree it is not the duty of the Court *suo motu* to determine the question of assignment and make the assignee a party to the decree. Where, however, no formal application for execution had been made by the assignee in the lower Court but the assignee decree holder wanted to execute the decree, the absence of a formal application under O. 21, R. 16 is a mere irregularity and does not prevent the Court from deciding the validity of the assignment. (*Shadi Lal, C. J.*) HARDITTA v. NIGAHIA MAL. 4 Lah. L. J. 259 : (1922) Lah. 336

—O. 21, R. 16—*Right to execute decree—Transferee of property but not of decree.*

No one can execute a decree except the decree holder or a person to whom the decree has been transferred by assignment in writing or operation of law. A transferee of the property forming the subject of a suit who has not obtained a transfer of the decree cannot execute it. 17 I. C. 512 foll. (*Stuart, J.*) SHIB CHARAN DAS v. RAM CHANDER. (1922) All. 98 : 68 I. C. 873

C. P. CODE (1908) O. 21, R. 22.

—O. 21, R. 16—*Transfer of property which is the subject of decree—Rights of transferee—Execution of decree.*

Where property forming the subject of a decree is transferred the transferee cannot execute the decree unless his name has been substituted in the suit in the place of his vendor. O. 21, R. 16 C. P. Code to the case nor does S. 146 C. P. Code enable the transferee to apply for execution 17 M. L. J. 391; 17 I. C. 512; 30 I. C. 831 (*Adam and Bucknill, JJ.*) THAKURI GOPE v. MALIK MOKHTAR AHMAD

(1922) Pat. 256 : 3 Pat. L. T. 625 :  
(1922) P. 562.

—O. 21, R. 16—*Transfer by assignment or operation of law—Meaning of*

The words "transfer by assignment in writing or by operation of law" in O. 21, R. 16 mean a transfer of all the transferor's interests in the decree. Unless the whole interest is exhausted there is not a transfer within the meaning of the rule (*Ryves and Stuart, JJ.*) MAZHAR HUSAIN v. MT. AMTUL BIBI. L. R. 3 A. 297 : (1922) All. 101 : 66 I. C. 679.

—O. 21, R. 16 Proviso—*Decree for money against assets if included—Assignment benami for one of the judgment debtors.*

Where a decree for payment of money against several persons personally and out of the assets in the hands of another judgment-debtor is assigned to a stranger benami for one of the judgment-debtors, the decree is incapable of execution against the other judgment-debtors, 31 B. 308 not foll. O. 21, R. 2 C. P. Code is no bar to the recognition of the adjustment of the decree in a case like the present 40 M. 296; 4 C. W. 534 foll. (*Spencer and Venkatasubba Rao, JJ.*) SADAGOPA AYYENGAR v. SELLAMMAL. 43 M. L. J. 761 : 16 L. W. 758.

—O. 21, R. 17—*Scope of—Power of court to allow amendment.*

Under O. 21, R. 17 C. P. Code, whenever an execution application is put in court which does not conform to the provisions of rules 11 to 14 of order 21, the court has the power either to reject the application or to allow the defect to be remedied. It does not impose upon the court the duty to calculate interest due under the decree. (*Das and Adam, JJ.*) CHOWDHURI CHINTAMONI MAHAPATRA v. SRIMATI MONMOHINI DEBI. 1 Pat. 149 : (1922) P. 409.

—O. 21, R. 18—*Pre-emption decree—Pliff awarded costs—Deduction of costs from deposit—Validity of deposit.* See PRE-EMPTION, DECREE. 2 Lah. 294.

—O. 21, R. 22—*Application for issue of notice—If a step in aid.* See LIM. ACT, ART. 182 (5). 35 C. L. J. 82.

—O. 21, R. 22—*Notice under—Execution proceeding without such notice, if a nullity—Execution sale if void.* See (1921) DIG. COL. 255. GURUDAS BISWAS v. SRIMATI THAKAMANI DAS. 64 I. C. 476.



C. P. CODE (1908) O. 21, R. 22.

—O. 21, R. 22—*Notice under—Minor—Service on adult members living in the same house*

The notice required by O. 21, R. 22 is necessary to give jurisdiction to sell in execution. The rule is sufficiently complied with if notice is given to the adult co-tenants in a case where they and the minor co-tenants live in the same house and the minors have no guardian-ad-litem on record. (*Sanderson, C. J. and Richardson, J.*) *FANI BHUSAN BHIBAN v. SURENDRA NATH DAS.*

35 C. L. J. 9 : 64 I. C. 25.

—O. 21, R. 22—*Omission to issue notice—Failure to record reasons for—Illegality or irregularity.*

The provisions of O. 21, R. 23 Sub-S. (2) requiring the Court to record its reasons is only discretionary and the failure to issue a notice is necessarily fatal to the validity of the subsequent proceedings. In an appeal against an order refusing to set aside an execution sale on the ground of want of notice under O. 21, R. 22 it would ordinarily be open to the appellant to ask the appellate Court to consider the executing Court's use of its discretion on its merits (*Oldfield and Ramesam, JJ.*) *KASIVISVANATHAN CHETTY v. SOMASUNDARAM CHETTY.*

42 M. L. J. 422 : (1922) M. W. N. 173 : (1922) Mad. 93.

—O. 21, R. 34—*Decree for specific performance—Right of defendant to execute decree (See C. P. Code S. 213).*

24 Bom. L. R. 496

—O. 21 Rr. 35 and 36—*Applicability—Decreeholder—Enjoyment of property delivered in execution—Disturbance by person without any right—Suit for damages.*

Where a decreeholder, who has obtained delivery in execution of a decree for possession of immoveable property, is disturbed in his peaceful enjoyment thereof by a person who, according to the decreeholder himself, has no right legitimately derived from any competent person to do so, his remedy is either in criminal prosecution or in a suit for damages. The person disturbing cannot be regarded as tenant against whom there can be an order for delivery under O. 21, R. 35 C. P. Code. (*Oldfield and Venkatasubba Rao, JJ.*) *IBRAHIM SAHIB v. KONAMMAL.*

43 M. L. J. 179 : 31 M. L. T. 356 (H. G.)

—O. 21, R. 35—*Cosharers in Joint possession—One Cosharer ousted by another—Suit for possession and profits—Damages, See (1921) DIG. COL. 256.* *SARABJIT SINGH v. RAJ KUMAR RAJ.*

44 A. 5 : (1922) All. 162.

—O. 21, Rr. 35 and 36—*Symbolical possession—Delivery of, in a case where actual possession ought to be delivered—Effect on parties.*

Though symbolical possession is delivered where actual possession should have been given, still so far as the judgment debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession 24 C. 715 : 17 M. L. J. 598 Rel. (*Adam, J.*) *MAHARAJA PRATAP UDAI NATH SAHI DEO v. BHAIANI SUNDERBAS KOER.*

3 P. L. T. 623.

C. P. CODE (1908) O. 21, R. 50.

—O. 21, R. 35 (2)—*Co-sharers in joint possession—Ouster of one cosharer by another—Suit for recovery of joint possession—Decree See (1921) DIG. COL. 256.* *BISHESHAR SINGH v. HANUMAN SINGH.*

44 A. 1 : (1922) All. 314.

—O. 21, Rr. 35 (2) and 36—*Delivery of possession of immoveable property—Necessity of compliance with procedure*

Where the persons concerned have been made aware of the delivery of possession in the course of execution proceedings and the publicity, which is the object of the provisions of the law, has been clearly achieved, it must be held that there has been substantial compliance with it.

*Khub Ram v. Surat*, 20 P. R. 917 distinguished. (*Leslie Jones and Dundas, JJ.*) *JUHR. LAL v. PEMAN.*

2 Lah. L. J. 563 : 68 I. C. 182.

—O. 21, R. 36—*Symbolical possession—Grant of, in a case not contemplated by the Code—Effect of, as against persons not bound by the decree*

The delivery of symbolical possession is effective only in cases where the Code recognises Symbolical possession. Nor does the delivery of such possession affect persons impleaded as parties to the suit against whom however there is no decree for possession. 36 B 273 foll: 20 Bom. L. R. 502 P. C. dist. (*Pratt and Kanga, JJ.*) *RAGHUNATH WAMAN v. KONDIBA BABAJI.*

24 Bom. L. R. 499 : (1922) Bom. 2 : 68 I. C. 91.

—O. 21, R. 40—*Arrest of judgment debtor—Imprisonment—Propriety of.*

Where all the moveable and immoveable properties of the judgment debtor had been sold in execution of decrees obtained by other persons and is not able to pay off the whole or any portion of the decree debt, it would be improper to order his imprisonment (*Martineau, J.*) *LALA DAS v. MINAMAL.*

4 Lah. L. J. 266 : (1922) Lah. 259

—O. 21, Rr. 45 and 46—*Attachment—Moveables—Agricultural produce in the hands of third parties—Procedure.*

O. 21, R. 46 C. P. Code and not R. 44 or R. 45 applies to the attachment of agricultural produce in the hands of a third party. (*Kincaid and Raymond, A. J. C.*) *BIKCHAND v. SAJANDAS.*

15 S. L. R. 128 : 64 I. C. 1007.

—O. 21, Rr. 46, 76, 79 and 80—*Company—Shares—Execution sale—Rights of purchaser—Discretion of directors to refuse to recognise transfer—See COMPANY, SHARES.*

42 M. L. J. 449.

—O. 21, R. 50—*Decree against firm—Execution against partners—Liability of deceased partner or his estate—Death of partner before suit.*

O. 21, R. 50 sub rule (4) is really intended to make clear the implication of sub-rule (1). It does not in any sense affect the provisions of sub rule (2) of that rule. The meaning of sub rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property

C. P. CODE (1908), O. 21, R. 52.

is concerned O. 21 R. 54 (2) is wide enough to cover the case of a deceased partner. (*Shah, A. C. J. and Crump, J.*) JIVRAJ LALOUBHAI PATEL v. BHAGVANDAS GORDHANDAS.

24 Bom. L. R. 1037 : 68 I. C. 627.

—O. 21, R. 52—Fund in court—Attachment—Rateable distribution—Priority—Duties of attaching court and custody court—Assets held by a court. See (1921) DIG. COL. 258. RAM KANAI PAL v. PURNA CHANDRA. 65 I. C. 650

—O. 21, R. 53—Attachment of decree—Payment into court of money due under attached decree—Cessation of interest.

Where in execution of a decree another decree is attached and the moneys payable under the attached decree are paid into court, interest on the amount of the attached decree as well as on the decree amount due to the attaching decree holder stops to run from the date of the payment into court. This fits in with the view that the holder of the decree sought to be executed by attachment of the other decree is in law the representative of the holder of the attached decree. (*Mookerjee, and Pantou, JJ.*) MADAN MOHAN DEY v. BISHUNPADA DEY.

35 C. L. J. 109 : 64 I. C. 780.

—O. 21, Rr. 53 and 90—Decree for possession of immovable property—Attachment and sale of—Setting aside sale.

Where a decree for possession of immovable property is sold in execution of another decree an application does not lie for setting aside a sale under O. 21, R. 90, C. P. C. (*N. R. Chatterjee and Suhrawardy, JJ.*) BIRENDRA NATH MITRA v. UMA CHARAN BANERJEE.

64 I. C. 388

—O. 21, R. 56—Sale proclamation—Fixing of valuation—Effect of.

A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. (*Coults and Ross, JJ.*) SUKRAJ BAHADUR v. DEBI BUKSH. 3 Pat. L. T. 342 : 65 I. C. 360.

—O. 21, R. 57—Applicability of Order of Court determining attachment.

Where there is an explicit order putting an end to the attachment the provision of O. 21, R. 57 C. P. C. have no application nor is there anything in the rule which limits the power of the Court to pass such an order. (*Daniels, J. C. and Dalal, A. J. C.*) SHEIKH MAHOMED MUZAFFAR ALI KHAN v. BHAGWAT PRASAD SINGH. 66 I. C. 642.

—O. 21, R. 57—Attachment - Execution. Struck off—Effect on attachment.

It is not an easy matter to decide whether property remains under attachment when the darkhast is struck off. Strictly speaking if the darkhast is struck off the attachment would go with it it seems contrary to the ordinary meaning of words that when a darkhast, which is issued to attach property, is dismissed, still the attachment continues. Having regard to the conduct of the judgment-creditor it was held in this case that there was no subsisting attachment at the time of the transfer

C. P. CODE (1908), O. 21, R. 57.

(*Macleod C. J. and Coyajee, J.*) GANPATI BHATTA v. DEVAPPA. 24 Bom. L. R. 442.

—O. 21, Rr. 57, 58, 63—Attachment—Objections to—Order—Striking off proceedings—Later order on objection petition—Validity of—Right of suit—"Default" meaning of.

Properties being attached in execution, objections were put in under O. 21, R. 58. Pending their disposal, as the decree holders were able to realise part of the decree amount, the proceedings were struck off—subsequently, on the representation of the objectors that the decree had been adjusted between the parties, the objection petition was allowed *ex parte*. On a question arising as to the effect of this order,

Held, the effect of the order striking off proceedings was to raise the attachment and with that order the court became *functus officio* and had no power to pass any further orders therein—The later order allowing the objection was therefore quite unnecessary and redundant and being a nullity in the eye of the law, there was no necessity for the decree holders to bring a suit within one year under O. 21, R. 63.

The word "default" in O. 21, R. 57 means a failure to do what the decree holder was bound to do, that is to go on with his application and have the property sold. (*Scott-Smith and Abdul Qadir, JJ.*) FATEH DIN v. QUTAB DIN. 3 Lah. 7. (1922) Lah. 108 : 67 I. C. 543.

—O. 21, Rr. 57 and 58—Collector executing decree—Power to dismiss application—Power to investigate claim.

A Collector is invested with all the powers which the Court might exercise in the execution of the decree. These include the power to dismiss under O. 21, R. 57, C. P. C. but do not include the powers to investigate claims made or objections preferred under O. 21, R. 58, because such an investigation would not be "in the execution of the decree." (*Hallifax, A. J. C.*) HARLAL v. NARAYAN. 18 N. L. R. 152 : 64 I. C. 420.

—O. 21, R. 57—Dismissal of execution application—Restoration—Revival of attachment.

Where an execution application dismissed for default is restored the attachment which came to an end on the dismissal of the execution application is revived and an execution sale without a fresh attachment is valid. (*Hallifax, A. J. C.*) HARLAL v. NARAYAN. 18 N. L. R. 152 : 64 I. C. 420.

—O. 21, R. 57—Dismissal of execution—Order maintaining attachment—Effect of.

Though an order dismissing an execution case but maintaining the attachment is not a proper order for the Court to pass, once it is passed it is binding on the parties between whom it is passed. 38 Cal. 482 dis. 41 A. 157 dis. (*Piggot, and Walsh, JJ.*) MAHOMED MUBARAK HUSAIN v. SAHU BIMAL PRASAD. 44 A. 274 :

20 A. L. J. 113 : 65 I. C. 91 :

L. R. 3 A. 52 : (1922) All. 62.

—O. 21, R. 57—Execution transferred to collector—Dismissal of application—Attachment effect on.

C. P. CODE (1903), O. 21, R. 58.

Where the execution proceedings have been transferred to a collector, he has power to dismiss the application under O. 21, R. 57, C. P. Code and there upon the attachment ceases. (*Halliday, A. J. C.*) *SHANKER RAO v. MANIK RAO*.

68 I. C. 643

—O. 21, R. 58—Applicability of—Claim procedure—Not applicable to Agency tracts. See AGENCY RULES R. 20

42 M. L. J. 487.

—O. 21, R. 58—Attachment—Claim by legal representative of deceased judgment debtor—Order on, appealable—Matter falling within S. 47, C. P. Code. See C. P. CODE S. 47 AND O. 21, R. 58.

3 Pat. L. T. 613

—O. 21, Rr 58 and 63—Claim by mortgagee—Adverse order declining to adjudicate—Suit for enforcing mortgage—Limitation—Conversion of mortgaged property into money—Effect of

Property mortgaged to plaintiff was attached and brought to sale in execution by the defendant. On the day fixed for the sale, the plaintiff preferred a claim petition that the sale proceeds should be kept in court deposit to satisfy his mortgage and not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant the latter pleaded that the suit was barred by arts. 11 and 62 of the Lim. Act. Held, by the Chief Justice (agreeing with Spencer, J.) (1) that there was no order negating the claim of the plaintiff and his suit was not therefore barred by art. 11 of the Limitation Act and (2) that the suit was one to enforce a mortgage and was governed by art 132 and not by art 62 of the Lim. Act, though the mortgaged property had been converted into money as a result of the court sale 41 M. 985 (F. B.) dist 41 C. 654 (P. C.) Rel. (*Sir Walter Schwabe C.J.*) on a difference of opinion between (*Spencer and Krishnan, JJ.*) *ABDUL KADIR SAHAB v. SOMASUNDARAM CHETTIAR*.

43 M. L. J. 467 : 16 L. W. 435.

—O. 21 R. 58—Investigation of claims to attached property—Powers of Court. See (1921) DIG. COL. 259 *HO SYEW WAING v. P. R. P. L. CHETTY*.

(1922) L. B. 16 : 61 I. C. 66

—O. 21 R. 58—Objection to attachment—Order if can be passed after attachment is raised—Effect of order. See C. P. CODE, O. 21, RR. 57, 58 AND 63.

3 Lah. 7.

—O. 21, R. 58—Objection petition of judgment-debtor to attachment—Order on—If appealable. See C. P. CODE S. 47 AND O. 21, R. 58.

3 Pat. L. T. 432.

—O. 21 Rr. 58, 63 and 100—Usufuctuary mortgagee—Right to object to attachment—Dispossession by auction purchaser—Application under O. 21, R. 100—Maintainability.

A usufuctuary mortgagee in possession cannot object to an attachment under O. 21, R. 58.

Where such a mortgagee is dispossessed by the purchaser at an execution sale, he is entitled to apply to court under O. 21, R. 100, and his

C. P. CODE (1908), O. 21, R. 66

application is not barred by O. 21, R. 63 (*Das and Adam, JJ.*) *BISWANATH PATRA v. LINGARAJ PATRA*.

1 Pat. 159 : (1922) P. 408.

—O. 21, R. 63—Claim—Dismissal for default—Effect of order. See (1921) DIG. COL., 261 *SATINDRA NATH BANERJI v. SIVA PRASAD BHARAT*.

(1922) Cal. 166. 64 I. C. 713.

—G. 21, R. 63—Claim suit—Decree-holder if a necessary party.

Where a claim has been rejected and the properties have been sold and purchased by a stranger purchaser, the decree holder is not a necessary party to a suit by the claimant 7 C. 608 Rel. (*Spencer and Ramesam, JJ.*) *SUBBARAYA MUDALIAR v. KANDASWAMY MUDALI*.

16 L. W. 330 : (1922) M. W. N. 674.

—O. 21, R. 63—Execution of decree—Attachment—Objection—Raising of attachment—Suit by decree-holder—Plea of adverse possession—Extinguishment of title—Lim. Act, S. 28. See (1921) DIG. COL. 261 *KEDAR NATH v. SUKNATH SINGH*.

64 I. C. 209.

—O. 21 R. 63—No suit brought—Whether defence open.

Adverse decision of a claim raised under O. 21 R. 58, prevents the unsuccessful party from asserting the rights thus claimed in any capacity whether as plaintiff or as defendant except in a suit under, 21 R. 63. (*Henderson and Panton, JJ.*) *HARIPADA (BERMAN) v. SURENDRA NATH SAMANTHA*,

(1922) Cal. 164

—O. 21, R. 63—Order under O. 21, R. 58 a nullity—Suit if to be filed under. See C. P. CODE O. 21, RR. 57, 58 AND 33.

3 Lah. 7.

—O. 21, R. 63—Suit by unsuccessful claimant—Onus of proving title to property—Fraudulent transfer evidence. See (1921) DIG. COL. 262. *MUSSAMAT ALI BAI v. KHAN SINGH*

67 I. C. 876.

—O. 21, R. 66—Execution Sale—Notification of incumbrances—Rights of purchaser—Estoppel.

Under O. 21, R. 66, C. P. Code, if a mortgage deed is merely notified, that notification is in no way conclusive as between the decreeholder or the purchaser on the one hand and the holder of the incumbrance on the other as to its validity, and where a sale is not effected subject to a mortgage but the mortgage is simply notified at the time of the sale, the auction purchaser is not estopped from questioning the validity of the mortgage. 29 C. 154, 20 A. 421 dist. (*Stuart and Sulaiman, JJ.*) *ROSHAN LAL v. LALLU*.

20 A. L. J. 722. L. R. 3 A. 500. (1922) All. 443 : 63 I. C. 790

—O. 21, R. 66—Execution sale—Notification of mortgage—Omission—Estoppel.

Where a decree holder brings properties of the judgment debtor to sale in execution of his decree without disclosing the existence of a prior mortgage in his own favour, he is estopped from setting up the mortgage thereafter as against the auction purchaser. The fact that the mortgagee is a minor makes no difference. 10

C. P. CODE (1908), O. 21, R. 66

C. 609; 22 B 686 Ref (*Brown, A. J. C.*)  
MAUNG KYIN PEIN v MA PWA ME.

4 U B R. (1921) 62 (1922) U B 1:  
64 I. C. 953

—O. 21, R. 66—*Fresh application for execution—Omission of notice—Irregularity*

Where on an application for execution notice had been issued under O. 21, R. 66 of the C. P. Code and the particulars to be entered in the proclamation of sale were settled, the omission to issue the notice under O. 21, R. 66 again on a succeeding application for execution does not constitute an irregularity. 12 A. 510, 18 C. 496, 21 Cal 66, 53 I. C. 809 ref. (*Kanhaiya Lal, J.*) BASANT LAL v. SAJJAD HUSAIN  
24 O. C. 391. 65 I. C. 988

—O. 21, R. 66—Mortgage—Notification in sale proclamation—Effect of See (1921) DIG COL, 262 KRISHNA KISOR DE v. NAGENDRA BALA CHAUDHURANI  
66 I. C. 694

—O. 21, R. 66—Order settling terms of sale proclamation—Direction to issue sale proclamation—Not appealable, See C. P. CODE, S. 47 AND O. 21, R. 66  
64 I. C. 547

—O. 21, R. 66—Valuation in sale proclamation—Nature of.

The value fixed by the Court for the preparation of sale proclamation need not be the free value of the property—It is a mere estimate, which should as far as possible be a fair estimate. (*Jwala Prasad and Ross, JJ.*) RAJBANS SAHAY v ASKARAN BAID  
1 Pat. 214.  
(1922) P. 550

—O. 21 R. 66—Value of the land not stated in sale proclamation—Whether vitiates sale—Failure to serve sale proclamation—Effect of.

The approximate value of the land should be stated in sale proclamations but its omission is an irregularity which does not necessarily vitiate the sale unless it had a material effect upon the number of bidders and upon the price. Failure to serve the sale proclamation does not vitiate the sale when the judgment debtor knows of it. 2 C. W. N. 848 distinguished. (*Greaves and Ghosh, JJ.*) JASHINUDDIN v. MANMOHINI.  
(1922) Cal 93,

—O. 21, R. 71—Execution sale—Default of purchaser in paying deposit or balance of purchase money—Order for recovery of loss caused by resale—Decree—Appeal. See C. P. CODE, S. 2 (2) AND O. 21, R. 71.  
44 A. 266.

—O. 21, Rr. 71, 84 and 85—Execution Sale—Non-payment of deposit—Fresh sale—Deficiency—Recovery of

Whether there is default in payment of the initial deposit of 25 per cent of the purchase price under O. 21, R. 84 or in the deposit of the balance under O. 21, R. 85, the property may be resold and the deficiency of price recovered from the defaulting purchaser. (*Piggott, Walsh and Lindsay, JJ.*) SITA RAM v. JANKI RAM.  
(1922) All. 200 : 44 A. 266 : 20 A. L. J. 105 :  
L. R. 3 A, 117 : 65 I. C. 913 (F. B.)

C. P. CODE (1908), O. 21, R. 86.

—O. 21, Rr. 72 and 90—Execution sale—Purchase by decree holder—Refusal of leave to bid—Effect of.

A purchase at an execution sale by the decree holder who has not obtained leave to bid is not void nor a nullity but is only to be avoided on the application of the judgment debtor or some other person interested. Such a sale can only be set aside upon application and upon cause shown. The same would be the result if the decreeholder had applied for leave to bid and had been refused such leave. (*Lord Phillimore*) RAI RADHA KRISHNA v. BISHESHWAR SAHAY  
16 L. W. 190 : 3 Pat. L. T. 529 ;  
31 M. L. T. 209 (P. C.) : (1922) P. C. 336  
67 I. C. 914 : 49 I. A. 312 (P. C.)

—O. 21, Rr. 72, 86, and 92—Permission to decree-holder to bid on conditions—Failure to fulfil conditions—Powers of court to refuse Confirmation of sale.

An application for permission to bid at an execution sale was granted on terms, that a certain sum of money due to a prior charge holder should be paid in Court. The conditions were not fulfilled *in toto*, but the properties were nevertheless purchased in auction by the decree holder:

Held, *a part* altogether from O. 21, Rr. 72 and 92 the Court has power to refuse to confirm the sale under O. 21, R. 86 or under the inherent powers of Court. (*Miller, C. J. and Coutts, J.*) MT. JANAKBATI CHAUDHRAIN v. RAMESHWAR SINGH.  
1 Pat. 235 ; (1922) P. 511.

—O. 21, R. 83—Alienation of property, with sanction of court—Minor's property—Procedure under Ss 29 and 30 of the Guardians and Wards Act not followed—Effect of. See GUARDIANS AND WARDS ACT, Ss 29 AND 30.  
36 C. L. J. 326.

—O. 21, R. 84—Execution sale—Omission by purchaser to deposit 25 p. c.—Effect of.

In the absence of proof of substantial injury to the judgment debtor an auction purchaser's omission to deposit the 25 p. c. in Court is a mere irregularity and does not vitiate the sale. 28 A. 238, 16 C. 33, 14 M. 227 Rel. 30 A. 273; 5 A. 316 dissented from. (*Abdul Raoof, J.*) INAIT ULLAH v. THE PUNJAB NATIONAL BANK, LTD.  
67 I. C. 427

—O. 21, Rr. 85 and 92—Execution sale—Time for payment of the purchase money—Extension of—No objection—Confirmation of sale

Though it is not open to the Court to extend the time for payment of the purchase price without the consent of the parties, still where an extension of time has been granted without objection on the part of the parties and the sale has been confirmed and the money drawn by the decreeholder, the sale cannot be set aside on account of the irregularity. (*Spencer and Ramesam, JJ.*) VARANAKKOT ILLATH SUBRAMANYAM NAMBU DIRI v. VYKUNDA KAMMATHI.  
43 M. L. J. 477 :  
16 L. W. 319 : (1922) M. W. N. 707 :  
31 M. L. T. 363 (H. C.)

—O. 21, R. 86—Leave to decree holder to bid—Conditional order—Failure to fulfil

C. P. CODE (1908), O. 21, R. 89.

conditions—Powers of court to re-sell *See* C P, CODE O. 21, RR. 72, 86 AND 92.

1 Pat. 235.

—O. 21, R. 89—Applicability of—Sale in partnership suit for realising assets *See* (1921) DIG COL 265. T. V. TULJARAM ROW *v* RAMA CHANDRA ROW. 68 I. C. 916.

—O. 21, R. 89—Application to set aside sale—Deposit of purchase money—No prayer to set aside sale—Request to withhold payment

The judgment-debtor deposited the decree amount with the extra percentage under O. 21, R. 89 C. P. C. but in his application he prayed that it may not be paid to the decreeholder pending disposal of an appeal. Subsequently on the objection of the decreeholder he withdrew the prayer aforesaid. Held that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decree amount having been withdrawn, the court was bound to set aside the sale 43 B. 735; 16 C. W. N. 904 Ref. (*Adam, J.*) RAM SHIVENDRA NARAYAN OJHA *v* AWADH BIHARY SARAN. 68 I. C. 629.

—O. 21, R. 89—Execution of decree—Decree for sale of mortgaged property—Auction sale—Deposit in court—Application to set aside the sale on part payment. *See* (1921) DIG COL. 265 MANAJI KUMARJI *v* ARAMITA. 46 Bom. 171 : (1922) Bom. 193.

—O. 21, R. 89—Execution sale—Setting aside—Application—Form of—Right of any judgment-debtor to take advantage of deposit by another.

A judgment-debtor is not under O. 21, R. 89, C. P. C., entitled to take advantage of any deposit made by his co-judgment-debtor, which was not made conjointly with him but quite independently of him. Such a deposit in Court cannot be treated as money received by the decree holder within the meaning of the rule. (*Krishnan, J.*) OBLA K SUBBAYAN *v* THOPPAI MUTHAYYA. 42 M. L. J. 71 : (1922) Mad 54 : 65 I. C. 983.

—O. 29, R. 89—Right to apply—Usufructuary mortgage;

It is competent to a mortgagee with possession to apply to set aside the sale of the property under O. 21, R. 89 21 O. C. 400 dist 35 Bom 288 foll. (*Kanhaya Lal, A. J. C.*) JAGMOHAN SINGH *v* BACHCHA. 9 O. L. J. 50 : 25 O. C. 78 : (1922) Oudh. 146 : 66 I. C. 929.

—O. 21, R. 89—Right to deposit—Usufructuary mortgagee in possession—Sale of property in execution *See* CONTRACT ACT, S. 69 20 A. L. J. 42.

—O. 21, R. 89—Right to apply—Purchaser after auction.

A third party purchasing the property after the date of the auction sale is debarred by O. 21, R. 89 from making an application to have the auction sale set aside. (*Harrison, J.*) SHAM LAL OF DELHI *v* HARI SHANKER. (1922) Lah. 302

—O. 21, R. 89—Right to apply—Sale in execution of decree—Judgment-debtor privately

C. P. CODE (1908), O. 21, R. 90.

selling the property so sold to a third person before confirmation—Right of such purchaser to apply, *See* (1921) DIG. COL. 267. SARADA KRIPA LALA *v* HARENDRA LAL DAS. (1922) Cal. 271 : 49 Cal 454 : 68 I. C. 289.

—O. 21, R. 89—Setting aside—Deposit of money—Formal application—Necessity for.

Where the money required to set aside an execution sale had been paid into Court within 30 days but no formal application to set aside the sale was presented within the time prescribed, the court cannot set aside the sale. A mere lodgment schedule which does not contain a prayer to set aside the sale cannot be treated as such an application. 14 M. L. T. 534; 19 M. L. J. 193, (*Krishnan, J.*) RAYAPATHY VENKATASUBBA RAO *v* NARAYANA RAO. (1922) M. W. N. 171 : 15 L. W. 450 : (1922) Mad. 83 : 66 I. C. 44.

—O. 21, R. 90—Execution sale—Application to set aside—Non-representation of minor.

An application to set aside a sale on the ground that there was no guardian ad-litem of a minor in the execution proceedings comes under O. 21, R. 90 C. P. Code and the alleged defect is a mere irregularity. (*Sanderson, C. J. and Richardson, J.*) FANI BHUSAN BHUIAN *v* SURENDRA NATH DAS. 35 C. L. J. 9 : 64 I. C. 25

—O. 21, R. 90—Execution Sale—Attachment—Absence of—Material irregularity—Sale within 30 days of the proclamation—Effect of.

The failure to attach the property before sale although an irregularity under the C. P. Code does not render the sale null and void. 18 C. 188; 34 C. 787; 21 A. 311 Ref. The object of the attachment is to bring the property under the control of the court with a view to preventing the judgment debtor from alienating it and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment debtor to the prejudice of the rights of the decree-holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree holder can prejudice the rights of the judgment debtor who has due notice of the sale. A court has jurisdiction to sell property without attachment.

Where property is sold within 30 days of the proclamation the irregularity does not render the sale void without proof of the substantial injury thereby to the judgment-debtor 21 C. 66 foll. (*Milner C. J. and Mullick, J.*) RAJA WAZIR NARAIN SINGH *v* BHIKHARI RAM. 3 Pat. L. T. 765 : (1922) Pat. 321 : 4 U. P. L. R. (Pat) 100 : 68 I. C. 363.

—O. 21, R. 90—Execution sale—Irregularity—Defect in attachment—Omission to attach.

The mere fact that there has been no attachment or that there is a defect in the attachment

C. P. CODE (1908) O. 21, R. 90.

does not render an execution sale a nullity. It is a mere irregularity. 67 I. C. 420 18 M. 437, 30 M. 255 Rel. (Hallifax, A. J. C.) SHYKER RAO v. MAWK RAO. 63 I. C. 643.

—O. 21, R. 90—Execution sale—Material irregularity—Publication of sale—Omission of lot from Paucity of bidders.

Where the paucity of bidders at an execution sale was due to the omission of the decree holder to announce it by beat of drum near the place where the property to be sold was situate. Held, that the sale must be set aside under O. 21, R. 90 C. P. Code 24 C. 291 Rel. (Broadway, J.) NAND LAL v. TOLA RAM. 67 I. C. 752

—O. 21, R. 90—Execution sale—Setting aside—Right to apply—Auction purchaser

An auction purchaser is a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90 C. P. Code and he can apply to set aside the execution sale under that rule. 20 C. 8 (P. C.) dist. 3 Pat. L. J. 516 not foll. 38 M. L. J. 228 foll.

The omission to notify existing incumbrances on the property sold entitled the auction purchaser to set aside the sale under O. 21 R. 90 C. P. C. (Batten J. C.) SHIU PRASAD v. SANTOOJI.

5 N. L. J. 146 65 I. C. 875.  
18 N. L. R. 98 : (1922) Nag. 113

—O. 21, R. 90—Fraud—Auction sale—Limitation to set aside.

Where the sale and the irregularity affecting it has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor, he is entitled to apply under R. 90 where the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him. There is nothing in O. 21 R. 90 which limits the filing of an application to the period prior to confirmation of the sale (Adam, J.) RAM FERESHAD LALL v. CHAMIRI SINGH, (1922) P. 422

—O. 21, R. 90—Selling aside sale—Price below that in sale proclamation—Effect

Where the value shown in the sale proclamation was fixed by consent, the fact that the price fetched at the sale was considerably less is not enough to set aside the sale (Jwala Prasad and Ross, JJ.) RAJBANS SAHAY v. ASKARAN BAID.

1 Pat. 214 : (1922) P. 550.

—O. 21, R. 90—Fraud—Misstatement by a decreeholder in the sale proclamation of the value of the property—Onus of proof—Finding of fact.

A wilful misstatement by a decree holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud. Where certain facts are found and an inference of fraud is drawn based upon facts so found it is open to the court in second appeal to consider whether as a matter of law such an inference is justified by the facts found. If however the first appellate court, which is the ultimate judge of fact, refuses to draw an inference of fraud upon the facts found by it that decision cannot be questioned in

C. P. CODE (1908) O. 21, R. 92.

second appeal unless the facts found necessarily amount to fraud. The misstatement of value in a sale proclamation does not necessarily amount to fraud. (Miller, C. J. and Mullick, J.) RAM DHARI CHAUDHURY v. DEONANDAN PRASAD SINGH.

3 Pat. L. T. 501. (1922) Pat. 269 :

4 U. P. L. R. (Pat) 71 (1922) P. 507

—O. 21, R. 90—Material irregularity—Omission to state value in sale proclamation—Sale when liable to be set aside.

The mere omission to state the estimated price of the property to be sold is not a material irregularity when it is shown that the property was visible to all the purchasers who were thus in a position to frame their own estimates. Even if there had been a material irregularity in the publication or conduct of the sale that would not justify interference in the absence of proof that substantial injury to the petitioners had resulted therefrom. (Le Rossignol, J.) MAHOMED NIZAM UD-DIN v. AMIN UD-DIN. 4 Lah. L. J. 441 : (1922) Lah. 35 : 67 I. C. 885, (1).

—O. 21, R. 90—Immoveable property—Decree for possession of land—Sale of decree in execution of another decree—Application to set aside sale under O. 21, R. 90 not maintainable. See C. P. CODE, O. 21, RR. 53 AND 90.

64 I. C. 388.

—O. 21, R. 90—Material Irregularity—Execution sale held on a day other than that advertised.

Where a sale in execution of a decree was held neither on the day originally advertised nor on the day to which it had been adjourned but on some third day, held it was a material irregularity in the conduct of the sale. 6 C. W. N. 44 foll. (Mookerjee and Panton, JJ.) HARI SADHAN ROY v. SHIB GOPAL MITRA.

35 C. L. J. 140 : 65 I. C. 746.

—O. 21, R. 90—Right to apply—Auction purchaser.

An auction purchaser cannot apply to set aside an execution sale under O. 21, R. 90 C. P. Code 20 C. 8 ; 19 C. W. N. 1291 Rel. (Prideaux, A. J. C.) BALWANT v. RATAN LAL. 68 I. C. 429.

—O. 21, R. 90—Right to apply—Person claiming adversely to judgment debtor.

A person claiming the property sold in court auction adversely to the title of the judgment debtor cannot apply under O. 21, R. 90 to have the sale set aside. History of section considered. (Brown, A. J. C.) MAUNG KUM v. MA NAN.

1 Bur. L. J. 234.

—O. 21, R. 90—Scope of—Fraud in conducting execution sale.

O. 21, R. 90 C. P. Code not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. (Chatterjee and Panton, JJ.) ABDUL SAMAD MONDAL v. BASIRUDDIN CHAUDHURY. 66 I. C. 220.

—O. 21, R. 92—Execution Sale—Application to set aside—Addition of parties after the time prescribed—Limitation.

## C. P. CODE (1908) O. 21, R. 92.

An application to have an execution sale set aside was made within the time allowed by law. In that application the number of the execution case was given and certain of the decreeholders auction purchasers were mentioned. The names of four of the decreeholders were not mentioned but notice was subsequently served on them of the application. *Held* that it was not necessary that notice of the application should be served on all persons affected by the sale within 30 days of the sale. O. 21, R. 92 C. P. C. merely provides that no sale shall be set aside until notice has been issued to all persons affected by it. But there is no limitation provided for giving such notice. 37 B 387, 390 foll. (*Lyle and Ashworth, A. J. C.*) *ABDUR RAMAN v. BABU HAR NARAYAN DAS*, 90 L. J. 211; 4 U. P. L. R. (O. C.) 72; (1922) Oudh. 129; 68 I. C. 238.

## O. 21, R. 92—Execution sale—Confirmation—Satisfaction of decree—Effect of.

Where a sale in execution is held prior to the admission of satisfaction of the decree by the decree holder, the sale cannot be confirmed after satisfaction is notified to the Court (*Kotwal, A. J. C.*) *NILKANTH v. YESHWANT* 18 N. L. R. 134; 65 I. C. 331.

## O. 21, R. 92—Execution sale—Setting aside—Notice.

O. 21, R. 92, C. P. Code, does not make it obligatory on the applicant to pay the process fee or to serve notice according to the mode of service prescribed in the C. P. Code in every case, on all persons affected by the sale. (*Suhrawardy and Ghose, JJ*) *SANTOSH BALA DEBI v. RAM CHANDRA GHATI* 67 I. C. 286.

## O. 21 R. 92—Sale in execution—Injunction—Want of notice.

Where an injunction was granted in favour of third parties who claim the property as their own, against the decree holder restraining him from executing his decree by sale but no notice of it was given to either the decree-holder or the officer conducting the sale and in consequence the sale took place, *Held* the validity of the sale cannot be questioned and the injunction is ineffective (*Stuart, J.*) *RAMJI DAS v. LALA CHHAGAL LAL*, (1922) All. 282.

## O. 21, R. 92—Setting aside execution sale—Second appeal.

There is no second appeal from an order setting aside a sale under O. 21, R. 92 of the C. P. Code. 38 Cal. 339 ref. (*Kanhaiya Lal, A. J. C.*) *JAGMOHAN SINGH v. BACHCHA*.

25 O. C. 78. 90 L. J. 50; (1922) Oudh 146; 66 I. C. 929.

## O. 21, R. 93—Execution sale—Absence of saleable interest in Judgment debtor—Suit for recovery of purchase money.

No suit lies for recovery of the purchase money when it is found that the Judgment debtor had no saleable interest in the property sold in execution. The remedy of the purchaser is by an application under O. 21, R. 93, C. P. Code; 41 I. C. 924; 22 C. W. N. 760; 39 A. 114 Rel.

## C. P. CODE (1908) O. 21, R. 93.

(*Newbould and Panton, JJ*) *BIPIN BEHARI GHOSH v. HARI CHARAN GHOSH*.

64 I. C. 628.

## O. 21, R. 93—Execution sale—No saleable interest in property—Right to sue for purchase money.

Where it is found that the Judgment-debtor had no saleable interest in the property it is open to the decreeholder to sue for recovery of the purchase money even under the new C. P. Code, 37 C. 67, 35 B. 29; 36 A. 529 Rel. (*Fletcher and Smither, JJ*) *PRASANNA KUMAR BHATTACHARJEE v. IBRAHIM MIRZA* 36 C. L. J. 205.

See CONTRA IN

36 C. L. J. 132.

## O. 21, R. 93—Execution sale—Refund of purchase money—Setting aside sale—Necessity for.

Where a purchaser at a court auction seeks to get back his purchase money, he must as a condition precedent, have the sale set aside under O. 21, R. 91, C. P. C. He can, however, sue the judgment-debtor on the ground of fraud or misrepresentation. 39 M. 803; 39 A. 114 foll. 35 B. 29 Ref. (*Macleod, C. J. and Coyajee, J.*) *BALVANT RANGNATH v. BALU MALU*.

24 Bom. L. R. 308; (1922) Bom. 205 67 I. C. 360.

## O. 21, Rr. 93 and 91—Execution sale—Setting aside—Judgment debtor having no saleable interest—Right to refund of purchase money.

Where after an execution sale it is found that the judgment-debtor has no saleable interest in the property the remedy of the auction-purchaser is to apply under O. 21, R. 91, C. P. C., to set aside the sale and then apply for a refund of the purchase money under O. 21, R. 93, C. P. C. The purchaser cannot bring a suit for setting aside the sale or for recovery of the purchase money. 39 M. 803; 3 C. 806; 25 B. 337; 39 A. 114; 36 A. 529; 37 C. 67, 35 B. 29; 40 M. 1009 Ref. (*Diake-Brockman, J. C.*) *LAKHMI CHAND v. CHATURBHUJ*. 65 I. C. 230.

O. 21, Rr. 93 and 90—Execution sale set aside—Refund of money with interest See (1921) Dig. COL. 273 *MAHARAJ BAHADUR SINGH v. FORBES*. 30 M. L. T. 187 (F. C.)

## O. 21, Rr. 93 and 91—Not retrospective—Right to sue for purchase money on sale turning out to be void—Difference between the old Code and new.

Under S. 315 of the C. P. Code of 1882 the purchaser at a sale in execution of a decree was competent to maintain a suit against the decree holder for recovery of his purchase money when the judgment-debtor was found to have had no saleable interest in the property sold. The purchaser was not restricted to the special procedure in the execution department mentioned in S. 315; 40 A. 411; 322 B. 753; 37 C. 67 40 M. 1009. Ref. A suit to recover the purchase money would be governed by art. 120 of the Lim. Act. *Semble*: The law is changed under O. 21, R. 93 C. P. C. and the remedy by suit is no longer available 39 A. 114; 39 M. 803; 40 M. 1009, 43 A. 60 R. But the alteration in the law being of a substantial

C. P. CODE (1908), O. 21, R. 94.

character is not retrospective and an auction purchaser whose right to obtain the purchase money was acquired before the coming into force of the new Code is not affected and his right is not extinguished. 35 A 419: 23 M L J 487, 39 M. 803: 12 L. W. 639 Rel. (*Mookerjee and Chotzner, JJ.*) MAKAR ALI v. SARFADDIN.

36 C L J. 132

—O. 21, R. 94—Sale certificate—Amendment without notice to judgment debtor—Irregularity—Revision. See C. P. CODE, Ss. 115, 153, ETC. (1922) M W. N. 130

—O. 21, R. 95—Adverse possession—Symbolical possession—Effect of delivery of, as between parties to a suit.

The plaintiff sued to recover possession of land from the defendant who was in adverse possession of it from 1898, and obtained a decree in 1914. In execution of the decree, he secured symbolical possession in 1915. In 1918, the plf. having sued again to recover possession was met by the defendant with a plea of his adverse possession for upwards of twelve years.

Held, that the plaintiff was entitled to succeed, since the decree of 1914 put a stop to defendant's adverse possession prior to the date of the decree, especially as the defendant was a party to the execution proceedings of 1915. 14 Bom. L. R. 115 F. B. doubted in view of 20 Bom. L. R. 502 (*Macleod, C. J., and Shah, J.*) MAHADEVAPPA DUNDAPPA v. BHIMA DODAPPA MALED

46 Bom. 710: 24 Bom. L. R. 232: (1922) Bom. 28: 66 I. C. 320

—O. 21, R. 95—Effect of possession under—Judgment debtor a trespasser.

After possession has been given to the decree-holder under O. 21 R. 95, the judgment-debtor's possession is only that of a trespasser. (*Jwala Prasad and Couils, JJ.*) RAM KRISHNA SINGH v. EMPEROR.

3 Pat. L. T. 335: (1922) P. 197: 66 I. C. 817: 23 Cr. L. J. 321.

—O. 21, R. 95—Symbolical possession—Delivery of—Effect of as against judgment-debtor.

Delivery of symbolical possession instead of actual possession is effective against the judgment-debtor and gives rise to a fresh start of limitation against him. This principle avails also persons claiming under the certified purchaser, 5 C. 584, 16 C. 530; 4 C. 870: 24 C. 175 foll. 36 B. 373; 24 W. R. 418 not foll. (*Chatterjee and Pearson, JJ.*) BHULU BEG. v. JATINDRA NATHSEN.

27 C. W. N. 24.

—O. 21, R. 96—Property in the hands of Receiver—Leave of court.

O. 21, R. 96 will not apply to property in the hands of a Receiver and he can be sued only with leave of court. (*Fawcett, J. C. and Raymond, A. J. C.*) RAMDAS v. AJUDHIADAS

63 I. C. 635.

—O. 21, R. 97—Delivery of possession—Second application for—Maintainability—Delivery on first application accepted by decree holder as complete—Effect of.

The return on a warrant for delivery of immovable property issued on an application made as against the judgment-debtor for the execution

C. P. CODE (1908), O. 21, R. 100.

of a decree for the possession of such property was that the delivery was complete, and this statement on the return was accepted by the decree holder. The judgment debtor had, during the pendency of the suit, granted a lease of a portion of the property. Alleging that he was not aware of the said lease when he accepted the delivery as complete, and that the lessee under the said lease prevented him from peacefully enjoying the property delivered to him, the decreeholder applied again as against the lessee, for removal of the obstruction and for the issue if necessary, of a warrant of delivery. Held that the execution having been definitely closed by the delivery on the first application accepted by the decree holder as complete, a second application by him for execution was in the absence of any allegation of fraud in the proceedings on the first application, incompetent. (*Oldfield and Venkatasubba Row JJ.*) IBRAHIM SAHIB v. KONAMMAL.

43 M. L. J. 179: 31 M. L. T. 356 (H. C.)

—O. 21, Rr. 97 and 99—Execution of decree—Landlord and tenant—Sub-tenants of defendant declining to surrender possession—Bom. Act II of 1918 See (1921) DIG. COL. 273 JAFFERJI IBRAHIMJI v. MIYADIN MANGAL.

46 Bom. 526: (1922) Bom. 273: 64 I. C. 692.

—O. 21, Rr. 97 and 99—Execution of decree for possession of property—Resistance to delivery of possession to decree-holder—Resistance by Sub tenant See (1921) DIG. COL. 273 JAIRAM JADOWJI v. NAWROJI JAMSHEDJI.

65 I. C. 212.

—O. 21 R. 100—Application under—Maintainability by person who is a representative of judgment debtor under S. 47. See C. P. CODE S. 47 AND O. 21 R. 100.

65 I. C. 476.

—O. 21, R. 100—Right to apply—Joint possession—Person claiming—Locus standi.

Held following 18 C. W. N. 695 and 3 M. 81 that claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of a joint family or otherwise and who is affected by the delivery of possession can claim to be in possession of the property on his own account within the meaning of S. 331 of the C. P. Code of 1882 corresponding to O. 21, R. 100 C. P. Code 1908, 17 B. 718 not foll. (*Kotwal, A. J. C.*) A. K. SINGH v. RAM PRASAD.

68 I. C. 174.

—O. 21, R. 100—Scope of.

In an action for rent the landlord obtained a decree against the tenant (purchaser from the original tenant) of a holding and purchased it. The opposite party applied under R. 100 praying that he should be restored to possession of his portion of the holding which he had purchased from the original tenant. The opposite party was therefore restored to possession. The landlord again sued the tenant for the rent of the portion in possession of the opposite party, got an ex parte decree and got it purchased by his servant who was given possession. The opposite party again objected under R. 100. The landlord having obtained a money decree, though the holding had



C P CODE (1931), O 21, R. 100.

not been split up, the opposite party was restored to possession. *Held*, the petitioner was not a bona fide purchaser for value and the land sold was acting fraudulently in giving up possession to the opposite party. (*Adami, J.*) **KHUB LAL DAS v. PATHO JHA.** (1932) P. 303.

—O 21, R. 100—Usufructuary mortgagee—Possession disturbed by purchaser at Court auction—Application under—Maintainability. See C. P. CODE, O. 21, Rr. 58, 63 AND 100.

1 Pat 159

—O 21 R 103—Decree holder selling own property by mistake—Remedy by suit or application See C P CODE S. 47 AND O. 21 RR. 92, 103.

15 L W. 272

—O, 21, R. 103—Suit under—Scope of inquiry—Decision as to title.

The scope of a suit under O. 21, R. 103, C P Code, is not merely the determination of the mere question of possession of the parties concerned but also the establishment of the right or title by which the plaintiff claims the present possession of the property. 16 I. C. 741, foll. (*Wallis, C. J. and Seshagiri Ayyar, J.*) **UNNI MOIDIN v. POCKER.** 44 Mad. 227.

—O 22, R. 1—Abatement—Death of defendant—Malicious prosecution and obstruction of right of way.

A suit for damages for malicious prosecution and obstruction of a right of way abates on the death of the defendant in the absence of any allegation that the estate of the wrongdoer was benefited thereby. 13 B 677, 34 I. C. 249, 9 Bur L. T. 38. (*Saunders, J. C.*) **MA SHWE THIT v. MAUNG PO AUNG.** (1921) 4 U. B. R. 73.

(1922) U. B. 7: 65 I. C. 63

—O 22, R. 1 and O. 33, R. 2—Right to sue in *forma pauperis*—Death of applicant—Right does not survive. See C. P. CODE, O. 33, R. 2,

64 I. C. 63.

—O. 22, R. 1 (2)—Execution application—Non compliance with provisions of O. 21, R. 11 (2) C. P. Code—Application when a step-in-aid. See LIM ACT, ART. 182 (5).

65 I. C. 14.

—O. 22, Rr. 2 and 4—Legal representatives—Substitution of—Parties already on record.

If the legal representatives of a deceased respondent are already on the record as parties, it is not necessary to make an application for substitution and it is enough to make an entry on the record to that effect. O 22, R. 4 is not applicable to the case 32 A. 551; 32 A. 563 foll. (*Daniels and Dalal, A. J. C.*) **HAFIZ-UN-NISA v. LAWHAR SINGH.** 24 O. C. 374 66 I. C. 24.

—O. 22, R. 2—Second appeal—Legal representative not brought on record—Mistake—Effect of.

Pending an appeal in the lower appellate Court one of the parties died. Their legal representatives were brought on the record by that Court but by a mistake the legal representatives were not made respondents in the second appeal. The error was due to a mistake in the judgment on

C P. CODE (1903), O. 22, R. 3.

the part of the copying department which did not show the names of the legal representatives although they had long been brought on the record. *Held*, that there was no abatement of the appeal and even if there were the mistake being bona fide the delay could be excused. (*Wilberforce, J.*) **KARTAR SINGH v. RALLA.** 67 I. C. 306.

—O. 22, Rr. 3 and 9—Abatement of suit—Order settling aside—Bringing on record of legal representatives.

Where more than three months after the death of a defendant in a suit the Court brought his legal representatives on record on an application for that purpose, on the ground that the parties were ignorant of the reduction of the time allowed by recent legislation, *held* that the delay was properly excused. The omission to set aside the abatement was a formal defect not affecting the merits of the order. (*Shah, A. C. J. and Crump, J.*) **LAKSHMIBAI JAGANNATH JOSHI v. YESWANT VITHAL BAGKAR.** 24 Bom L R 909.

—O. 22, R. 3—Appeal—Death of one of the Respondents—Effect of.

Where in an appeal the interests of the several respondents cannot be discriminated, an order of abatement in respect of one of the respondents results in the abatement of the appeal against all. (*Watmsley and Greaves, JJ.*) **SRIMATI GOL ASMATER KHATUN v. NAWAB KHAJAH HABIBULLA.** 64 I. C. 49.

—O. 22, R. 3—Applicability—Mortgage suit—Death of plaintiff after preliminary decree—Request of interest to B, Application by B to be brought on record—Limitation.

A died on 28-4-16 after obtaining a preliminary decree dated 30-3-16 obtained on a mortgage. The period of redemption expired on 30-7-16, B, who claimed to succeed to A's interests under a will put in a petition on 26-5-19 to be brought on record and to be given a final decree.

*Held*, the suit had abated under O 22, R. 3. The right to sue in O. 22 R. 3 includes in the case of mortgage suits the right to obtain a final decree after the passing of a preliminary decree. (*Ayling and Venkatasubba Rao, JJ.*) **DAKORU SUBBARAYADU v. MUSTI RAMADASU.**

42 M. L. J. 301: 30 M. L. T. 202:

(1922) M. W. N. 375: 68 I. C. 942: 15 L. W. 309.

—O 22, R. 3—Appeal against some of the defendants only—Effect.

Where the suit was originally filed against a number of co-promisors some of whom died an appeal against the surviving defendant only does not fail as a whole but the right to prosecute it survives as against him, for a contract entered upon by one or more promisors can be enforced against all or any of them. (*Le Rossignol and Abdul Quadir, JJ.*) **THE FIRM OF GURUDAS RAMKOTURAM v. BHAGWAN DAS.**

(1922) Lah. 182: 68 I. C. 815.

—O. 22 R. 3—Court's discretion to allow amendments under See C. P. CODE O 22, RR. 10 AND 3.

43 M. L. J. 147.

—O. 22, R. 3—Legal representative—Who is.

C. P. CODE (1908), O. 22, R. 4.

The words 'legal representative' cannot be construed to mean all legal representatives. They must include any legal representative to whom the right to sue survives. (*Macnair, A. J. C.*) *NARAYAN v. AMRITA*. 18 N. L. R. 21 : 65 I. C. 542.

—O. 22, R. 4—*Abatement, —Death of party after preliminary decree—Legal representatives not brought on record—Final decree.*

A preliminary decree does not put an end to a suit which remains pending till the final decree and therefore, when a defendant dies after the passing of a preliminary decree, the provisions of O. 22, R. 4 C. P. C. have application. And where no application is made under O. 22 R. 4 (1) for the substitution of the legal representative of the deceased within the time of limitation following his death, the suit abates as against him. It is not competent to the heirs of the deceased to apply for the passing of a final decree while the order of abatement is in force. 30 A. 551 *Rel. (Stuart and Sulaiman, JJ.) JAGAR NATH UMAR v. RAM KARAN SINGH*.

20 A. L. J. 575 : L. R. 3 A 460 (1922) A 396.  
4 U. P. L. R. (A) 182 : 68 I. C. 251.

—O. 22, R. 4—*Abatement—Death of one of the legal representatives—Legal representative not brought on record.*

It is on the death of one of the defendants his legal representatives are not brought on record the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate. (*Chatterjee and Pearson, JJ.*) *SARAT KAMINI DAS v. CHAITANYA CHANDRA PROHORAJ* 67 I. C. 290.

—O. 22, R. 4—*Appeal—Abatement—Decree for joint possession—Appeal by deft—Omission to substitute legal representatives of deceased respondent.*

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial court and pending an appeal therefrom by the defendant, one of the plaintiffs respondents dies and his legal representatives are not brought on record within time, the whole appeal abates. 24 C. W. N. 44 *foli. (Walmsley and Suhrwardy, JJ.) ARJAN MIRDHA v. KALI KUMAR CHAKRABUTTY*. 68 I. C. 194.

—O. 22, R. 4 and O. 21, R. 63—*Claim suit—Legal representative of deceased decree holder not brought on record—Effect of*

Where a defeated claimant files a suit under O. 21, R. 63, C. P. Code, to establish his title but without impleading the legal representatives of a decree-holder who had died prior to the institution of the suit, the legal representative of the deceased-holder is not bound by the decree in the title suit and so far as the deceased decree-holder was concerned, the order dismissing the objection in claim proceedings had become conclusive under O. 21, R. 63, C. P. C. (*Scott Smith, J.*) *PIYARA LAL v. MAZHAR KHAN*.

16 P. L. R. 1922 : (1922) Lah 78 :  
4 U. P. L. R. (Lah.) 23 : 64 I. C. 359.

C. P. CODE (1908), O. 22, R. 5.

—O. 22, R. 4—*Co-sharers—Suit for declaration of title—Death of one—Abatement.*

Where some of the proprietors of a village sue the others for a declaration in respect of the *shamilat* of the village and one of the defendants dies and his legal representatives are not brought on record within time, the whole suit abates and is liable to be dismissed. (*Chevis and Harrison, JJ.*) *SAHA MATOMED v. KARAM ILAHI* (1922) Lah 131 65 I. C. 121.

—O. 22, R. 4—*Legal representatives—Decree for sale on mortgage.*

Where the legal representatives of a mortgagor are impleaded as parties to a suit for sale by the mortgagee and a decree for sale is passed in execution of which the properties are purchased by a stranger, it is not open to the legal representatives thereafter to claim to redeem the mortgage on the strength of their own independent title as purchasers of a portion of the equity of redemption at a revenue sale. (*Ryves and Gokul Prasad, J.*) *RAM LALLAN SINGH v. HAREKH NARAIN RAI*. 20 A. L. J. 641 : (1922) All. 463.

—O. 22, Rr. 4 and 11—*Legal representative—Statutory period for bringing on record—Extension of time whether allowed.*

In a case where the appellant, though represented by counsel, does not put in a formal petition for bringing deceased respondent's representatives on the record within the time prescribed by law, it is not right to extend time to allow him to do so. (*Le Rossignol, J.*) *WALAYAT KHAN v. MUST. MALAN*. (1922) All. 30.

—O. 22, Rr. 4 and 10—*Preliminary decree—Death of judgment debtor thereafter but before passing of final decree—Effect of—Substitution of legal representative—O. 22, R. 10, C. P. C. applicable. See C. P. CODE, O. 22, Rr. 10 AND 4.* 64 I. C. 307.

—O. 22, R. 4—*Redemption suit—Appeal—Death of mortgagor—Failure to bring on record legal representative—Effect.*

In the course of an appeal arising from a suit by a second mortgagee to redeem the prior mortgage, the mortgagor respondent died—The effect of failing to bring his legal representative on record was the abatement of the appeal. (*Chevis and Harrison, JJ.*) *NANAK CHAND v. RAM CHAND*. 4 Lah. L. J. 189 : (1922) Lah. 101.

—O. 22, Rr. 4 and 9—*Suit against firm—Death of sole proprietor—Legal representatives not brought in time—Abatement.*

Where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representatives on record, held the suit abated. (*Ghose, J.*) *RAM PRASAD CHIMONLAL v. ANUNDI AND CO.*

49 Cal. 524 : (1922) Cal. 408.

—O. 22, Rr. 5 and 2—*Claim against legal representative—Legatee.*

Where a person who is not the Legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may

C. P. CODE (1908), O. 22, R. 5

be taken advantage of by the proper legal representative and the representatives on record will be accountable to him. If this is so, the legatees and creditors can proceed against the proper legal representatives if their claim is not barred. Their proper legal representatives will be in a position to get the benefit of the decree and thus to be in possession of assets. (*Schwabe, C.J. and Coutts Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHALAM v. RAJA VENKATADRI APPA RAO 43 M. L. J. 486.

16 L. W. 369 : (1922) M. W. N. 532.  
31 M. L. T. 221 (H.C.) : (1922) Mad. 457.

—O. 22, R. 5—"Court" meaning of—  
Question of legal representative—Who to decide.

The word "court" in O. 22 R. 5 means the court before whom the question as to who the legal representative is, arises viz the trial court if the question arises at the trial stage or the appellate court if the question arises in appeal. There is no provision in the code for an appellate court to delegate its powers under the rule; the utmost that can be done is to direct the trial court to take evidence on the question and return the same (*Miller, C.J. and Coutts, J.*) MR CHAND MANI v. KARTIK SINGH 3 Pat. L. T. 380 : (1922) P. 197. 65 I. C. 131.

—O. 22, R. 5—Legal representative—Dispute as to—Decision of question on appeal.

Where a dispute arises in the course of the trial as to who are the representatives of a deceased party it is the duty of the primary court to decide the dispute after investigation and if it fails to do so, the appellate court can decide the question. (*Broadway and Abdul Raoof, JJ.*) TAJA v. DEVI DITTA. 4 Lah. L. J. 314.

—O. 22, R. 5—Legal representative—Who is.

For the purposes of O. 22 R. 5 Civil Procedure Code it is sufficient if a person has succeeded in forcing recognition of his status from the deceased and has intermeddled with the deceased's estate and is actually in possession of a portion of it. (*Le Rossignol and Martineau JJ.*) GOOR BACHAN SINGH v. GIAM SINGH. (1922) Lah. 175.

—O. 22, R. 8—Insolvency of plaintiff—

No application by Official Assignee for substitution—Subsequent annulment of adjudication—Application by original plaintiff to be restored—Limitation. See (1921) DIG. COL. 279. KHUNNI LAL v. RAMESHAR. L. R. 3 A. 40 : (1922) All. 361. 64 I. C. 52.

—O. 22, R. 9 (2)—Application under—  
Formal order of abatement—Necessity for.

O. 22 R. 9 (2) C. P. Code contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. 36 A. 235 foll.; 42 A. 540 not foll. (*Ryves and Gokul Prasad, JJ.*) MUS SAMMAT GUJRATI v. SITAI MISSEER. 44 All. 459 : (1922) All. 209 : 66 I. C. 554.

—O. 22, R. 10 and S. 47—Ascertainment of mesne profits—Tenancy created pendente lite—Transfer of tenant—Bad.

In execution of a decree for possession and mesne profits, there was an enquiry made as to

C. P. CODE (1908), O. 22, R. 10

mesne profits. During the pendency of the suit the defendant had leased the property, but he had surrendered the lease as soon as he came to know of the decree. On the question arising if he could be made party in the execution application and made liable for mesne profits.

Held, there was no devolution of interest within the meaning of O. 22, R. 10 C. P. Code nor would question of his liability fall under S. 47 C. P. Code. Injustice arising by adding him as party and general principles referred to. (*Lord Phillimore.*) MAHA RAJA SIR MANINDRA CHANDRA NANDI v. RAM LAL BHAGAT. 43 M. L. J. 589 : 31 M. L. T. 131 (P. C.) : 27 C. W. N. 29 : 36 C. L. J. 542 : 16 L. W. 905 : (1922) P. C. 304 : 4 U. P. L. R. (P. C.) 88 : 20 A. L. J. 988 : 24 Bom. L. R. 1251 : 68 I. C. 973 : 49 I. A. 220 (P. C.)

—O. 22, R. 9—Abatement—Ignorance of death of party—If an excuse.

Mere ignorance of the fact of death is not a sufficient excuse under O. 22, R. 9. (*Broadway and Abdul Qadir, JJ.*) CHUNI LAL v. KALA KHAN. 4 Lah. L. J. 171 : (1922) Lah. 61 : 67 I. C. 596.

—O. 22, R. 9—Setting aside abatement—  
Procedure.

Before an abatement is set aside, the Court has to be satisfied that there was sufficient cause for not applying in time. Ignorance of death, standing by itself, may be sufficient cause; but if it is accompanied by great delay and dilatoriness it would be otherwise. (*Sanderson, C. J. and Richardson, J.*) SARAT CHAND SARKAR v. MAIHAR STONE AND LIME CO. LTD. 49 Cal. 62 : (1922) Cal. 335 : 67 I. C. 917.

—O. 22, R. 10—Applicability of.

O. 22, R. 10 applies only to cases which do not fall under the preceding rules of the same Order. (*Ayling and Venkatasubba Rao, JJ.*) DAKOJU SUBBARAYADU v. MUSTI RAMADASU. 42 M. L. J. 301 : 30 M. L. T. 202 (H. C.) : 15 L. W. 309 : (1922) M. W. N. 375 : 68 I. C. 942.

—O. 22, R. 10—Devolution of interest—Gift by father to son—Suit for preemption—Right to continue the suit.

Where a father a cosharer in a village had filed a suit for pre-emption in respect of a sale made by another cosharer and during the pendency of the suit executed a deed of gift of all his properties in favour of his only son Held that the son was entitled as donee to maintain the suit in the place of his father. (*Simpson and Wazir Hassan, A. J. C.*) MIRZASADIQ HUSAIN v. MAHOMED KARIM. 9 O. L. J. 456.

—O. 22, R. 10—Pendency of suit.

Quære whether the expression the pendency of the suit in O. 22 R. 10 C. P. Code covers the period between the original and an amended decree. (*Oldfield and Ramesam, JJ.*) NARAYANA AYYAR v. BIVARI BIVI. 43 M. L. J. 559 : (1922) M. W. N. 731 : 16 L. W. 623.

C P CODE (1908), O. 22, R. 10.

—O. 22, Rr. 10 and 3—*Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to.*

Where a public trust is represented at different stages of a suit by different representatives, one not claiming under the other, the rule applicable to the case is O. 22, R. 10 and not O. 22, R. 3 of the C. P. Code. In a case failing under O. 22, R. 10 the Court has wider discretion to allow amendment and new pleas at the instance of a representative than it has under O. 22, R. 3 on the application of a legal representative. (*Ayling and Krishnan, JJ*) *SUNDARESAN CHETTY v. VISVANATHA PANDARASANNADHI AVERGAL.*

45 Mad. 703 : 43 M. L. J. 147 : 16 L. W. 83 :  
31 M. L. T. 66 (H. C.) : (1922) M. W. N. 444 :  
(1922) Mad. 402.

—O. 22, Rr. 10 and 4—*Scope of—Pending suit—Death of judgment-debtor after preliminary and before final decree—Legal representative*

After the preliminary and before the final decree where the judgment-debtor dies, and more than six months after his death an application is made to bring his legal representatives on the record, such application falls under O. 22, R. 10 and not under O. 22, R. 4, C. P. C., and is not barred by time. (*Hallifax, A. J. C*) *TULARAM v. TUKARAM.*

64 I. C. 307.

—O. 23, R. 1—*Applicability of—Probate proceedings—Permission to withdraw—Nature of*

O. 23, R. 1, C. P. C. does not apply to probate proceedings the provisions in S. 55 of the Prob. and Adm. Act relating to the applicability of the C. P. Code to such proceedings being qualified by the words "so far as the circumstances of the case will admit" 40 I. C. 345 ; 20 C. W. N. 999 and 21 B. 435 Rel. 38 B. 309 dist. (*Shudlal and Martineau, JJ*) *BANWARI LAL v. KRISHNEN DEVI.*

2 Lah. L. J. 242 : 67 I. C. 1002.

—O. 23, R. 1—*Bar under—Nature of—Subject matter includes defence.*

The bar under O. 23 R. 1 is in respect of the subject matter and not cause of action. The subject matter of a suit includes the defence made. (*Hopkins, S. M*) *BHAGWAN SAHAI v. JHABBU LAL.*

L. R. 3 A. 218 (Rev.)

—O. 23, R. 1—*Execution proceedings—Withdrawal of—Order of rejection—Appeal.*

O. 23, R. 1, C. P. Code does not in terms apply to withdrawal and abandonment or execution proceedings but there is nothing to prevent a decree holder from withdrawing his execution application. If the courts persists in selling property of the judgment debtor in spite of the prayer of the decree holder not to proceed with execution it acts without jurisdiction (*Jwala Prasad and Ross, JJ.*) *CHAUDHURY RAM PRASAD RAI v. MAHESH KANT.*

1 Pat. 232 :

3 Pat. L. T. 445 : (1922) P. 525.

—O. 23, R. 1—*Formal defect—Allegation—Proof—Leave to withdraw—Revision.*

A Court ought not to grant leave to withdraw a suit with liberty to sue afresh on a mere allegation that there is a formal defect, without satisfying itself that it does exist as a matter of fact. An

C. P. CODE (1908), O. 23, R. 1.

order granting leave to withdraw without sufficient or proper cause can be interfered with in revision. (*Richardson, J.*) *SRIMATI KIRANMOY DASI v. RAMA NATH PAL.*

64 I. C. 556.

—O. 23, R. 1—*Leave to withdraw Suit with liberty to sue afresh—Grounds for.*

The fact that notices on the heirs of a deceased defendant could not be served is no ground for allowing plaintiff to withdraw a suit with liberty to file a fresh suit. (*Shah, A. J. C., and Crump, J.*) *LAKSHMIBAI JAGANNATH JOSHI v. YESHWANT VITHAL BAGKAR,*

24 Bom. L. R. 909.

—O. 23, R. 1—*Leave to withdraw part of the claim—Power of Court to grant leave.*

On an application by plaintiff to withdraw a part of his claim with liberty to bring a fresh suit on the ground of misjoinder of causes of action and parties, the Court, found there was no misjoinder as alleged in the petition but still granted the leave without stating any grounds for allowing the same. *Held*, that the plff. ought not to have been allowed leave to withdraw a part of the claim (*N. R. Chatterjee and Panton, JJ.*) *GOPAL CHANDRA BANDOPADHYA v. BENODE BEHARY ROY MANDAL.*

64 I. C. 82.

—O. 23, R. 1—*Leave to withdraw suit—Not a decree and not appealable.*

An order granting permission to the plff. to withdraw a suit or to abandon a part of his claim is not a decree and is not therefore appealable, 18 C. 322 : 27 C. 362 ; 15 A. 169 ; 17 A. 97 Ref. (*Abdul Rauf and Martineau, JJ*) *SANT RAM v. MT. SAHIB KAUR.*

(1922) Lah. 267 :

65 I. C. 719.

—O. 23, R. 1—*Leave to withdraw suit with liberty to sue afresh—Grounds for—Improper grant of leave—Remedy of aggrieved party—Appeal—Revision—Suit.*

The circumstances contemplated by O. 23, R. 1 of the Code are confined to those mentioned in Cls. (a) and (b) of R. 1, sub-r. (2) of the Order, and do not include a case where the Court making the order is not satisfied that the circumstances mentioned in cls. (a) or (b) exist. If the Court is not satisfied that the circumstances contemplated in the rule exist then it has no jurisdiction to make the order as the jurisdiction is only conferred where the Court is so satisfied. If this condition is not fulfilled it is clear that the jurisdiction does not arise. In all cases where an order under the rule is made it must be presumed in the absence of proof to the contrary that the Court was satisfied that the conditions in one or other of the cls. (a) and (b) existed.

Where the Court had jurisdiction to make the order, it is not open to the Court in a subsequent suit to question the propriety of his decision, or to consider whether in fact there existed a formal defect or other sufficient ground for the order. Where jurisdiction is conferred to determine a particular question and the Court having jurisdiction determines it, the decision is binding upon the parties, whether right or wrong, until it is set aside by some process known to the law in that suit. This may be done either by review of judgment or by appeal or revision where such procedure is permitted by law in the particular

## C. P. CODE (1908), O 23, R. 1.

case It cannot be done in a collateral proceeding. To hold otherwise would be to destroy the finality of all legal proceedings and to render a determination of rights by a Court of law impossible. 24 C W N. 723 (F. B.) foll. 3 P. L. J. 404 (1920) Pat. 232 overruled (*Dawson Miller, C. J. Mullick and Jwala Prasad, JJ.*) Rāj KUMAR MAHTON v RAM KHELAWAN SINGH.

1 Pat 190 (1922) Pat 17 64 I C 387  
3 Pat L. T. 80 (1922) P. 44

—O. 23, R. 1—Leave to withdraw suit on payment of costs—Omission to pay costs within time fixed—Effect of.

Where leave to withdraw a suit with liberty to bring a fresh suit is given on payment of defendant's costs within a fixed time, the non-payment of the costs within the time does not operate as a dismissal of the suit or as a bar to the institution of the fresh suit, unless the order granting leave had itself provided that on such non-payment the suit should stand dismissed. Otherwise, if a fresh suit is brought without payment of costs the proper procedure is to stay the hearing until the costs are paid. 19 C. L. J. 7529 foll., 14 C. L. J. 105; 31 C. 965, 2 C. L. J. 480 Ref. (*Mookerjee, A. C. J. and Fletcher, J.*) DEB KUMAR ROY CHOUDHURY v. DEB NATH BARNA BIPRA. 64 I. C. 738

—O. 23, R. 1—Leave to withdraw suit with liberty to sue again—Order granting leave without considering or recording any grounds—Interference in revision See C. P. CODE, S. 115 AND O 23, R. 1, 64 I C 948.

—O 23, R. 1—Propriety of permission to withdraw—Not open to question—Withdrawal of some plaintiffs—Legality

When permission is granted to withdraw from a suit with liberty to bring a fresh suit, no other court can question the propriety of such permission.

Where the court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the court acts without jurisdiction and a fresh suit is barred (*Jwala Prasad and Ressa, JJ.*) MT. RAM DEVI v. MT. BAHU PRASAD. 1 Pat. 228 : (1922) P. 489.

—O. 23, R. 1—Withdrawal of suit—Omission to adduce evidence. See (1921) DIG. COL. 282. INDU BHUSAN SARKAR v JATU MULLIK. 35 C. L. J. 161

—O. 23, R. 1—Withdrawal of suit with liberty to sue—Finality of order—Institution of subsequent suit.

Where a suit has been allowed to be withdrawn with liberty to sue afresh, the court trying the subsequent suit is not competent to enter into the question whether the court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order. (*Chatterjee and Newbould, JJ.*) SAMADDI SHERIKH v. FULBASH BEWA. 65 I. C. 704.

—O. 23, R. 1—Withdrawal of suit with leave to sue—Formalities necessary for—Improper grant of Leave—Effect of—Grant of leave by implication.

## C. P. CODE (1908), O 23, R. 3.

The permission mentioned in O. 23, R. 1 C P C. need not be express, and it is sufficient if the grant of permission can be implied from the order read with the application on which the order was passed. 3 P. R. 1905 at p. 25 and 97 P. R. 1916 diss.

It is not open to the defendants to question the propriety of the order granting the permission which has become final 15 I. C. 175 foll (*Shadi Lal and Martineau, JJ.*) BANWARI LAL v KISHEN DEVI. 2 Lah. L. J. 242 : 67 I. C. 1002

—O. 23, R. 1—Withdrawal—Powers of appellate Court.

To give an Appellate court jurisdiction to act under O. 23, R. 1 cl. (2) there must be either some formal defect or something in the nature of a formal decree *ejusdem generis* under sub-clause (b). Otherwise the court has no jurisdiction to act under the order (*Greaves, J.*) UDOY CHAND v MULLA REASAT HOSSAIN (1922) Cal 58

—O. 23, R. 1—Withdrawal of suit—Reasons for granting leave—Bar of O. 2, R. 2, C P Code.

Where a suit is brought for the interest due on a mortgage, it is not a sufficient cause for granting leave to withdraw the suit with liberty to sue afresh that a subsequent suit for the principal would be barred by O. 2, R. 2, C P Code. (*Scott Smith, J.*) PARDUMAN CHAND v GANGA RAM. 66 I. C. 285

—O. 23, R. 1 (3)—Withdrawal of suit—Fraud or collusion—Effect of

The operation of O. 23, R. 1 (3) C P Code which prohibits a fresh suit in respect of the same subject-matter is subject to the provisions of S. 44 of the Evidence Act which allows a party to prove that a decree was obtained by fraud or collusion. (*Hopkins, S. M. and Fremantle, J. M.*) AMIR SINGH v. JAI RAM. L. R. 3 A. 84 (Rev).

—O. 23, R. 2—Adjustment—Award—Supersession of—Subsequent reference through court.

In a suit for dissolution of a partnership and taking accounts the parties referred their disputes to arbitration without the intervention of the court. An award was made and the plaintiff applied to the court to file the award as an adjustment under O. 23, R. 3, C. P. Code. Subsequently both the parties applied to the court to appoint an arbitrator for settling their disputes. The court made an order accordingly but the arbitration failed. Thereupon the plaintiff sought to proceed with his application under O. 23, R. 3 C. P. Code. Held that the previous arbitration proceedings had been annulled when the parties agreed to the appointment of an arbitrator by the court and that the prior award could not be filed as an adjustment under O. 23, R. 3 C P. Code. (*Macleod C. J. and Coyajee, J.*) KHM-CHAND NAROTAMDAS v. BHOGILAL HIRACHAND. 24 Bom. L. R. 361 : 67 I. C. 913.

—O. 23, R. 3—Award in a pending suit—Private arbitration—If enforceable.

Where in a pending suit the parties submitted their disputes to private arbitration, the award cannot be enforced under O. 23, R. 3 C P. Code

C. P. CODE (1908), O. 23, R. 3.

25 C. W. N. 127 and 40 Bom. 386 followed; 45 Bom. 245 dissented from. Necessity for arbitration through court pointed out. (*Rankin, J.*) AMAR CHAND CHAMARIA v. BANWARI LALL RAKSHIT. 49 Cal. 608 : (1922) Cal. 404.

—O. 23, R. 3—Award—Compromise modifying—Decree on—Power of Court to pass decree.

It is competent to a court on an application under Sch. II, para 20, C. P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties. (*Kanhaya Lal, J. C. and Daniels, A. J. C.*) HAKIM FAZAL AHMAD v. ENAYAT AHMAD. 9 O. L. J. 219 (1922) Oudh 189 : 68 I. C. 209.

—O. 23, R. 3—Compromise decree—Relief granted to defendants—Execution.

Where a Court passes a decree on the basis of a compromise there is nothing to prevent it from granting a relief to a defendant which can be executed provided that relief has been agreed to by the parties and is one of the considerations on which the compromise is based, 18 Mad. 410 30 Mad. 478; 5 C. W. 485 ref to (*Lyle, A. J. C.*) BISHESHAR SINGH v. MAHOMED YASIN ALI KAHN. 25 O. C. 53 : 9 O. L. J. 276 : (1922) Oudh 150 : 68 I. C. 232.

—O. 23, R. 3—Compromise decree—Tenancy—Forfeiture—Relief against—Ejectment—Tenancy created under decree on consent See (1921) DIG. COL. 284. GOPAL KRISHNA NATH v. HARI NATH KAPURTHI. 66 I. C. 766

—O. 23, R. 3—Compromise as between some of the parties—Effect on others. See (1921) DIG. COL. 283. MUSSAMMAT BHAGWATI KUER v. JAGDAM SAHAY. 6 Pat. L. J. 604.

—O. 23, R. 3—Compromise—Decree—Form of—Recital of compromise—Compromise beyond suit.

Where a compromise goes beyond the subject-matter of the suit, the proper procedure for the court is to recite the compromise in the decree but to make part of the decree only so much of the compromise as relates to the subject-matter of the suit, 47 Cal. 485 (P. C.) Ref (*Mookerjee and Panton, JJ.*) JIVAN KRISHNA CHAKRAVARTHY v. RAMESCHANDRA DAS. 65 I. C. 47.

—O. 23, R. 3—Compromise decree—Passing of—Portion of claim not within jurisdiction—Effect of.

Where the claim is beyond the jurisdiction of the trial court, it is not competent to the court to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10, C. P. C.

Per *Coutts Trotter, J.*—The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the court and the decree on the compromise was valid (*Sadasiva Iyer and Coutts Trotter, JJ.*) GOVINDASAMI KADAVAKAR v. KALIAPERUMAL. (1922) M. W. N. 83 : 16 L. W. 155 : 66 I. C. 837.

—O. 23, R. 3—Compromise relating to matters outside suit—Persons not parties to suit—Estoppel—Res judicata.

In a partition suit among some minor brothers a consent-decree was put in by the mother and

C. P. CODE (1908), O. 23, R. 3.

some adult brothers who were not parties to the suit, according to which the latter relinquished their shares in the mother's property in favour of the minor brothers. In a subsequent suit by one of the adult brothers for his share in the mother's property.

*Held*, (1) the consent decree was bad in so far as it related to matters extraneous to the partition suit;

(2) it did not have the effect of an estoppel or res-judicata; and

(3) it could not under the circumstances have effect as a family arrangement (*Rankin, J.*) SHASHI BHUSAN SHAW v. HARI NARAIN SHAW, 48 Cal. 1059 : 66 I. C. 705.

—O. 23, R. 3—Compromise of suit—Power of Court to go behind—Dekhan Agri. Rel. Act. (XVII of 1879) S. 12.

In a suit to recover the amount of a promissory note from an agriculturist, the latter admitted the note but denied consideration and prayed for an account. When the suit came on for hearing a compromise was presented to the Court under which the defendant agreed to pay the amount of the suit and costs in instalments. The defendant, when examined, said that he had agreed to the compromise though he did not understand the accounts and that he had received only a small amount from the plaintiff many years ago. The Court disregarded the compromise and dismissed the suit on the merits. On appeal :—

*Held*, by *Macleod, C. J.*, that, on an application to record an agreement under O. 23, R. 3 Civil Procedure Code the Court could go behind the transaction, provided it was perfectly clear that the whole of the plaintiff's claim was admitted.

*Held*, by *Shah J.*, that inasmuch as the defendant admitted the plaintiff's claim without full knowledge of his legal rights, the application of S. 12 of the Dekkhan Agriculturists' Relief Act was not excluded by O. 23, R. 3 of the Civil Procedure Code. 8 Bom. 20, 34 Bom. 502; 35 Bom. 120; 37 Bom. 614, Ref.

Per *Macleod, C. J.*—O. 23, R. 3 does not oust the jurisdiction of the Court in this class of cases from inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor.

Per *Shah J.*—According to the decisions the provisions of O. 23, R. 3 C. P. C. whenever they are applicable must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. Thus if in any suit it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith so far as it relates to the suit. " (*Macleod, C. J., and Shah, J.*) GOTURAM RADHAKISAN v. BARKU DODHU.

24 Bom. L. R. 88 : 46 Bom. 560 : (1922) Bom. 331 : 67 I. C. 253.

—O. 23, R. 3—Petition of Compromise—Judgment not delivered—Duty of Court See (1921) DIG. COL. 286 TANGIPULA NAGIAH v. SESHAMMA. 65 I. C. 82.

C P CODE (1908), O 25, R 1.

———O. 25, R. 1—Security for costs—Residence out of British India—Temporary residence for purposes of suit. See (1921) DIG. COL. 286. HANIF MAULABAKSH v. KULSUM.

46 Bom 589. (1922) Bom. 299 : 64 I. C. 703.

———O. 25, R. 1 (3)—Suit for payment of money—Dissolution of partnership accounts and recovery of stridhanam property

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within O 25 R. (1) (3) C. P. Code. (*Greaves and Ghose, JJ*) AMULYA SUNDARI DASSYA v. SYAMA SUNDAR SAHA.

68 I. C. 607

———O. 26—Scope of—If amplifies or enlarges the application of S. 75.

See C P. CODE S. 75 AND O. 26 3 Lah. 209

———O. 26, R. 2—Examination of witnesses on commission—Dismissal of application without enquiring or satisfying that evidence is unnecessary or irrelevant—Interference in revision. See C. P. CODE S. 115 AND O. 26, R. 2.

64 I. C. 821

———O. 26, R. 3—Examination de bene esse—Irregularities in—Objection—Waiver. See (1921) DIG. COL. 286 DINA NATH LAW v. METHARAM NAVALRAI & Co.

64 I. C. 785.

———O. 26, R. 4—Examination of witnesses—Rights of plaintiff and defendant—Discretion of Court—Interference—Revision.

Where an application is made by a defendant, who lawfully resides out of the jurisdiction of the Court, according to the ordinary course of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. *Ross v. Woodford* (1894) 1 Ch 38 and *New v. Burns*. 64 L. J. Q. B. 104 Ref.

In cases under O. 26, R. 4 C P Code a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. O 16, Rr. 19 and 21 apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to a suit, but are required to give evidence as witnesses. They have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. Such a case is governed by O. 26, R. 4 C. P. Code :—

A court of appeal should exercise great caution when invited to interfere with an order of the trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. Each case depends on its own circumstances and no rule as to the exercise of that discretion could be laid down. If the Appellate Court deems that the discretion was wrongly exercised, if it deems that the case in all its bearings was not laid before the Court below, if it sees that the Court below misapprehended an important part of the case, the Court will interfere. The High Court in revision set aside the order of the lower Court, where that

C. P. CODE (1908), O. 30, R. 3.

Court overlooked the distinction which should be observed in the treatment of an application by the defendant as distinguished from a similar application by the plaintiff, and ordered the defendant to be examined on commission on payment of costs to the plaintiff for cross-examination (*Mookerjee and Panton, JJ.*) KUMAR SARAT KUMAR RAY v. RAM CHANDRA CHATTERJEE.

35 C. L. J. 78. (1922) Cal 42

———O. 29—Scope of—Suit against corporation See (1921) DIG. COL. 287 SINEHI RAM BIHARI LALL v. THE AGENT, EAST INDIA RAILWAY CO.

64 I. C. 125.

———O. 30—Scope of provisions.

The effect of the provisions regarding suits against partners in the firm name is merely to give a compendious mode of describing in the writ the partners who compose the firm ; in effect the partners are sued individually. The firm name is a mere expression and not a legal entity (*Ghose, J*) RAM PROSAD CHIMONLAL v. ANUNDJI & Co.

49 Cal. 524 : (1922) Cal. 408

———O. 30—Partnership—Suit for dissolution and accounts—Parties—Names of partners disclosed—Application for substitution of representatives. See (1921) DIG. COL. 288 FULIN BEHARI ROY v. MAHENDRA CHANDRA GOSAL. 67 I. C. 10.

———O. 30, R. 1—Firm including a minor partner—Reference of suit to arbitration—Sanction of Court.

Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of O. 32. Where the matter is referred to arbitration, it is not necessary that the court should give assent under O. 32, R. 7. (*Harrison, J.*) SUKHA NAND v. BEHARI RAM ISHAR DAS.

68 I. C. 750.

———O. 30, R. 1—Firm—Suit by—Change of partners—New firm—Suit on old contract—Parties.

The cause of action in respect of a contract with a firm vests in all the partners jointly and if after the contract, one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. If the new partnership brings a suit in its own name, it cannot by substituting the names of the old partners alter the period of limitation for instituting the suit and avoid the bar of limitation. (*Kemp, A. J. C.*) FIRM OF MANGHOOMAL JETHANAND v. FIRM OF ARATMAL SATRAMDAS.

15 S. I. R. 152 : 65 I. C. 26 : (1922) Sindh 13.

———O. 30, Rr. 3 and 5—Ex parte decree—Setting aside of—Service of summons—Suit against firm—Leave to serve by registered post—High Court Rules Ch. VII, R. 11.

An ex parte decree was obtained against a firm which had been sued in the firm name and served as such with the leave of Court, by registered post. It was alleged in an application to set aside the ex parte decree by the applicant that the summons was not duly served and that the firm had long ceased to carry on business as such firm but was being wound up by the applicant. Held, a suit

C. P. CODE (1908) O. 30 R. 8

can be brought against a firm in its firm name even if it be a dissolved firm provided only that the liability arose at a time when the firm was in existence. Under O 30, R. 3, the only way in which such writ can be served is by serving it either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. If rule 11 of Chapter VIII of the High Court Rules is applied it is necessary that it should be so applied as to comply with O 30, R. 3. (*Rankin, J.*) **HAKJIBAN-DAS GORDHANDAS v. BHAGWANDAS PURSRAM**

(1922) Cal 390

———O. 30, R. 8—Appearance as defendant under protest—Issue whether he is a party to be decided by court—Practice—Procedure. See (1921) DIG. COL. 288. **VITHALDAS NAROTHAM BHATT. v. HANSRAJ AMARCHAND.**

64 I. C. 688

———O. 31 R. 2—Suit against temple—Parties In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. (*Odgers and Devadoss, JJ.*) **ADIRAJU ARASU KANNIKKE BALLALA v. PATTU.**

(1922) Mad. 405.

———O. 32, Rr. 3 and 4—Execution proceedings—Applicability of the rule—Minor judgment debtor.

The provisions of O. 32, C. P. Code, relating to "suits by or against minors" have no direct application in proceedings in execution, after the rights of the parties have merged in a good and valid decree. The "lis" in respect of which it is essential that a minor defendant should be represented by a duly appointed guardian is at an end after the decree is passed. In determining whether a minor was sufficiently represented in the execution proceedings Courts are at liberty to look at the substance of the transaction. (*Sanderson, C. J. and Richardson, J.*) **FANI BHUSAN BHUIAN v. SURENDRA NATH DAS**

35 C. L. J. 9: 64 I. C. 25.

———O. 33, R. 3—Guardian ad litem not appointed—Interests represented by manager—Proceedings if ineffectual.

Where the minors were sufficiently represented by the manager of the family the mere fact that there was no formal order appointing the manager-guardian ad litem will not enable them to escape the liability under the decree 36 All. 383 reld. to, (*Kanhaya Lal, J. C.*) **SAT DEO v. JAI NATH.** 90 L. J. 141: 4 U. P. L. R. (O. C.) 43: (1922) Oudh 75: 67 I. C. 808.

———O. 32, R. 3—Minor defendant—Guardian ad litem not appointed—Dismissal of entire suit—Common interest.

Where one of the defts. in a suit for a declaration of a right of way is a minor, and he is not represented by a guardian the suit ought to be dismissed. No effective decree can be made in the absence of one of the persons jointly interested in the alleged servient tenement. 25 C. W. N.

C. P. CODE (1908) O. 32 R. 4.

249 at p. 252, foll. (*N. R. Chatterjea and Panton, JJ.*) **SADHU CHARAN PAL v. INDRA MOHAN MISTARI.**

64 I. C. 90.

———O. 32, R. 3—Minor defendant—Guardian ad litem—Appointment of head clerk—Guardian's address and whereabouts known—Procedure illegal—decree—Setting aside—Inherent power of court.

Where a court after knowing of the existence and address of the guardian of the minor defendants in a suit, did not order fresh notice to the guardian but made the Head clerk of the court the guardian of the minors and proceeded with the suit in consequence of which there was no proper defence to the plaintiff's suit, Held that the decree and the execution sale which followed it were illegal and not binding on the minor and that the court had inherent power to set aside the decree and the execution sale after imploding the auction purchaser as a party. 35 A. 331 P. C. 43 M. 94: 42 I. C. 711 Ref. (*Devadoss, J.*) **JAMBU AMMAL v. MINOR NATARAJAM PILLAI**

31 M. L. T. 215 (H. C.): (1922) Mad. 485.

———O. 32, Rr. 3 and 4—Minor defendant—Guardian ad litem—Appointment of—Duty of Court—Absence of notice to guardian—Ex parte decree—Decree if binding on minor.

It is duty of the Court to appoint a guardian ad litem for a minor defendant under O. 32, R. 2, C. P. C. No person can be appointed guardian without his consent. At the same time where the court has given sanction and approval for the appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceedings. A mere irregularity in the appointment of a guardian ad litem will not render the decree passed against the minor null and void, unless it is proved that the minor's interests have suffered thereby. At the same time where no notice or summons is served on the guardian of the minor, and no order was made appointing a guardian for the minor, and there was no appearance by the so-called guardian at any stage of the proceedings, a decree passed against the minor is not binding on him 26 C. L. J. 258: 37 A. 179: 20 C. L. J. 469: 2 P. L. T. 617 Relied on. (*Jwala Prasad and Adam, JJ.*) **RANI CHATTRA KUMARI DEBI v. PANDA. RADHA MOHAN SINGARI.** 66 I. C. 137: 3 Pat. L. T. 451: (1922) P. 291

———O. 32, Rr. 3 (1) and 4 (3)—Guardian—Minor defendant—Certificated guardian—Appointment of without his consent—Proposed guardian appealing against decree. See (1921) DIG. COL. 289 **ANKADA PRASAD v. UPENDRA NATH DAY SIRCAR.** 26 C. W. N. 781: 65 I. C. 18.

———O. 32 R. 4 (3)—Minor—Appointment of guardian—Consent of guardian whether necessary—Prejudice of minor whether necessary for setting aside the decree.

An appointment without his consent of a guardian for a minor in a suit is without jurisdiction. The provisions of O. 32 R. 4(3) in respect of consent are mandatory and there is nothing in the law to suggest that, unless it is established



C. P. CODE (1908) O. 32, R. 4

that the minor is prejudiced, he cannot get relief. (*Coutts and Das, JJ.*) SHAIKH SAJJAD HUSSAIN v. SAKAI RAI. (1922) P. 448

—O. 32, R. 4—*Suit on mortgage by manager of joint Hindu family—Minor members impleaded—Manager appointed guardian ad-litem Decree if binding on minor.*

Where in a suit to enforce a mortgage executed by the manager of a joint Hindu family he is himself appointed guardian *ad-litem* of the minor members impleaded in the suit, and a decree is passed on confession of judgment, the decree is a nullity as against the minors for the manager was not a proper person to be appointed as guardian 25 B. 337; 30 C. 1021, 38 A. 315, 43 A. 104 Ref (*Lindsay and Ryves, JJ.*) MURLIDHAR v. PITAMBAR LAL. 44 A. 525 :

20 A. L. J. 329 : 4 U. P. L. R. (A) 170 : (1922) All. 91 : 66 I. C. 372.

—O. 32, R. 4 (3)—*Old Code—Consent of Guardian—Presumption. See (1921) DIG COL 291* SARAT CHANDRA MAITI v. BIBHABATI DEBI

66 I. C. 433.

—O. 32 R. 5—*Appointment of guardian—Ad-litem—Appeal from decree preferred by another next friend.*

Where a guardian ad litem has been once appointed by the court for a minor deit his appointment enures for the *lis* in the course of which it was made unless and until revoked by the court. Consequently an appeal against a decree passed against the minor can only be preferred by him, 44 A 35; 22 M 187; 2 A L J 482 foll. (*Stuart and Ryves, JJ.*) SHAMBOO v. KANHAYAN.

44 A. 619 : 20 A. L. J. 599 : L. R. 3 A 512 : (1922) All. 332.

—O. 32, R. 6—*Creditor—Minor plaintiff—Right of debtor to demand security.*

Where a defendant admitted liability for a debt but refused to pay it to the minor legal representative of the deceased creditor unless his interests were safeguarded. *Held*, that the defendant was not legally bound to pay the money to the minor till he was satisfied that his interests would not suffer and that, therefore, in a suit by the minor's next friend for the debt the deft. should not be made liable for the plff's costs. (*Broadway and Abdul Qadir, JJ.*) THAKAR DAS v. THE FIRM OF BASHI MAL KISHEN CHAND.

64 I. C. 385.

—O. 32, R. 7—*Arbitration—Reference—Minor parties—Absence of Court's sanction—Effect of—Award not void but voidable—Decree on award—Revision—No interference. See C. P. CODE, S. 115 AND SCH. II PARA. 16* 65 I. C. 50.

—O. 32 R. 7—*Compromise without leave of court—not void—Minor's suit to set aside—Limitation. See (1921) DIG COL. 292* JITA SINGH v. MIAN SINGH 4 Lah. L. J. 211 : (1922) Lah. 166.

—O. 32, R. 7—*Institution of suit in forma pauperis—Subsequent payment of court fee—Effect of—Limitation.*

Where an application for leave to sue in forma pauperis is presented together with the plaint

C. P. CODE (1908) O. 33, R. 9

and subsequently the applicant pays the full court-fee on the plaint the suit must be deemed to have been instituted on the day on the original presentation of the plaint and not on the date when the court-fee was paid. The payment was an admission on nothing more than that the applicant was at the time of the payment, in possession of means to make it and was no longer a pauper. The withdrawal of the application for leave to sue as a pauper must be deemed to be a submission to an order of dispauperisation and not to one of refusal of his original petition (*Hallifax, A. J. C.*) GOPIKISHAN v. BULAKIDAS, 18 N. L. R. 44 (1922) Nag. 160 : 65 I. C. 506.

—O. 32 R. 7—*Suit against firm—Minor member of firm—Reference to arbitration—Sanction of Court if necessary. See C. P. CODE O. 30 R. 1.* 68 I. C. 750.

—O. 32 Rr 8 and 9—*Pauper suit—Minor plaintiff—Costs to be paid by next friend.*

Where the next friend of a minor sues in forma pauperis, the Court can order the next friend to pay the costs of the defendant, (*Hallifax A. J. C.*) MAROTI v. BHAGI, 68 I. C. 465.

—O. 33, R. 2—*Right to sue in forma pauperis—Personal right—Death of applicant—Survival of right.*

The right to make an application to sue in forma pauperis is a personal right and does not survive to the heirs of the pauper. An application by the heirs of a pauper to be brought on record in such an application is not maintainable, but there is nothing to prevent them from making a fresh application for being allowed to sue as paupers (*N. R. Chatterjee and Suhrawardy, JJ.*) JATINDRA NATH GHOSE v. SOURINDRA NATH MITRA. 64 I. C. 63.

—O. 33, R. 5—*Order rejecting application for leave to sue in forma pauperis—Whether open to revision under S. 115 C. P. C. See C. P. CODE S. 115 AND O. 33 R. 5* 20 A. L. J. 55.

—O. 33 R. 9—*Suit in forma pauperis—Dispaupering—Concealment of property—Asset of doubtful value—Insurance policy.*

A plff was given leave to sue in forma pauperis in a case where otherwise he would have had to pay a Court-fee of over Rs. 500. Subsequently pending the suit the court found that he had omitted to state in his list of assets an insurance policy whose then value was Rs. 245. Thereupon the court dispaupered the plaintiff, asked him to pay the full court fee and on his failure to do so, dismissed the suit. *Held*, in revision, that even assuming that concealment of property in a particular case might amount to improper conduct, which by itself, would entitle the court to dispauper a plaintiff under O 33, R. 9, the facts which came to light in this case only demanded a further scrutiny by the Court to ascertain whether the plff had means, so that he ought not to be allowed to continue the suit as a pauper. If that scrutiny had been made, it would have been discovered, that plaintiff was still unable to pay the Court-fees,

C. P. CODE (1908), O. 33, R. 10.

(*Macleod, C. J. and Coyajee, J.*) SHANKARABHAT v. SHANKARABHAT.

24 Bom. L. R. 734 : (1922) Bom. 215.

—O. 33, R. 10 and 11—Pauper plaintiff—Partial success—Costs decreed to deft. exceeding amount decreed to plff.—Right of Govt. to a first charge. See (1921) DIG. COL. 294 T. V. CHAKRA PANI AYYENGAR v. THE GOVERNMENT OF INDIA.

42 M. L. J. 191 : 31 M. L. T. 38 (H. C.) : (1922) Mad. 125.

—O. 33, R. 10—*Suit in forma pauperis*—Amendment of plaint—Costs of application

Where a plaintiff has obtained leave to sue in *forma pauperis* and there after applies for amendment of the plaint it is not competent to the court to direct the plaintiff to pay the costs of the amendment then and there and on default dismiss the suit. (*Shah, C. J. and Crump, J.*) AMBAJI BALWANT RAO MANE v. HANMANT RAO BAJIRAO DESHMUKH.

24 Bom. L. R. 924 : (1922) Bom. 385.

—O. 34, R. 1—Mortgage suit—Parties—Hindu joint family—Minor members if necessary parties. See (1921) DIG. COL. 297. JAG SAH v. RAMCHANDRA PRASAD,

6 Pat. L. J. 640

—O. 34, R. 1—Mortgage suit—Parties—Joint Hindu family. See (1921) DIG. COL. 297. SHEIK ABDUL RAHMAN v. SHIB LAL SAHU.

6 Pat. L. J. 650 : (1922) Pat. 81 : (1922) P. 252. 4 U. P. L. R. (Pat.) 13

—O. 34, R. 1—Mortgage suit—Parties—All heirs of mortgagor if necessary parties—Addition of some after expiry of limitation. See (1921) DIG. COL. 396 HAR CHARAN ROY v. MAHOMED HASAIN.

66 I. C. 312.

—O. 34, R. 1—Mortgage suit—Parties—Owner of equity of redemption not impleaded—Effect of—Execution Sale—Purchase by mortgagee—Rights of purchaser

The possession of the purchaser at a sale by a mortgagee in execution of the decree in a suit brought by him on his mortgage, the owner of the equity of redemption not being a party to the proceedings, is not the possession of an owner of all the interests in the property. He buys subject to the equity of redemption, and therefore by virtue of his purchase, only steps into the shoes of the mortgagee. Where the mortgagee would be barred by limitation from bringing a suit to obtain possession or to have the property sold to realise the mortgage amount the purchaser would be equally barred. If the auction purchaser did not get possession he was bound to take proceedings to obtain the benefit of his purchase and he could not get possession unless he had that right as a successor to the original mortgagee. (*Macleod, C. J. and Coyajee, J.*) DATTATRAYA MANGESHAYA v. VENKATESH VASUDEO.

24 Bom. L. R. 741 : (1922) Bom. 334

—O. 34, R. 1—Mortgage suit—Parties—Suit by prior mortgagee without impleading puisne mortgagee—Effect of rights of prior mortgagee—Subsequent suit.

C. P. CODE (1908), O. 34, R. 1.

A prior mortgagee sued for foreclosure without impleading a puisne mortgagee. After that suit was barred by time the puisne mortgagee sued the same mortgagor for foreclosure of the same property without impleading the prior mortgagee. The puisne mortgagee got his decree first and obtained possession of the property. Held, the prior mortgagee could maintain a suit and obtain a decree against the puisne mortgagee for possession of the property subject to his right to redeem. 13 N. L. R. 69 : 32 C. 894 Foll ; 5 C. L. J. 315 : 14 A. L. J. 1146 not foll. (*Hallifax, Kotval and Dobby, A. J. C.*) JOGESHWAR v. MOTI. 66 I. C. 631.

—O. 34, R. 1—Mortgage suit—Parties—Suit by prior mortgagee without impleading puisne mortgagee—Decree—Execution sale—Rights of prior mortgagee purchaser—Right to hold prior mortgage as a shield.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee as a party and obtains a decree and in execution sale thereof purchases the property, he can in a suit by the puisne mortgagee to enforce his mortgage set up his prior mortgage right as a shield and insist on redemption. 31 C. 737 Rel. The puisne mortgagee is not entitled to bring the properties to sale in execution of his mortgage decree without redeeming the prior mortgage-purchaser. (*Prait and Duckworth, J.J.*) N. N. V. CHETTY FIRM v. K. A. P. L. CHETTY FIRM, 1 Bur. L. J. 217.

—O. 34, R. 1—Suit on prior mortgage—Puisne mortgagee if a necessary or proper party—Addition of puisne mortgagee—Limitation—C. P. Code O. 1, R. 9.

O. 34, R. 1 C. P. Code is subject to the provisions of O. 1, R. 9 C. P. Code and the combined effect of these rules as regards mortgages is that all persons whose rights may be adjudicated upon and determined in the suit ought to be added as parties but that failure to add one or more such persons should not have the effect of defeating the suit. The court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. A suit by a prior mortgagee without impleading the puisne mortgagee is not unsustainable though the puisne mortgagee is a proper party. The omission to implead the puisne mortgagee as a party to the suit within limitation does not involve a dismissal of the suit. 13 A. 432 ; 18 C. 164 Ref. (*Miller, C. J. and Mullick, J.*) SITAL PRASAD RAY v. ASHO SINGH. (1922) Pat. 326.

—O. 34, R. 1—Mortgage suit—Persons in possession of mortgaged property as transferees from mortgagor not impleaded as parties—Decree—Execution—Rights of purchaser.

Subsequent to the execution of a simple mortgage the mortgagor sold the property to defts who remained in possession. Thereafter the mortgagee brought a suit on the mortgage without impleading the defts and in execution of the decree purchased the property. Held, that the mortgagee purchaser was not entitled to possession of the property against the defts. 21 M. L. J. 213 ; 8 L. B. R. 266 ; 23 I. C. 791 foll. (*Robinson,*

C. P. CODE (1908), O. 34, R. 1.

C. J. and Duckworth, J.) S. P. S. CHETTY FIRM v. MAUNG PYAN GYI. 66 I. C. 562

—O. 34, R. 1—Mortgage Suit—Parties—Omission to implead person entitled to equity of redemption—Subsequent suit on mortgage.

Where a mortgagee brings a suit on his mortgage and obtains a decree thereon without impleading a person in whom the equity of redemption vested by transfer, it is open to him to sue again on the mortgage impleading the latter as a party and thus giving him an opportunity to redeem. (*Gokul Prasad and Stuart, JJ.*) *RAMPRA V. HAZARI LAL*. 4 U. P. L. R. (A) 42. 65 I. C. 654

—O. 34, R. 1—Mortgage suit—Parties—Person claiming title under mortgage—Omission to implead—Effect of.

Where a mortgagee or a person claiming title under him forecloses the mortgage in a suit without impleading a person claiming title under the mortgagor subsequent to the mortgage, the latter is not affected by the decree in the foreclosure suit and the remedy of the mortgagee or his representative is to bring a fresh suit for foreclosure against the person deriving title from the mortgagor thus giving him an opportunity to redeem. (*Macnair, A. J. C.*) *SHEORAM V. JAMNABHAI*. 65 I. C. 503

—O. 34, R. 1—Mortgage—Prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Decree—Rights of prior mortgagee.

Where a prior mortgagee obtained a final decree for foreclosure in a suit on his own mortgage without impleading the puisne mortgagee as a party to the suit, it is open to the prior mortgagee who, after the foreclosure decree, represents the interest of the mortgagor to deposit in court the money due on the puisne mortgage under S. 83 of the T. P. Act and claim to redeem the puisne mortgagee. The puisne mortgagees were entitled in equity only to the payment of their mortgage money. 28 B. 153; 1 C. 445 foll. 29 I. C. 794; 8 C. L. J. 173 dist. (*Ryves and Gokul Prasad, JJ.*) *PARASRAM SINGH V. PANDOH*. 20 A. L. J. 401. L. R. 3 A. 217. 4 U. P. L. R. (A) 145; (1922) All. 135.

—O. 34, R. 1—Mortgage—Redemption—Sub-mortgage—Parties to suit.

In a suit by a mortgagee to redeem his Sub-mortgage the original mortgagor is not a necessary party, though there is no impropriety in impleading him. (*Shah, A. C. J. Crump, J.*) *GANESH MORESHWAR JOSHI V. VASUDEO VITHAL PARANJE*. 24 Bom. L. R. 911. (1922) P. 424; 63 I. C. 741.

—O. 34, R. 1—Prior and puisne mortgage—Rights of—Purchase in execution of a decree on the mortgage—Rights of purchaser as against puisne mortgagee—Suit for money. See (1921) Dig. Col. 298. *MUSSAMMAT SUKHI V. GHULAM SAIFDAR KHAN*. 42 M. L. J. 15.

26 C. W. N. 279; L. R. 3 P. C. 1; 30 M. L. T. 175; 24 Bom. L. R. 590; (1922) P. C. 11; 65 I. C. 151 (P. C.)

C. P. CODE (1908), O. 34, R. 3.

—O. 34, R. 2 and 3—Mortgage decree for payment by instalments and not fixing a date—Whether decree-holder required to apply for a final decree—Court's power enlarge time.

When a preliminary decree for payment by instalments whether extending over 6 months or not is passed by consent of the parties in a mortgage suit, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution and the court has the same powers in regard to enlargement of time for payment allowed by such a decree as it has with any other mortgage decree. (10 C. L. J. 19 and 14 C. L. J. 648) not followed (*Hallifax, A. J. C.*) *NALAYAN V. DAULAT*.

(1922) Nag 182; 67 I. C. 273.

—O. 34, R. 2, Cl. (c)—Time for redemption—Time fixed by original decree—Dismissal of appeal—No extension of time.

Where the preliminary decree in a mortgage suit fixes a period of six months for redemption and an appeal from that decree is dismissed without extension of time by the appellate court, the period of six months runs from the date of the first court's decree and not from that of the appellate decree. (*Newbould and Cumming, JJ.*) *BASANTA KUMAR ADAK V. SM, RADHA RANI DAS*.

26 C. W. N. 440;

36 C. L. J. 159; (1922) Cal 329.

—O. 34, R. 3—Application for final decree for foreclosure—Limitation—Art 181 applicable. See LIM ACT, ART 181.

66 I. C. 97.

—O. 34, R. 3 and 5—Mortgage—Foreclosure decree—Extension of time—Confirmation on appeal.

Where the decree of an appellate Court confirming the lower Court's final decree for foreclosure allowed the Judgment debtors two weeks for paying the balance of the decretal money and directed that if they made the said payment, they would be put back in possession of the mortgaged property, but if they failed to do so their rights in it would be extinguished, Held the effect of the decree of the appellate court was merely to grant an extension of time for payment of the decree amount and therefore the judgment debtors were entitled to pay the decretal amount before the passing of the order absolute (*Kanhaya Lal, J. C.*) *GOKARAN SINGH V. MANGLI*.

66 I. C. 673.

—O. 34, R. 3—Preliminary decree for foreclosure—Right of redemption—Final decree not passed

The passing of a preliminary decree for foreclosure does not extinguish the right of redemption of the mortgagor. Consequently it is open to him to redeem at any time before the passing of the final decree even though the six months' time allowed by the preliminary decree has expired, 16 Cal. 246. 3 C. L. J. 533 foll. (*Chatterjee and Panton JJ.*) *YSAF ALI V. KASIM ALI*.

26 C. W. N. 532.

—O. 34, R. 3 and 5—Redemption—Person having interest in mortgaged property—Not

C. P. CODE (1908), O 34, R 4

*impleaded in mortgage suit—Right to redeem—Basis of redemption—Interest—Mesne profits.*

Where a person who had an interest in the mortgaged property was not made a party in the suit brought by the mortgagee his rights are not affected and he is still entitled to redeem.

In allowing him to redeem, accounts must be taken on the footing of a mortgage which subsists and which it is sought to redeem and not merely on payment of the decree amount. 43 All. 469 (P. C.) followed. In calculating the amount payable, interest should be made payable at the mortgage rate up to the date fixed in the decree for redemption.

Where the mortgagees had obtained possession, the amount of mesne profits should not be taken as an equivalent of interest due, except with the consent of parties. (*Woodroffe and Ghose, JJ*) JNANENDRA NATH SINGH ROY v. SHORASHI CHARAN MITRA, 49 Cal 626 : (1922) Cal. 23

—O. 34, Rr. 4 and 5—*Application for final decree—Nature of—Plea of payment out of Court.*

Proceedings to get a final decree for sale in a mortgage suit are not proceedings by way of execution but are proceedings in the suit. 15 A.L.J. 448 toll. Before a Court can pass a decree absolute for sale, it has to find out the amount due to the decree holder for which the decree has to be passed and in the course of the enquiry the court can recognise a payment made out of court by the judgment debtor even though the payment has not been certified. (*Gokul Prasad and Stuart, JJ.*) SITAL SINGH v. BAJNATH PRASAD.

20 A. L. J. 602 : 44 All. 668 : L. R. 3 A. 477 : (1922) All. 383.

—O. 34, Rr. 4 and 5—*Deposit of money due under preliminary decree—Limitation.*

There is no period of limitation applicable to an application by the mortgagor to deposit the money directed to be paid into court by the preliminary decree. The right of the mortgagor to pay the amount due is a continuing right which can be exercised at any time until an order absolute is passed. 10 O. C. 30 ; 17 O. C. 347 ref. 39 A. 641, 14 O. C. 10 dist. (*Dalal, A. J. C.*) BANKE BIHARI LAL v. GHANI AHMAD.

9 O. L. J. 14 : (1922) Oudh 33 : 66 I. C. 944.

—O. 34, R. 5—*Mortgage decree—Compromise decree—Payment out of Court.*

O 34, R 5 C P Code does not apply to mortgage decrees based on a compromise arrived at between the parties and there is nothing in law which prohibits the payment of a compromise decree out of Court 57 I. C. 473 foll. (*Gokul Prasad and Stuart, JJ.*) SITAL SINGH v. BAJNATH PRASAD. 20 A.L.J. 602: 44 All. 668: L.R. 3 A. 477: (1922) All. 383.

—O. 34 Rr. 4 and 5—*Mortgage—Preliminary and final decree—Passing of final decree without notice to defendants mortgagors—Ex parte decree—Setting aside.* See C. P. CODE O. 9, R. 13, 67 I. C. 282.

—O. 34, R. 4—*Mortgage suit—Right to interest—Pendency of suit—Ex parte decree—Setting aside.*

C. P. CODE (1908), O. 34, R. 5.

Ordinarily the mortgagee in a mortgage suit should set interest at the contract rate during the pendency of the suit. Where an ex parte decree is set aside, the suit would be considered to be pending during the period when the proceedings to set aside the ex parte decree were pending. (*Chatterjee and Panton, JJ*) SIBA PRASAD DAS CHAUDHURY v. KAZIMUDDIN SARKAR.

65 I. C. 709

—O 34, Rr. 4 and 5—*Preliminary decree in a suit for sale on a mortgage—Application for an order absolute in 1913—Dismissal of—Remedy of party aggrieved—Whether application can be received—No second application for final decree lies—Limitation Act, Art. 171 applies to an application for a final decree*

Where an application purporting to be for an order absolute in a mortgage suit is made in 1913 and dismissed, the only remedy of the party aggrieved is to appeal against the order 42 M. 52 followed.

The application which has been so dismissed cannot be revived as revival implies the pendency of the prior petition.

After the dismissal of the first application, there cannot be a second application for a final decree.

An application for a final decree in a mortgage suit more than 3 years after the date for payment under the preliminary decree is barred by limitation under Art. 181 of the Limitation Act (1917) 7 L. W. 438 followed. (*Krishnan and Ramesam, JJ*) MUMMADI VENKATIAH v. BOGA-NATHAM VENKATA SUBBIAH. 42 M. L. J. 51 :

(1922) M. W. N. 11 : 30 M. L. T. 228 :

16 L. W. 198 : (1922) Mad. 65.

—O. 34 R. 5—*Decree absolute—Application for—Starting point—Appellate preliminary decree—Limitation Act Art. 181. See (1921) DIG. COL. 300 JAYANTI VENKAYYA v. DAMISETTI SATHIRAJU. 64 I. C. 470.*

—O. 34 R. 5—*Delivery of title deeds—Decree—Default—Damages.*

Where the preliminary and the final decree in a mortgage suit directed defendants to deliver up to plaintiffs all documents in their possession or power relating to the plaint property, but did not provide an alternative relief, viz., payment of damages, in the event of non delivery, held, that the Court could not grant such alternative relief by way of execution.

*Quære.*—Whether the decree in the absence of specification of documents to be delivered was not too indefinite for execution. (*Ayling, O. C. J. and Odgers, J*) MARATH SIVARAMAN NAIR v. SESHU PATTAR. 42 M. L. J. 356 :

16 L. W. 589 : (1922) Mad 299.

—O. 34, R. 5—*Final decree—Application—Appeal from preliminary decree—Right to appeal when accrues. See LIM. ACT, ART. 181. (1922) Pat. 164.*

—O. 34, R. 5—*Final decree—Mortgage suit—Effect of final decree—Charge not extinguished.*

Notwithstanding the passing of a final decree in a mortgage suit it is open to the mortgagor to pay up the mortgage amount and redeem the

## C. P. CODE (1908) O. 34, R. 6.

mortgage until the sale is held and the sale proceeds distributed. It is settled law in equity that though a personal covenant is extinguished by a judgment a charge subsists notwithstanding the judgment which does not determine the security or put an end to the charge, 31 C. 863 rel.

Where therefore on a sale being held in execution of a mortgage decree the mortgagor deposited the amount due to the decree holder under O. 21, R. 89 borrowing the said sum from a third person under an arrangement that the lender is to have all the rights of the decree holder, the lender is subrogated to the rights of the mortgage decree holder. (*Das and Bucknill, JJ.*) MOULVI MAHOMED MUSA v. EDAL SINGH. 3 Pat L. T. 233 ; (1922) P 92 : 65 I. C. 801

—O 34, R. 6—Mortgage decree against father—Son's share in ancestral profts—Personal decree. See (1921) DIG COL. 300. KRISHNA PRASAD v. RAM PRASAD SINGH. 64 I. C. 629.

—O. 34, R. 6 — Mortgage decree—Personal remedy barred—Rights of mortgagee

Where a mortgage decree gives the mortgagee a remedy against the mortgaged properties the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover the money is by sale of the mortgaged property. (*Macleod, C. J. and Coyajee, J.*) HANMANT TIMAJ DESAI v. RAGA VENDRA RAO. 24 Bom. L. R. 410 (1922) Bom. 237 : 67 I. C. 847.

—O. 34, R. 6—Personal decree against mortgagor—Form of.

Where there is a personal covenant in a mortgage deed, the proper form of the decree is to direct that if the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit. It is not proper to direct that in default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof. (*Macleod, C. J. and Shah, J.*) KESHAV MANJA BHAT v. GOVIND NAGA BHAT. 24 Bom. L. R. 843 :

—O. 34, R. 6—Personal liability — Purchaser of mortgaged property

A purchaser of the equity of redemption is under no personal liability to the mortgagee though he agreed to pay off the mortgage. (*Lord Atkinson*) NANKU PRASAD SINGH v. KAMPTA PRASAD SINGH. 26 C. W. N. 771 : 3 Pat. L. T. 637.(F.C)

—O. 34 R. 6—Personal decree—Transfer and redemption of mortgage—Covenants for payment of debt—Appellate Court—Power to pass decree.

Where the mortgagor covenants to transfer the hypothecated properties indefeasibly to the mortgagee, with the usual clause for redemption, and further covenants to pay the mortgage debt with interest to the mortgagee, his heirs and assigns, the latter clause is a personal covenant to pay out of properties other than the hypothecated properties, as the latter clause would be entirely superfluous,

## C. P. CODE (1908), O. 34, R. 14.

if the parties had no intention that the mortgagor should be personally liable to pay to the mortgagee the money due to him. Therefore in such cases the mortgagee is entitled to a decree for sale but also to a personal decree against the mortgagor. 10 Cal. 740 ; 16 Cal. 540 dist.

A personal decree can be made against the mortgagor at the appellate stage. 47 Cal. 370 foll. (*Mookerjee and Buckland, JJ.*) ASKARAN BOID v. GOBORDHAN KOBRA.

26 C. W. N. 318 . (1922) Cal 52

—O 34, Rr 7 and 8—Scope of—Preliminary and final decree. See (1921) DIG. Col. 301 KHUSHABA RAMJI THOKE v. BUDHAJI SAKARAM THORAT. 46 Bom. 348 : (1922) Bom. 127 : 64 I. C. 1004.

—O. 34, Rr. 8, 7 and 9—Decree—Mortgage—Deposit under S. 83 of T. P. Act,

Where there is a valid mortgage and a deposit is made in the court by the mortgagor to redeem it, the court is not bound to first pass a preliminary and then a final decree which means the prolongation of the proceedings. if no injustice will be done to either party by the passing of the final decree at once. (*Gokul Prasad J.*) SETH ROSHAN LAL v. BHURI SINGH (1922) ALL. 479.

—O, 34, R. 8 — Mortgage — Redemption decree—Application for sale, See (1921) DIG. COL. 301. SANKARA NAINAR PILLAI v. P. V. THANGAMMA. 45 Mad. 202 : 30 M. L. T. 252 : (1922) Mad. 247.

—O. 34, R. 8—Proviso—Extension of time—Contract rate of interest.

Where a mortgagor seeks an extension of the time allowed by the decree for payment of the decree amount and is allowed an extension, he must pay interest at the contract rate during the extended period. (*Daniels, A. J. C.*) MT. BASHIRAM v. BISHAMBAR NATH. 90 L. J. 439. (1922) Oudh 268.

—O. 34, R 10—Costs claimable under—Only costs in execution—Costs which should have been included in final decree, not claimable in execution. See RES JUDICATA—EXECUTION PROCEEDINGS. 20 A. L. J. 170.

—O. 34, Rr. 14 and 15—Charge on property—Claim for future maintenance—Remedy by suit—Execution.

The mortgage charge mentioned in O 34, R 14 C. P. Code, is a mortgage or charge existing prior to the date of the decree and not one created by the decree.

The principle that a person who holds a mortgage or charge should have recourse to a suit, is recognised for the benefit of the person against whom the mortgage or charge may have to be enforced and it is competent to such a person to waive the protection accorded to him by O. 34, R. 14, C. P. Code.

The petition of compromise which was incorporated in the decree, stated that the plff. would be entitled to a maintenance at the rate of Rs 4 per month, and that if the amount was not paid from month to month, the plaintiff would be entitled to realise the sum from the defendant by

C. P. CODE (1908), O. 34, R. 14.

execution of the decree. The petition finally recited that all the properties mentioned in the schedule to the plaint would remain charged for the payment of the allowance as maintenance.

Held, that the decree-holder was entitled to recover in execution without further suits, the allowance as it accrued due.

It is not competent to the judgment-debtors to resile in execution proceedings and contend that notwithstanding the express provisions of the decree, the decree-holder must be driven to a separate suit. (*Mookerjee and Pantou, JJ.*) *INDRAMANI DAS v. SURENDRA NATH MANDAL.* (1922) Cal. 35 : 35 C. L. J. 61 : 64 I. C. 852.

—O. 34, R. 14—*Contravention of—Effect of—Sale in execution of money decree—Purchase*  
Under O. 34, R. 14 C. P. Code is confined only to claims arising under the mortgage and has no application to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage. 5 B. L. R. 450; 32 C. 296 Ref. (*Chatterjee and Pearson JJ.*) *RAJA JAGADISH CHANDRA DEO DHABAL DEB v. BHUBANESHWAR MITRA.* 27 C. W. N. 38.

—O. 34, R. 14—Mortgagee obtaining simple money decree in lieu of debt—Liability of mortgage property to be sold. See (1921) Dig. Col. 302 *TANSUKH RAI v. SRI GOPAL.* 43 All. 677.

—O. 37—*Suit under on promissory note—Oral agreement as to payment of interest—Decree.*

In a suit on a promissory note instituted under Chapter 37 of the C. P. Code where no leave had been obtained to defend the suit the plaintiff is not entitled to a decree for interest at 18 o/o on the strength of an oral agreement alleged in the plaint. The plaintiff can only get interest at 6 o/o. (*Rankin J.*) *KADER BUKSH HAZIR BUKSH v. SHAIKH SERAJUDDIN.* 49 Cal. 716.

—O. 38, R. 1—*Arrest before judgment—Attendance in court at another place.*

Where a person has to leave his place of residence for attendance in a criminal Court his departure is not with a view to delay the plaintiff or avoid the process of court or to obstruct or delay execution and an order under O. 38, R. 1, C. P. C. is not justifiable. (*Chevis A. C. J.*) *DAULAT RAM v. KIRPA RAM.* 4 Lah. L. J. 423.

—O. 38, R. 2—*Surety—Extent of liability—Production of judgment-debtor.*

Where a person stands surety under O. 38, R. 2 C. P. Code for another arrested before judgment, the surety is not discharged from liability unless at the time when the judgment-debtor is produced, he can be called upon to pay up the decree amount or suffer imprisonment in default. The mere production of the debtor with a production order does not absolve the surety. (*Maug Kin, J.*) *SUBRAMANIA IYER v. ABDUL RAHMAN.* 1 Bur. L. J. 196.

—O. 38, R. 5—Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution. See C. P. CODE, SS. 73 and 115. 26 C. W. N. 169.

C. P. CODE (1908), O. 39, R. 1.

—O. 38, R. 5—Attachment before judgment—Non-compliance with the provisions of R. 5—Attachment ultra vires—Alienation not void. See C. P. CODE S. 64. 68 I. C. 188.

—O. 38 R. 5 and O. 21 R. 57—*Attachment before judgment—Dismissal of execution application—Effect on attachment.*

An attachment, before judgment ceases to be operative on the dismissal of the first application for execution. 17 N. L. R. 121 foll. (*Hallifus, A. J. C.*) *AMOLAKSAO v. MAHIPATRAO.* (1922) Nag. 81 : 66 I. C. 850.

—O. 39, R. 1—*Power to restrain proceedings in another court—Jurisdiction.*

In a case in which the defendants have submitted to the jurisdiction of a Court by entering appearance, the Court has jurisdiction to grant an injunction restraining the debts from executing in another court a decree which they had obtained against plaintiff—Case law referred to. (*Coutts and Ross, JJ.*) *KUMAR GANGA SINGH v. PIRTHI-CHAND LAL.* 1 Pat. 356 : (1922) P. 34.

—O. 39 Rr. 1 and 2—*Interim Injunction—Mandatory form—Power of court to issue—Limits of.*

Whether the injunction be one restraining a party from altering the position of affairs or directing him to restore the conditions which prevailed at the time the cause of action arose, that order must not go further and must not create a totally new state of things. 38 B. 381 Ref. (*Harroson J.*) *THE LAHORE ELECTRIC SUPPLY CO LTD. v. BOMBAY MOTOR CYCLE CO.* 67 I. C. 742.

—O. 39, R. 1—*Temporary injunction—Balance of convenience—Irreparable injury*

In granting a temporary injunction the court has to balance the convenience and inconvenience of both sides where the basis of the appellants' claim would be gone if the status quo ante is not preserved and irreparable injury would accrue to him the Court would issue an interim injunction pending the appeal. (*Abdul Raouf, J.*) *ALLAH DIN v. SHANKAR DAS.* 66 I. C. 599.

—O. 39, Rr. 1 and 2 and O. 40 R. 1—*Temporary injunction—Restraining execution of decree for possession—Receiver—Appointment of.*

Plffs. were owners of a bungalow which had been let to deft. on lease, which plffs alleged expired on 30.6.1920. Meanwhile deft. had sub-let the premises or part of them, and as he could not get possession from his sub-tenants a suit had to be filed in which there was a decree in deft's favour. The plffs. as owners of the property sued deft. claiming that they were entitled to possession and that the decree which the deft. had obtained against his sub-tenants was not binding upon them, and for an injunction against deft. not to take possession. An application was made by plffs for a temporary injunction restraining deft from executing his decree against the sub-tenants. Held that the Court had no jurisdiction to restrain the deft. from seeking to get the benefit of his decree which had nothing whatever to do with the plaintiff's claim. What the plffs. ought to have asked

C. P. CODE (1903), O. 39, R. 1

for was the appointment of a Receiver, so that the Court might take charge of the property through its receiver pending the settlement of the dispute between the plff. and the deft. (*MacLeod, C. J. and Coyajee, J.*) NASARVANJI CAWASJI ARJANI v. SHAHAJADI BEGAM.

24 Bom. L. R. 378. (1922) Bom 385 : 66 I. C. 768.

—O. 39, R. 1—Temporary injunction—When granted—Execution of decree.

The granting of a temporary injunction is a matter of discretion albeit a judicial discretion. One of the principles the court has to bear in mind is that it must first see that there is a bona fide contention between the parties and then, on which side in the event of success the balance of inconvenience will lie if the injunction does not issue. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *statu quo* until that question can be finally decided. (*Broadway, J.*) KANSHI RAM v. SHARF DIN.

(1922) Lah. 356 : 66 I. C. 161

—O. 39, R. 2—Interlocutory injunction—Arbitration proceedings—Contract of reference impeached—Effect of.

In dealing with an interlocutory application for injunction the court must be governed by considerations as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction and the burden lies on the plaintiffs as the persons applying for the injunction, of showing that their inconvenience exceeds that of the defendants. The plaintiff must be able to show that an injunction until the hearing is necessary to protect him against irreparable injury and by the term "irreparable injury" is meant, substantial injury which could never be adequately remedied or attenuated for by any damages.

The Court refused an injunction restraining the defendant from proceeding to arbitration where an action had been brought impeaching the instrument containing the agreement for reference, on the ground that the contracts were wagering contracts. If the plaintiffs succeeded in establishing their contention that the contracts were wagering, then the reference would not be enforceable and the award of arbitrators would likewise be invalid and unenforceable. In this event there would be nothing to prevent the plffs. from recovering from the defendants any sum that may have been paid in execution of any decree based on the award. 15 C. 650 ; 25 M. 543 Rel. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS KALIANDAS v. FIRM OF GAJANMAL.

15 S. L. R. 5.

—O. 39, R. 2 (3)—Injunction—Disobedience—Contempt—Application for punishing guilty litigant—Transfer of revenue—Application to be made to Court with territorial jurisdiction. See C. P. CODE S. 150 AND O. 39 R. 2. 16 L. W. 748.

—O. 39, R. 2 (3) and O. 43, R. 1 (r)—Temporary injunction—Disobedience—Refusal to attach property—Order appealable. See C. P. CODE O. 43, R. 1 (r). 66 I. C. 9

C. P. CODE (1903), O. 40, R. 1.

—O. 39, R. 3—Injunction—Ex parte order. See (1921) DIG. COL. 305 BURMA OIL COMPANY v. SAMPSON. 64 I. C. 534

—O. 40 and O. 43, R. 1—direction to receiver to pay money into court—Order if appealable. See (1921) DIG. COL. 308 PALANIAPPA CHETTY v. PALANIAPPA CHETTY.

(1922) Mad. 234 : 65 I. C. 403.

—O. 40, R. 1—Appeal—Order appointing receiver without appointing a particular person by name. See C. P. CODE O. 43 R. 1 (s) (1922) Pat. 250.

—O. 40, R. 1—Appointment of receiver Mortgage decree—Objection of decree-holder—Effect. See C. P. CODE, S. 51 AND O. 40, R. 1. (1922) Pat. 66

—O. 40, R. 1—Receiver—Appointment of—*Prima facie* case.

In cases where a receiver is applied for, it is settled law that the applicant should at least present a *prima facie* case and should convince the Court that there may be a fair chance of succeeding in the suit (*Coutts and Adams, JJ.*) BANWARI LAL CHOWDHURY v. MOTI LAL CHOWDHURY.

3 Pat. L. T. 466 (1922) P. 493 68 I. C. 656.

—O. 40, R. 1—Appointment of receiver—Vesting of property—When effective.

Where a receiver is appointed property vests in him only when the orders under O. 40, R. 1 (b) (c) and (d) are made (*Hallif, A. J. C.*) RAMKRISHAN v. GANAPATI. 68 I. C. 432.

—O. 40, R. 1—Receiver Appointment—grounds for Mahomedan widow in possession—Procedure on application—Refusal to appoint receiver at one stage—Subsequent application.

The mere fact that a Mahomedan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry into the merits of the application. There is nothing in O. 40, R. 1, C. P. C. to prevent the appointment of a receiver in such a case. The mere fact that a receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later state, when fresh grounds are made out. (*Batten, J. C. and Hallif, A. J. C.*) ZAHARDS SYED ALI v. AHMAD SYED. 68 I. C. 502.

—O. 40, R. 1—Receiver—Appointment of—Suit at the instance of a simple money creditor—Rights of mortgagee. See (1921) DIG. COL. 306 PIRTHI CHAND LAL CHOWDHURY v. KALIKANAND SINHA. 3 Pat. L. T. 24 (1922) P. 318.

—O. 40, R. 1 (2)—Receiver—Finding as to allegations necessary—Receiver if can enquire into claim of title—Court if can delegate power of inquiry. See (1921) DIG. COL. 307. HAMIDA RAHAMAN v. JAMILA KHATUM. 65 I. C. 837.

—O. 40, R. 1—Receiver—Grounds for appointment—Discretion—Interference on appeal.

A court has a right to proceed under O. 40, R. 1, C. P. Code where it appears to be just and convenient to do so and the court may make an

## C. P. CODE (1908), O. 40, R. 1.

order appointing a receiver *suo motu*. Though a suit is brought for a mere declaration and possession of the property cannot be awarded by the court to one party or the other, the court has jurisdiction to appoint a receiver to maintain the *status quo ante* pending a suit or appeal. Where a single Judge of the High Court has appointed a receiver the exercise of his discretion will not be lightly interfered with on appeal. (*Shadi Lal, C J and Abdul Qadir, JJ*) *AMARNATH v. MT. TEHAL KAUR*.

4 U P L R. (Lah) 73 : 67 I. C. 383.

—O. 40, R. 1 and O. 43 R (S) 1—*Dispossession by receiver of a third party—Appeal*:

When property of a third party is interfered with by an officer of the court like the Receiver the party has ordinarily two remedies. He may apply to the court for a summary order restraining the Receiver from interfering or he may ask the leave of the court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy, the order of the Court is an order under O. 40, R. 1 (b) and is appealable. 39. C 713 : 3 Pat. L. J. 573 Rel. (*Ojfield and Venkatasubba Rao, JJ.*) *KAMA SWAMY PILLAI v. JANAKI AMMAL*.

16 L. W. 833 : (1922) M. W. N. 725.

—O. 40, R. 1 (2)—*Applicability of—Parties to the suit—Disturbance of possession*.

The provisions of O. 40, R. 1 (2) C. P. Code refer to the case of the removal of a person other than a party to the suit and the court is not debarred from removing one of the parties from the possession of the property. 18 C. W. N. 537, 24 M. L. J. 658 foll. (*Shadi Lal C. J. and Abdul Qadir JJ.*) *AMARNATH v. MT. TEHAL KAUR*.

4 U. P. L. R. Lah. 73 : 67 I. C. 383.

—O. 40, R. 4—Receiver—Suit for accounts after discharge—Suit against agent of receiver. See (1922) Dig. Col. 308 p. *HARIHAR MOOKERJEE v. JAHARUDDIN MANDAL* 26 C. W. N. 992.

—O. 41, R. 1—*Appeal—Copy of decree not filed—No valid presentation*.

Under O. 41, R. 1 C. P. Code, every memorandum of appeal must be accompanied by a copy of the decree appealed from and without such copy there is no valid presentation of the appeal (*Brown, J. C.*) *MAUNG PO SAUNG v. MA MUN*. (1921) 4 U. B. R. 75 : 65 I. C. 68.

—O. 41, R. 1—*Appeal—Presentation of—Copy of decree not filed—Effect*.

Presentation of memorandum of appeal unaccompanied by a copy of decree is no legal presentation. (*Chevis, J.*) *BASHI RAM v. MUNICIPAL COMMITTEE, CHINIOT*. 4 Lah. L. J. 193 : (1922) Lah. 191.

—O. 41, R. 1—*Memorandum of appeal—Copy of translation of decree filed—Not a valid presentation*.

The presentation of a second appeal with an Urdu translation of the decree of the District Court and without an English copy is invalid and the Court refused to excuse the delay in filing a

## C. P. CODE (1908), O. 41, R. 4.

proper copy. (*Chevis and Le Rossignol, JJ.*) *DAIM v. HAYAT*. 4 Lah. L. J. 381.

—O. 41, R. 1 and O. 42, R. 1—*Second Appeal—Presentation of—Copy of interlocutory order not filed—Effect of*.

Where a Second Appeal is filed without a copy of the interlocutory order referred to in the judgment of the court below it does not affect the validity of the presentation, especially when the points decided by the interlocutory order do not arise in the appeal. Even if the appeal could be considered to have been presented only when the copy of the interlocutory order was filed, there was sufficient cause for excusing the delay, (*Martineau, J.*) *LAKHMI DAS v. ISHAR DAS*.

4 Lah. L. J. 20 : (1922) Lah. 93.

—O. 41, R. 1—*Two appeals and two decrees in suit—Only one decree filed for second appeal—If valid presentation*.

Where from the decree in a suit two appeals were preferred and two decrees drawn up by the appellate court, O. 41, R. 1, C. P. Code requires both decrees to be filed for the presentation of a second appeal to be valid. (*Scott-Smith and Harrison JJ.*) *MAHOMMAD DIN v. MEST. ZERUNISSA*. 3 Lah. 215 : (1922) Lah. 390.

—O. 41, R. 2—*Appeal—New grounds—When allowed—New basis of claim*.

Plaintiffs sued for a declaration that the property in suit was their sole property and was not liable to attachment basing their claims on certain partitions. The trial Court found that their partitions had not been proved, then on appeal the Dt. Judge disposed of the claim on an entirely new plea which was not raised in the Trial Court.

Held that the Dt. Judge should not have considered that plea. (*Leslie Jones and Broadway, JJ.*) *RAM CHAND v. RAMA NAND*.

3 Lah. L. J. 302

—O. 41, R. 2—*Copy of a decree*.

There is no proper presentation of an appeal without a copy of a decree even when there is no decree in existence. (*Shadi Lal, C J. and Martineau, J.*) *THE MUNICIPAL COMMITTEE CHINIOT v. BASHI RAM*. (1922) Lah. 170.

—O. 41, R. 4—*Appeal—Parties—Some of the parties entitled to rent made respondents—Effect of*.

Where certain tenants appealed making only some of the co sharer landlords respondents, Held, that as the respondents alone could not have sued for rent, the appeal impleading them without joining the other landlords as respondents, was unsustainable. Under O. 1, R. 9 C. P. Code a person who is a necessary party to the suit is a necessary party to the appeal. 6 C. W. N. 196 : 11 C. W. N. 504 ; 31 C. 489 P. C. Rel. 34 C. 1020 not foll. (*Ross, J.*) *JITENDRANATH CHATTERJI v. JHAKU MANDAR*.

66 I. C. 780 : 3 Pat. L. T. 456 : (1923) P. 4

—O. 41, R. 4—*Power of appellate court—Deceased defendant—Judgment in favour of*.

Under O. 41, R. 4 C. P. Code an appellate court has power to reverse a judgment in favour of a deceased defendant as regards the whole of



C. P. CODE (1903), O. 41, R. 5.

the plaintiff's claim and not only as regards that part of it in which the surviving defendant or defendants were particularly interested 40 M. 546, 848; 25 M. L. J. 248 foll. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR v. KANDASAMI MUDALIY. 16 L. W. 330. (1922) M. W. N. 674

—O. 41, R. 5—Stay of execution—Costs—Practice

Where the respondent is an insolvent and an application for stay of a decree for costs is made the proper order to make is to direct the appellant to pay the costs to the respondent's solicitor on the latter's undertaking to repay the same in the event of the appellant succeeding on appeal. (*Schawbe, C. J. and Krishnan, J.*) RAMANUJAM CHETTY v. PADMANABHAM PILLAI

16 L. W. 975

—O. 41 R. 5—Refusal to stay—Power of Appellate Court.

Where the learned Judge in Chambers has exercised a discretion vested in him by law his order should not be disturbed unless there is anything to show that it was without jurisdiction or was passed with material irregularity or there is any adequate proof that some loss would be occasioned by it to the appellant which can be called substantial.

Where one obvious loss is that the appeal which is pending becomes useless, and/or probable loss is that the business of the appellant firm will be seriously disturbed by their account books passing into the hands of the receiver, and where the process is likely to be a protracted and expensive one, the balance of convenience is in favour of staying the execution rather than proceeding with it. (*Shadi Lal and Abdul Quadri, JJ.*) THE FIRM OF BADRI DAS JANKIDAS OF DELHI v. MATHANMAL. (1922) Lah 185

—O. 41, R. 5—Scope of.

Where it had been found that the sale in favour of the petitioner, a rival pre-emptor, was not genuine and that he waived his right of pre-emption, held, unless it is shown that substantial loss would result to the petitioner, an order to stay execution in favour of the pre-emptor would not be made especially where the decree-holder has deposited a large sum of money which would be idle and where he would be placed in the same position as the petitioner with respect to the collection of rent. (*Brasher, J.*) ARJAMAND KHAN v. SHANKAR LAL. (1922) Lah 364.

—O. 41 R. 6—Stay of sale—Claim proceedings—Suit—Stay if can be granted in appeal.

After the rejection of a claim petition in execution proceedings the claimant filed his suit for declaration of title and on its being dismissed appealed—Pending the appeal, he applied for a stay of sale.

Held O. 41, R. 6 applies only to cases where the appeal is against the decree which is to be executed. The petitioner's remedy is to ask for a temporary injunction under O. 39. (*Le Rossignol, J.*) MOJAK v. KANHAYA LAL.

4 Lah. L. J. 168. (1922) Lah. 58.

C. P. CODE (1908), O. 41, R. 10.

—O. 41 R. 10—Appeal—Rejection of for failure to furnish security—Effect of—Subsequent extension of time.

Once an appeal has been dismissed for failure of the appellant to give security for costs within the time fixed, it is not thereafter open to the court to extend the time for giving security. (*Greaves and Ghose, JJ.*) SRIMATI HARI BHABINI DEBI v. NARENDRA NATH ROY, 67 I. C. 883.

—O. 41, R. 10—Applicability—Pauper appeals.

O. 41, R. 10 C. P. Code does not apply to pauper appeals—42 Bom. 5 foll. (*Chevis and Campbell, JJ.*) NAZIM v. ABDUL HAMID.

3 Lah. 30 : 4 U. P. L. R. (Lah.) 67 : (1922) Lah. 87 : 67 I. C. 256.

—O. 41, R. 10—Order rejecting appeal for failure to furnish security—Decree—Appeal. Sec (1921) DIG. COL. 313 ROMESH CHANDRA DAS v. MANINDRA LAL DAS. 26 C. W. N. 1020

35 C. L. J. 131 (1922) Cal. 246

—O. 41, R. 10 (2)—Pauper appeal—Dismissal for failure to give security for costs—Validity—Appeal if lies.

No appeal against an order rejecting an appeal for failure to furnish security for costs, but the validity of the same can be tested in revision.

Where a District Court allowed the appellants to appeal *in forma pauperis* and subsequently directed them to furnish security for costs, it acted illegally and with material irregularity. (*Chevis and Campbell, JJ.*) NAZIM v. ABDUL HAMID. 3 Lah. 30 : 4 U. P. L. R. (Lah.) 67 : (1922) Lah. 87 : 67 I. C. 256.

—O. 41 R. 10 (2)—Security not furnished in time—Dismissal of appeal

Where security is not furnished within the time fixed by the court the appeal should be rejected. The provisions of O. 41 R. 10 (2) are mandatory and the mere fact that the whereabouts of the client are not known is not sufficient.

Per *Chevis, A. J. C.* :—It is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from the court or from his counsel can readily find him. (*Chevis and Martineau, JJ.*) PARMA NAND v. RAM PARKASH, 2 Lah. L. J. 391 : 68 I. C. 306.

—O. 41 R. 10—Security for costs when ordered—Poverty of appellant.

Poverty of the appellant by itself is not a sufficient ground for an order directing a security to be given. But no case has gone to the length of saying that mere want of means on the part of the appellant is a sufficient ground for dispensing with security. The true rule is that poverty of an appellant, standing by itself and without reference to the general facts of the case under appeal, ought not to be considered sufficient to warrant his being required to furnish security for costs 8 A. 203 and other cases, cited (*Venkata Subba Rao, J.*) KONAMMAL v. ANNADANA JADAYA GOUNDAR. (1922) M. W. N. 361.

C. P. CODE (1908), O. 41, R. 11.

—O 41, R. 11—Second appeal—Dismissal under O. 41, R. 11—Review of judgment—Discovery of new evidence—Not a sufficient ground *See* C. P. CODE, O. 47 R. 1, 36 C. L. J. 76.

—O. 41, R. 17—*Appeal—Non-appearance of appellant on date fixed for hearing—Procedure—Dismissal on the merits—Propriety of.*

On the day fixed for hearing an appeal, the appellant was not present in court but a vakil holding a vakalat from him was present and applied for an adjournment. This was refused and thereupon the vakil informed the court that, as he had no instructions or papers, he could not argue the appeal and took no further part in the proceedings. The appellate court instead of dismissing the appeal for default under O. 41, R. 17 C. P. Code considered the evidence in the light of the grounds raised in the appeal memo, and dismissed the appeal with costs. *Held* (1) that there was no appearance on the part of the appellant within the meaning of O. 41, R. 17 C. P. Code.

(2) that the appellate court has no power to go into the merits of the case and to dismiss the appeal on the merits,

(3) and that the proper order to be made on second appeal was to set aside the order of the lower appellate court dismissing the appeal on its merits as *ultra vires* and to direct him to restore the appeal to file and dispose of it according to law (*Ayling and Odgers, JJ.*) *MUSLIRAKATH MAHOMED v. MANAVIKRAMA.*

43 M. L. J. 317 : 16 L. W. 434 : (1922) M. W. N. 604

—O 41 R. 17 and O. 23 R. 3—*Dismissal of appeal for default—Compromise thereafter—Power to record.*

Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and respondent within a month of the dismissal file a petition of the compromise settling their disputes, with an additional application for restoration of the appeal. *Held* that in the circumstances of the case, the court ought to have restored the appeal and passed a decree in terms of the compromise. (*Suhrawardy Pantun, JJ.*) *ASWINI KUMAR DUTT v. SUKHODA SUNDARI DEBYA* 68 I. C. 448.

—O. 41, R. 18—*Dismissal of appeal—Omission to provide identifier—Effect of.*

An appeal cannot be dismissed under O. 41, R. 18, C. P. Code, on account of the omission of the appellant to provide a person to identify the respondent as required by O. 5, R. 18, C. P. Code (*Jhala Prasad and Ross, JJ.*) *NAGENDRA NATH, GHOSH v. SHAMBHU NATH PANDE.*

3 Pat. L. T. 498 : 65 I. C. 49

—O. 41 R. 19—*Dismissal of appeal for default—Restoration—Sufficient cause.*

Where an appellant came by the last possible train on the day fixed for the hearing of the appeal, and he had engaged no advocate or pleader, to go on with the appeal there is no sufficient reason for restoring the appeal which had been dismissed for default. (*Hopkins, S. M.*) *NIRANJAN SINGH v. BALDEO*

L. R. 3 A. 486 (Rev.)

C. P. CODE (1908), O. 41, R. 22.

—O. 41, R. 19, and O. 47 R. 4, (2)—*Memo-randum of appeal—Deficient court fee not paid—Dismissal of appeal—Restoration—Effect of—Notice not given to opposite party. See* (1921) DIG. COL. 314. *SURAJPAL PANDEY v. UTM PANDEY* 6 Pat. L. J. 625 : 3 Pat. L. T. 117 : (1922) P. 281.

—O. 41, R. 19—*Sufficient cause—Counsel engaged in another court.*

The fact that the counsel was engaged in another court when the appeal was called on and had sent word to the Reader of the court for a short pass over is not sufficient to set aside the dismissal for default and re-admitting the appeal. (*Abdul Raooff and Martineau, JJ.*) *SAIF ALI v. CHIRAGH ALI SHAH.* 68 I. C. 785.

—O. 41, R. 20—*Addition of parties—Powers of appellate Court*

It is competent to an appellate court to add respondents to an appeal under the provisions of O. 41, R. 20 C. P. Code even though the time within which an appeal against those persons might have been prepared had expired 14 A 154 ; 33 C 329 Rel. on (*Brown, A J. C.*) *MAUNG AN GALE v. MA MIN DUN.* 66 I. C. 365.

—O. 41, R. 22—*Applicability of—Letters Patent Appeal—Memorandum of cross objections.*

O. 41, R. 22 of the C. P. Code does not apply to appeals under the Letters Patent and consequently there can be no cross objection on a Letters Patent appeal. 21 A. 297 foll. (*Mears, C. J. and Banerjee, J.*) *MANGAT RAI v. MUSST. PURNA KUAR.* L. R. 3 A. 198.

—O. 41, R. 22—*Decree in favour of party—Verbal criticism of judgment—Petition if can be filed as cross objection. See COURT FEE.*

1 Pat. 258.

—O. 41, R. 22—*Decree in favour of party—Petition to support decree in appeal on other grounds—If cross objections See COURT-FEE.*

(1922) All. 280.

—O. 41, R. 22—*Letters Patent appeal—Provisions of Code if apply. See LETTERS PATENT* (1922) All. 55.

—O. 41, R. 22 and 33—*Memorandum of cross objections—Co-respondents.*

Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, he cannot prefer a memorandum of objections against the other respondents on the appeal. O. 41, R. 22 C. P. C. should ordinarily be confined to cases of cross-objections urged against the appellant, but O. 41, R. 33 C. P. C. gives the court a very wide discretion and cases may occasionally arise where cross-objections against a co-respondent should be heard. (*Daniels, J. C. and Dalal, A. J. C.*) *SHEIK MAHOMED MUZAFFAR ALI v. BHAGWAT PRASAD SINGH.* 66 I. C. 642.

—O. 41, R. 22—*Memorandum of cross objections—Presented out of time—Excusing delay.*

It is clear from the words of O. 41, R. 22 C. P. Code that a cross objection can be admitted after

C. P. CODE (1908), O. 41, R. 22.

the expiry of 30 days from service of notice of the appeal on the respondent, so that even if one be put in during the argument of the appeal, it might be admitted in a proper case (*Halliday, A. J. C.*) KUKSA V. DANJIB BHAN.

5 N L J 192. 66 I. C. 217 : (1922) Nag, 213.

—O 41, R. 22—*Memorandum of cross objections—Respondent putting in a petition supporting the decree of the lower court-fee.*

Where the respondent in an appeal from a decree which totally dismissed the plaintiff's suit put in a petition stating the reasons on which they supported the decree, the respondent need not pay court fee on the petition. (*Banerji and Ryves, JJ.*) RAM PRASAD KALWAR V. MT. AJANASIA.

(1922) All 280 : 44 All. 577 : 68 I. C. 861.

—O 41, R. 22—*Time expired appeal Treated as memorandum of objections.*

A time-expired appeal may be treated as a memorandum of cross objections under O 41, R. 22 C. P. Code. 25 A 628 Ref. (*Martineau, J.*) BAWA SINGH V. THAKUR SINGH.

4 U. P. L. R. (Lah) 80 : 67 I. C. 478.

—O. 41, R. 23—*Appellate court—Powers of remand—Question of fact fully investigated.*

Where a question of fact has been fully investigated in the court below and the appellate court comes to a different conclusion on some portion, it ought not to remand the case for working out the result of its decision but should itself uphold or modify the decision of the lower court. (*Piggot and Walsh, JJ.*) SHIAM SARAN V. BANARSI DAS.

20 A. L. J. 258 : 4 U. P. L. R. (A.) 102 : (1922) All. 192 : 66 I. C. 866

—O. 41, R. 23—*Decision on all issues by trial court—Appellate court differing in its conclusion—Legality of remand.*

When a suit is tried by the first court and is dismissed on the merits and the appellate court comes to a different conclusion on the main issue in the case but nevertheless remands the case on the ground that evidence was not properly directed, the order of the appellate court recording its finding on the issue and then directing a remand is materially irregular and should be set aside in revision by the High Court (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU V. GANAPATHY RAJU.

30 M. L. T. 314 : (H C) : 16 L. W. 593.

—O 41, R. 23 and O. 43, R. 1 (cl). 4—*Decision on preliminary point—Meaning of—Order of remand Appealability.*

Where the District Munsif in a suit held that the construction of a service grant was clear and that evidence of the consideration for that grant and of whether services were in fact rendered or not was irrelevant, and on appeal the appellate Judge took a different view of the construction of the grant and held that such evidence was relevant accordingly remanded the case with that direction to the lower court. Held, that the reversal was on a preliminary point within the meaning of O. 41, R. 23 C. P. C. and the order of remand was appealable.

C. P. CODE (1908), O. 41, R. 23.

The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure questions of law or pure questions of fact. There are many instances of such point such as, that a suit is barred by limitation; that the Court has no jurisdiction under the Estates Land Act; that evidence tendered was not admissible, that on the plaintiff's evidence there is no evidence for the defendant to answer, in a libel suit that there is no proof of publication. (*Sir Walter Schwabe, C. J. Oldfield and Coutts Trotter, JJ.*) MALAYATH VEETHIL RAMAN V. KRISHNAN NAMBUDRIPAD.

43 M. L. J. 354 : 31 M. L. T. 208 (H. C.) : 16 L. W. 425 : (1922) M. W. N. 588 (F. B.)

—O. 41, R. 23 and O. 43, R. 1 (A)—*Order of remand—Provision of law not specified—Appeal*

Where an appellate court passes an order of remand without specifying the provision of law under which the order is made, it must be presumed to be made under O 41, R. 23, C. P. Code and the order is appealable. 19 A. L. J. 971 foll. (*Walsh and Ryves, JJ.*) BIBI KULSOOM UN-NISSA V. RAM PRASAD.

20 A. L. J. 321 : L. R. 3 A. 394 : 44 A. 492 : (1922) A. 226 : 4 U. P. L. R. (A) 168 : 67 I. C. 713.

—O 41 Rr. 23 and 25—*Order of remand—Reconsideration of by appellate Court.*

There is a distinction between an order under O. 41, R. 23, C. P. Code, and an order under O. 41 R. 25 C. P. C. which merely remands specific issues for decision. An order of the former class is a final order which is subject to appeal and cannot be considered by the court which passed it except on review whereas an order under O. 41, R. 25, C. P. Code, is an interlocutory order which it is open to the Court to reconsider. 16 A. 306 ; 43 A. 477 Rel (*Daniels and Lyle, A. J. C.*) KUAR NAGESHAR SAHAI V. KUAR MATA PRASAD.

25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh. 236,

—O. 41, R. 23—*Order under—Appealability.*

The Legislature intended to put orders of remand on exactly the same footing as appellate decrees and to make them appealable on precisely the same grounds. If a mistake in deciding the question of custom can be corrected in an appeal from an appellate decree it is reasonable to hold that it can be and ought to be corrected in an appeal from an order of remand also. 20 I. C. 788 Approved.

Per *Martineau, J.*—The competency of a second appeal is not dependent on the question whether the decision of the Lower Appellate Court is based on a finding of fact or on a finding of law for even when the decision is based on a finding of fact a second appeal will be on one of the grounds mentioned in S. 41 (1) (b) and (c) of the Punjab Courts Act. Whether or not a second appeal lies, depends on the nature and value of the suit; a second appeal being barred by S. 42 (2) only in a

## C. P. CODE (1908) O. 41 R. 23.

suit of the nature cognizable by a Court of Small Causes when the amount or value of the subject matter of the suit does not exceed Rs. 500 S. 42 (1) merely restricts the grounds on which a second appeal can be entertained to those mentioned in S. 41. (*Shadi Lal, C. J. Abdul Raoof and Martin au, JJ.*) *MT. UMRI v. SHAH MAHOMED*, (1922) Lah 178.

## —O. 41, Rr. 23 and 25—Powers of appellate court—Retrial.

An appellate court has inherent power to order a retrial but that course should not be adopted except in exceptional circumstances and where the code does not provide an adequate procedure (*Buckland, J.*) *RADHA KANTA DAS NANAK v. PRAKASH CHANDRA DUTT* 64 I. C. 599.

## —O. 41, Rr. 23 and 25—Order of remand—Propriety of—Decision by trial court on all issues—Appellate court differing on one issue and remanding the case.

Where the trial court decided a suit on all the issues and dismissed the suit and the appellate court being of a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the findings of the first court on the other issues. *Held* that the order of remand was improper. The appellate court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial court were insufficient to dispose of the case, the appellate court should have called for findings under O. 21 R. 25 C. P. Code. (*Spencer and Venkatasubba Rao, JJ.*) *MUNISAWAMI NAICKEN v. MUNISWAMI NAICKEN*. 16 L. W. 979.

## —O. 41 R. 23—Preliminary point—Remand—Appeal if lies—Inherent powers of Court.

An appeal lies from an order remanding a case under O. 41, R. 23 of the Civil Procedure Code even if the suit has been decided on a preliminary point. To say that there is no appeal where the court acts in contravention of the rule and reverses the judgment of the trial Court and remands the case, would be to refuse an appeal in every case where the order of remand is erroneous.

An appellate Court has inherent powers to order a remand which can however be made where the justice of the case demands it (*Walmsley and Ghose, JJ.*) *SASHI MUKHI DAS v. ABINASH CHANDRA HALDAR*. (1922) Cal 279.

## —O 41 R. 23—Remand—Appellate Court, if can direct trial by other than original Court.

O 41, R. 23, C. P. C. contemplates that the remand should be to that Court from whose decree the appeal is prepared, but if the Appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another Court. 279 P. L. R. 1913 Rel. Where the person who heard the appeal was an Additional Judge who had no power under the C. P. Code or the Punjab Courts Act to transfer a case from one subordinate Court to another, his order remanding the case to another Court from that which tried it, is to that extent, illegal (*Scott Smith, J.*) *CHAJJU v. SHAM LAL*. (1922) Lah. 239 : 66 I. C. 113.

## C. P. CODE (1908) O. 41 R. 23.

—O 41, Rr. 23 and 25—Remand—Inherent power—Revision—C. P. Code, S 175.

Where instead of passing an order under O 41, R 25, C. P. C., an Appellate Court remanded for rehearing under O. 41, R. 23 the court cannot be said to have acted without jurisdiction to justify interference in revision under S. 115, C. P. C. The appellate court has inherent power to make a remand. (*Newbould, J.*) *ATUL CHANDRA SEAL v. SHEIKH KOBADALI*. 64 I. C. 436.

## —O. 41, Rr. 23 and 25—Remand order—Interference on appeal with that order—Effect in proceedings in the interim.

Per *Walsh, J.* :—Whether upon a remand order being wrongly made, the decree and all the proceedings taken under that order, are null and void, depends on the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the court below fall with it. It would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the appellate Court and in obedience to such remand order, were held to be invalid where as the result of the High Court's own decision that remand order turned out to have been perfectly justified. (*Piggott and Walsh, JJ.*) *RAJKALI v. GOPI NATH, NAIK*. 44 A 2 11 20 A. L. J. 44 : (1922) A. 35 : 66 I. C. 317.

## —O. 41, R 23—Remand—Order of single Judge—Power of successor to question the propriety of.

Where a Single Judge of the High Court hearing a second appeal remands it for fresh decision to the lower court, and the case then comes up on second appeal from the revised decision of the lower court, it is not open to the High Court to question its own earlier Judgment remanding the case to the lower court. The remedy of the party was to have appealed against the Judgment of the Single Judge remanding the case. (*Miller, C. J. and Coultis, J.*) *MUNSHI LAL v. RAMASIS PURI*. 3 Pat. L. T. 343 : 65 I. C. 175 : 1 Pat. 246 : (1922) P. 384.

## —O. 41, R. 23—Remand—Powers of appellate Court.

Where an appellate Court can pass a preliminary decree it is its duty to do so and a remand as to matters which can be the subject matter of the preliminary decree is not warranted. (*Kumara-swami Sastri and Devadoss, JJ.*) *SUBBE GOUN-DAN v. KRISHNAMACHARI*. 45 Mad. 449 : 42 M. L. J. 372 : 30 M. L. T. 217 : 15 L. W. 537 : (1922) M. W. N. 269 : (1922) Mad. 112 : 68 I. C. 869.

## —O. 41, Rr. 23, 24 and 25—Remand—Powers of appellate Court—Full trial in Court of first instance.

Where the trial Court has decided the suit on the evidence on all the issues it is not open to the appellate Court to remand the case under O. 41, R. 23, C. P. Code as though the suit had been decided on a preliminary point. The appellate Court should have taken the course indicated by

C. P. CODE (1908) O. 41 R. 23.

O. 41 R. 24 or R. 25 C. P. Code (*Richardson and Ghose, JJ.*) NURAL GUNI v. KAZAMAINI.  
66 I. C. 922.

—O 41, R. 23—*Remand—Power of High Court—Decision on issue given by the courts below.*

Where an issue has been raised and determined by the first court and the appellate court on the evidence adduced it is not within the competence of the High Court in second appeal to remand the case for rehearing upon that very issue. (*Miller, C. J. and Mullick J.*) GUNPAT RAO BANKA PURI v. RAJ KUMAR SINGH.

67 I. C. 494.

—O. 41 R. 23 and O. 43, R. 1 (4)—*Remand—Powers of appellate Court—Inherent power—Appeal from order of remand.*

In a suit for dissolution of partnership and rendition of accounts the trial court appointed a Commissioner to examine the account books and then passed a preliminary decree based upon the Commissioner's report. On appeal the District Judge was of opinion that the trial of the suit in the first court had not been a satisfactory one and that the pleadings of both parties ought to have been required to be amended. He set aside the whole proceedings of the trial Court and remanded the case for a new trial. The order of remand did not show under what provision of the Code it professed to have been made. The defendants having appealed from the order of remand, the question arose whether an appeal lay. *Held*, without expressly deciding the question whether the District Court had an inherent right of remand and whether an appeal lay from a remand made in the exercise of such a right, that having regard to the fact that the policy of the Allahabad High Court had always been to allow as wide a meaning as was reasonably possible to O. 41, R. 23, C. P. C., and that the District Judge presumed himself to be acting simply under those provisions and did not express himself as acting in the exercise of any inherent jurisdiction, the appeal lay. (*Piggott and Walsh, JJ.*) FIRM OF GOKUL PRASADHAR PRASAD v. RAM KUMAR.

44 A. 176 : 19 A. L. J. 971 : 64 I. C. 878 : (1922) All. 254.

—O. 41, R. 23 and S. 151—*Reversal and remand for de novo trial—Propriety of*

Where the lower appellate court reversed the decree of the court below, modified one of the issues and remanded the case for a *de novo* trial on the modified issue : *Held* the procedure was wrong. (*Greaves and Ghose, JJ.*) RADHA KRISHNA SAHA v. KANAL KAMINI DEBYA.

35 C. L. J. 345 : (1922) Cal. 456.

—O 41, R. 24—Second appeal—Question of fact—Power of High Court to decide if there is evidence or record. See C. P. CODE, S. 100.

3 Pat. L. T. 303.

—O 41, R. 25—*Issues—Power of appellate court to remand.*

Where the appellate court finds that the parties failed to grasp the essential questions arising in the case and to adduce evidence adequately, the

C. P. CODE (1908) O. 41 R. 27.

appellate court is entitled to frame new issues and remand them for trial. 31 B. 381 Ref. (*Fawcett, J. C. and Kemp, A. J. C.*) SHAH MAHOMED v. RAMZAN.  
66 I. C. 833.

—O 41, R. 25—*Order of remand—Reconsideration on further hearing.*

In the case of a remand under O. 41, R. 25 of the C. P. Code it is open to the appellate court on receipt of the finding of the court below to reconsider the view of the law on which the remand was based. 43 All. 377 foll. (*Daniels, J. C.*) SHYAM NARAIN v. JADUNATH SINGH.

25 O. C. 41 : (1922) Oudh. 118 : 68 I. C. 242.

—O. 41, R. 25—*Order under—Nature of.*

An order under O. 41, R. 25 which merely remands specific issues for decision is interlocutory which it is open to the court to reconsider. (*Daniels and Lyle A. J. C.*) KUAR NAGESHAR SAHAI v. KUAR MATA PRD.

25 O. C. 189 :

9 O. L. J. 235 : (1922) Oudh. 236.

—O. 41, R. 26—*Finding—Objections not filed—Court's discretion.* See. (1921) DIG. COL. 320 PARTAB SINGH v. ACHHAR SINGH.

67 I. C. 846.

—O. 41, R. 27—*Additional evidence—Admission of, by appellate Court, when justified.*

As pointed out by the Privy Council in 31 B. 381 (P. C.) the legitimate occasion for the admission of additional evidence by the appellate Court under O. 41, R. 27, C. P. Code, is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent or where a discovery is made, outside the court, of fresh evidence, and an application is made to import it. 31 M. 114 : 42 C. 675 foll. (*Scott Smith and Abdul Quadir, JJ.*) FIRM OF RAM RICHHPAL SHAM LAL v. FIRM OF BANSI DHAR SONS.

66 I. C. 370.

—O. 41, R. 27—*Additional evidence—Admission on appeal—Objection to—Partly objecting, relying on a portion of that evidence.*

Fresh evidence should not be admitted by an appellate Court in order to enable it to decide the case in favour of one of the parties to the suit. 31 Bom. 381, 1 Pat. L. J. 435, 31 Mad. 114 ref. Where, however, such evidence had been admitted in the lower appellate Court and the party objecting to the admission himself relies upon a portion of such evidence he cannot object to the remainder being placed on the record. (*Batten, J. C.*) BHAIROON SINGH v. HINDU SINGH.

(1922) Nag. 119 : 67 I. C. 237.

—O. 41, R. 27—*Additional evidence—Admission on appeal.*

It is largely discretionary with an appellate court to admit additional evidence on appeal and a party cannot claim it as a matter of right. (*Greaves, J.*) SYED NAYAJAN ALI v. MIDNAPORE ZAMINDARY COMPANY.

67 I. C. 770.

—O. 41, R. 27—*Additional evidence—Admission by appellate court—Grounds for.*

The mere fact that a litigant was not aware of the existence of documentary evidence in the case is no ground for admission of such evidence for the first time on appeal. 31 B. 381 : 42 C. 675

C. P. CODE (1908), O. 41, R. 27.

Rei. (*Newbould, J.*) SRIMATI MANMOHINI DEBI  
v. RAMKISHORE. 68 I.C. 334

—O. 41, R. 27—*Additional evidence—Admission of—Powers of appellate court.*

Where evidence was tendered after the close of the case in the trial court and during the arguments and was for that reason rejected by the trial court, the appellate court should not in the exercise of its discretion admit that evidence, (*Chevis and Le Rossignal, JJ.*) VAISHNO DAS v. HEM RAJ. 4 Lah. L. J. 371.

—O. 41, R. 27—*Additional evidence—Power of appellate court to admit*

The appellate court should exercise its power allowing additional evidence very cautiously and sparingly and only in the interests of justice (*Mookerjee and Chotzner JJ.*) RAJA SREENATH, ROY v. SECRETARY OF STATE FOR INDIA. 36 C. L. J. 345.

—O. 41, R. 27—*Additional evidence—Decree passed pending appeal—Admission in evidence.*

Where pending an appeal from a decree in a rent suit a decree is passed in favour of the appellant in a title suit, the appellate court should receive the decree in evidence and act upon it. 31 B 381: 31 M. 114, 36 A. 93 Re' (*Teunon and Newbould, JJ.*) SASHI BHUSHAN BOSE v. PRASULLA MULLICK 64 I. C. 721

—O. 41, R. 27—*Admission of additional evidence—Appellate Court—Powers of.*

An appellate court acts improperly in admitting additional evidence after the close of the arguments in the case. Even if it does admit such evidence, it should record its reasons for so doing under O. 41, R. 27 C. P. C. (*Suhrawardy and Cuming, JJ.*) ISAP ALI v. SATIS CHANDRA ROY. 65 I. C. 504.

—O. 41, R. 27—*Admission of additional evidence—Powers of appellate Court—Opposite side to be given opportunity to rebut.*

An appellate court can admit additional evidence only under the provisions of O. 41, R. 27 C. P. C. and if it admits additional evidence the other side must have an opportunity of rebutting it. 31 B. 381, 24 C. L. J. 457 Ref. (*Ghose, J.*) HRIDAY KRISHNA PAL v. RAJANIKANTAPAL. 68 I. C. 293.

—O. 41, R. 27—*Admission of additional evidence—Omission to record reasons—Effect.*

Where an appellate court admits in evidence a khatian from the Record of Rights without recording reasons for the admission of such evidence, the defect is not fatal to its decision. O. 41, R. 27, C. P. C. is only directory and not mandatory. (*Wamsley and Greaves, JJ.*) RAHMUDDIN KAZI v. RADHA GOVINDA BHOUMIK. 64 I. C. 238.

—O. 41, R. 27—*Application for producing additional evidence in appeal—New and important matter not within knowledge at the time of decree—Proper procedure by way of review.* See C. P. CODE O. 47, R. 1 AND O. 41 R. 27

L. R. 3 All. 12 Rev.

C. P. CODE (1908), O. 41, R. 33

—O. 41, R. 27—*Appointment of commissioner—Additional evidence*

An appellate court can appoint a commissioner and direct him to file his accounts into court after examining the same, (*Scott Smith and Abdul Raoof JJ.*) MT. RAM PIARI v. SULTAN BAKSH. 3 Lah. 382.

—O. 41, R. 27—*Recording of reasons.*

Non-recording of reasons is an irregularity and fresh trial was ordered in the circumstances of the case. (*Sanderson C.J. and Richardson J.*) AFSAR KHAN v. SHABU MONDAL. (1922) Cal. 148.

—O. 41, R. 27 (2)—*Appellate Court—Admission of fresh evidence—Reasons.*

Where a document is admitted in evidence for the first time in the appellate court, the court ought to record its reasons for the same. (*Chatterjee and Sahrawardy JJ.*) AMBICA CHARAN SEN v. GIRISH CHANDRA SEN. 68 I. C. 719.

—O. 41, R. 31—*Appellate judgment—Contents of—Judgment affirming decision of court below.*

Whether or not a judgment is according to law must depend on the facts and circumstances of each case. There is firstly the difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first court. Where the judgment of the first court has fully discussed all the matters which were placed before it and the appellate court has appreciated the main facts in the case but has dismissed the appeal in a short judgment the appellate judgment is not vitiated by any irregularity. (*Woodroffe and Ghose, JJ.*) MAHOMED HUSSAIN CHOUDHURY v. RABIA KHATUN. 68 I. C. 467.

—O. 41 R. 31—*Judgment—Reasons for finding—Statement of.*

Where the reasons for the finding of an appellate court are given in a summary way but the court clearly based its decision on the points raised in the court below and the probabilities of the case, the finding is not contrary to law. (*Pearson, J.*) SHFO BAKSH SHAH v. MANNU SINGH. L. R. 3 A. 454 (Rev.)

—O. 41, R. 31 and R. 11—*Judgment of appellate court—Summary dismissal of appeal—Contents of judgment*

O. 41, R. 31 of the C. P. Code controls O. 41, R. 11 and an appellate court dismissing a second appeal under the latter provision must state the points for decision and the decision thereon with reasons. (*Chatterjee and Panton, JJ.*) BIPIN BEHARI CHATTOPADHYA v. JOGENDRA NATH BANDOPADHYA. 65 I. C. 479.

—O. 41, R. 31 (4)—*Remand—Appeal from—Finding of fact.* See (1921) DIG. COL. 321 HOND RAM v. HOTO RAM. (1922) Lah. 97.

—O. 41, R. 33—*Appellate Court—Powers of.*

Where an appellate court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower

C. P. CODE (1908) O. 41, R. 33.

court. (*Piggott and Walsh JJ.*) GOVIND DASS  
v. RAM CHARAN LONIA. 4 U. P. L. R. 25 (A):  
68 I. C. 307

—O. 41, R. 33—*Partition suit.*

The appellate court has power to exercise the powers conferred upon it by O. 41, R. 33 in partition suits. There is no restriction of the powers as to any class of suit under that rule. (*Chatterjee and Pantou, JJ.*) PROBHA CHANDRA BISWAS v. GOPAL CHANDRA. (1922) Cal. 398.

—O. 41, R. 33—*Powers of appellate court—Grant of relief against defendant not impleaded as a party to the appeal.*

An appellate court can grant relief to an appellant as against a defendant against whom there is no appeal. The powers conferred by O. 41, R. 33 should be exercised in cases where, as the result of an Appellate Court's interference in favour of the appellant, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience, 22 C. L. J. 390 foll. (*N. R. Chatterjee and Pantou, JJ.*) BIKRAM KUMAR BOSE v. MOHIT KRISHNA BOSE. 64 I. C. 178.

—O. 41, R. 33—*Respondent—Transposition as appellant—Procedure.*

An appellate court acts without jurisdiction in ordering by its judgment that a respondent who had not been formally transposed as appellant, should be shown as appellant. Such an order deprives the respondent of his costs and ought to have been made during the pendency of the appeal and not as part of the judgment, (*Piggott and Walsh, J.*) HARDEO PRASAD v. DAVODAR PRASAD. 20 A. L. J. 980.

—O. 42 R. 1—*Second appeal—Presentation without copy of first court's judgment if valid.* See (1921) Dig. COL 322 DYALA v. HIRU.

67 I. C. 670.

—O. 42, R. 1—*Second appeal—Presentation without copy of judgment—Effect of—Extension of time—Allahabad High Court Rules, Chap. III, R. 2* See (1921) Dig. COL. 322 BHAIROON GHULAM v. RAM AUTAR SINGH. 43 All 660

—O. 43, R. 1 and O. 47, R. 7—*Order granting review—No second appeal.*

There is no second appeal against an order granting a review. (*Chatterjee and Pearson, JJ.*) BARADA KISHORE ACHARJYA CHOUDHURY v. JAGAT CHANDRA DAS. 64 I. C. 568.

—O. 43, 1 (a) and O. 41, R. 23—*Remand under inherent power—No appeal from order.*

An order of remand under the inherent powers of an appellate court and not falling under O. 41, R. 23 C. P. C. is not appealable under O. 43 R. 1 (a) C. P. C. (*Ayling O. C. J. and Odgers J.*) SHEIK MAHOMED MARAKAYAR v. RANGASAMI NAIDU. 31 M. L. T. 182. (H. C.) : 16 L. W. 515.

—O. 43 R. 1 (a) and O. 41, R. 23—*Order of remand—Appealability.*

Per Shadi Lal, C. J. and Martineau, J.: In order to determine whether an order of remand is appealable or not, the test is this: suppose, the

C. P. CODE (1908) O. 43, R. 1.

court instead of making an order of remand passed a decree on the strength of the adjudication constituting the order of remand, would there be a second appeal from that decree? If a second appeal would lie from the decree, the order of remand is appealable, otherwise not.

Per Raoof, J.: An appeal from an order of an Appellate Court remanding a case under O. 41, R. 23, C. P. Code does lie in all cases except those in which absolutely no right of second appeal against the appellate decree is given in the body of the Code or by any other law 50 P. R. 1911; 85 P. R. 1914 Diss, 20 I. C. 788 foll. (*Shadi Lal C J Abdul Raoof and Martineau JJ.*) MUSST. UMRI v. SHAH MAHOMED.

3 Lah. 218 : 4 Lah. L. J. 359 : (1922) Lah. 178 : 68 I. C. 849.

—O. 43, R. 1 (c)—*Application to set aside dismissal for default—Dismissal of that application for default—Appeal.*

Where a second application to set aside the dismissal of a prior application to set aside the dismissal of a suit for default, is itself dismissed, there is no appeal against the order of dismissal 19 C. W. N. 25 Ret. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR MITTER v. MURARI MOHAN BOSE. 36 C. L. J. 184.

—O. 43, R. 1 (a) — *Inherent power—Remand—Appeal—Competency of.* See C. P. CODE, O. 41, R. 23 AND O. 43, R. 1

19 A. L. J. 971.

—O. 43, R. 1 (j)—*Appealable order—Costs—Appeal as to—Competency of.*

If an order is itself appealable, an appeal will lie from that part of the order which relates to costs 8 C. 91; 12 Cal. 271; 16 B. 241 Ref

Where on the application of the judgment-debtors, a sale was set aside but the order setting aside the sale saddled them with the costs of the other side, and they filed an appeal against that part of the order which directed them to pay the costs of the other side, held, that an appeal lay. (*Piggott and Walsh, JJ.*) SHIB KUMAR V. SHEO GHULAM. 44 A. 209 : 20 A. L. J. 11 :

L. R. 3 A 91 : L. R. 3 All. 577. (1922) A. 90 : 64 I. C. 932.

—O. 43, R. 1 (n)—*Appeal—Injunction subject to a condition.*

An order for the issue of an injunction subject to a condition is appealable but there is only one appeal against it. (*Banerji, J.*) GANESH PRASAD SAHU v. DUKH HARAN SAHU. (1922) All. 441 : 66 I. C. 509

—O. 43, R. 1 (r) — *Order refusing to attach property—Disobedience of temporary injunction—Appeal.*

An order of court refusing to attach property for disobedience of an interim injunction falls within O. 39, R. 2(3), C. P. Code, is open to appeal 27 I. C. 131 (foll.) (*Scott Smith, J.*) DIWAN CHAND v. JHARIA COAL Co. (1922) Lah. 347 : 66 I. C. 9.

—O. 43 R. 1 (s) and O. 40, R. 1 (b)—*Appeal—Dispossession of third party by receiver.* See C. P. CODE O. 40, R. 1, (1922) M. W. N. 725.

C. P. CODE (1908), O. 43, R. 1.

—O. 43, R. 1 (S)—*Appeal—Order declaring that receiver should be appointed—Nature of routine*

An order under O. 43, R. 1, C. P. C., declaring that a receiver should be appointed in the case or appointing anybody by name as Receiver is an order which is appealable under O. 43, R. 1, 14 C. L. J. 489 : 18 (F. B.) foll. 13 C. L. J. 157 : 17 Bom. L. R. 510, 18 A. L. J. 212 Not Foll. (*Jwala Prasad and Bucknill, JJ.*) GOBIND RAM v. GANESH RAM. (1922) Pat 250 : 4 U. P. L. R. (Pat). 68.

—O. 43, R. 1 (u)—*Appeal—Remand order—Provision of law not stated—Effect of—Presumption that order is made under O. 41, R. 23 C. P. C.—Appeal—Maintainability of* See C. P. CODE O. 41, R. 23. 20 A. L. J. 321.

—O. 43, R. 1 (u)—*Order of remand—Appeal—Findings of fact.*

On an appeal from an order of remand, the High Court is bound by the findings of fact of the lower appellate court. 20 All 42 ref (*Daniels, A. J. C.*) QAMAR JEHAN BEGAM v. BANSI DHAR. 65 I. C. 376.

—O. 43, R. 1 (w) and O. 47, R. 7—*Order granting review—Appeal against—Power of appellate Court. See (1921) Dig. Col. 326. SURJYA NARAIN CHOWDHURY v. KUNJA BEHARI MAL. 66 I. C. 909.*

—O. 44, R. 1—*Leave to appeal in forma pauperis—Dismissal of application—Effect on appeal—Payment of Court fee.*

There is a distinction between applications to sue as a pauper, and applications to appeal as such. The distinction was deliberately drawn by the legislature. 40 M. 687 Ref In the case of an application to sue, the plaint is an integral portion of the application, in the case of an appeal, the memorandum of appeal is a separate document. Consequently the dismissal of the application for leave to appeal as a pauper does not involve the dismissal of the appeal. An order of the Court directing payment of the Court-fees which could be made under S. 149 C. P. Code is valid and proper. On payment of the Court fees the appeal is effective as from the date of the original presentation. 2 Lah. 1 ; 55 P. R. 1913 ; 95 P. R. 1917. dit (*Le Rossignol and Campbell, J.*) MAHANT DIYAL DAS v. SUNDAR DAS. 3 Lah. 35 : (1922) Lah. 225 : 65 I. C. 741.

—O. 45, R. 7—*Appeal to His Majesty in Council—Time for furnishing security—Extension of.*

It is competent to the High Court to extend the time for furnishing security for the costs of an appeal to His Majesty in Council if the appellant shows cogent reasons for such extension and also satisfies the Court that he has exercised due diligence during the period allowed. The mere fact that he has not been successful in his attempt to raise a loan is not a sufficient reason. 11 All. 7, 14 Mad. 391, 44 P. R. 1910, 11 C. W. N. 1104 ref. (*Maung Kin and Duckworth, JJ.*) PONNAMMAL v. THE BANK OF RANGOON. 11 L. B. 108 : 65 I. C. 450.

C. P. CODE (1908), O. 45, R. 13.

—O. 45, R. 7—*Appeal to Privy Council—Time for furnishing security—Act XXVI of 1920*

An appeal to His Majesty in Council from a decree passed before the coming into force of Act XXVI of 1920 is governed by O. 45, R. 7 as it existed before its amendment and the period for furnishing security is 6 months. Where cash is offered as security before the expiry of 6 months but is accepted after that period owing to the court's delay the deposit must be deemed duly made. (*Mears, C. J and Banerji, J.*) DEBI RAI v. PRAHLAD DAS. 44 A. 242 : 20 A. L. J. 51 : L. B. 3 A. 94 : 65 I. C. 340. (1922) A. 87.

—O. 45, R. 7—*Leave to appeal to His Majesty in Council—Furnishing security—Order for, when to be made.*

As an ordinary rule security shall be furnished in cash or in Government securities while the proviso to O. 45 R. 7. allows some other form of security. It provides against any delay by reason of such permission being given by requiring that the order for such other form of security might be passed at the time the certificate is granted. While, therefore, it is open to the applicant to move the Court to permit security in any other form to be granted it is essential the court should be so moved before or at the time of the hearing of the application for leave to appeal when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate security must be furnished in cash or in Government securities within the period allowed, by O. 45, R. 7, C. P. Code, (*Robinson, C. J and Maung Kin, J.*) KIRKWOOD v. MAUNG SIN. 66 I. C. 542.

—O. 45, R. 7—*Time for furnishing security and deposit in Privy Council Appeal—Extension of.*

Under O. 45, R. 7 as amended by S 3 of Act XXVI of 1920 the High Court's discretion to extend the time for furnishing security and making a deposit for translation and printing and other charges has been curtailed and limited to the period mentioned in the amendment. The High Court has no power to extend the period beyond six weeks. (*Mears, C. J. and Banerji, J.*) RAM DHAN v. PRAG NARAIN. 44 A. 216 : 20 A. L. J. 13 : (1922) All. 43 : L. B. 3 A. 634 : 65 I. C. 249.

—O. 45, R. 13 (d)—*Stay of proceedings—Power of High Court—Appeal to Privy Council—Decree executed and possession obtained—Proceedings in Revenue court in ejectment.*

In execution of a decree of a High Court under appeal to the Privy Council, possession was obtained by the decree-holder. He sued in the Revenue Court to eject the defendant from certain *sir and khudkashi* lands. On an application in the High Court to stay the proceedings : *Held*, the proceedings in the Revenue Court did not come within proceedings in execution of the decree, but were consequential on the decree of the High Court and on the fact that possession was obtained. The matter was not within O. 45, R. 13 of the



C. P. CODE (1908), O. 45, R. 13.

Civil Procedure Code. (*Mears, C. J. and P. C Banerji, J.*) CHET RAM *v.* RAM SINGH.  
64 I. O. 152.

—O. 45, R. 15—*Order of His Majesty in Council—Transmission of—Power to impose conditions.*

Where a High Court acting under O. 45, R. 15 of the C. P. Code transmits an order of his Majesty in Council to the first court for execution, it is competent to the High court to give directions to pay out the money on taking sufficient security from the decree holder. (*Daniels and Wazir Hasan, A. J. C.*) RANI BIJAI RAJ KOER *v.* THAKUR JAI INDRA BAHADUR SINGH.  
9 O. L. J. 5.

(1922) Oudh, 34. 66 I. C. 982.

—O. 47, R. 1 and O. 41, R. 11—Application for review—Subsequent appeal—Appeal summarily dismissed—Review incompetent See (1921) DIG. COL. 324 SHIVAPPA *v.* RAM CHANDRA  
46 Bom. 1: (1922) Bom. 130.

—O. 47, R. 1 and O. 41 R. 27—*Discovery of new and important matter after decree—Procedure to bring it before the court.*

The ordinary way of bringing before the notice of the court new and important matter which was not within the knowledge of the applicant at the time the decree was passed should be by application for review and not by an application for producing additional evidence, when rebutting decree cannot conveniently be taken nor original matter be conveniently dealt with. The other party would be likely to be prejudiced by the matter having been brought before the lower courts and by not having a proper opportunity of replying to it. (*Freemantle, J. M.*) SWAMI DIN *v.* QAMAR JAHAN SINGH.  
L. R. 3 A. 12 (Rev.)

—O. 47, R. 1—*Compromise decree—Setting aside—Grounds for—Separate suit—New and important matter—Discovery of.*

A person who wishes to displace a decree passed in terms of a compromise to which she was a party on the ground that she affixed her signature to the compromise at the instance of an agent in ignorance of its contents, can either apply for a review of the decree or institute a separate suit for the purpose. The mere fact that an application to set aside the decree is headed as made under S 151 C. P. C. (which is clearly inapplicable to the case) does not preclude the court from dealing with the application as one for review, if the provisions of the Code relating to review are applicable to the case.

The fact that a party to a compromise in terms of which a decree has been passed has affixed his signature to a compromise at the instance of an agent in ignorance of its contents is new and important matter within the meaning of O. 47, R. 1, C. P. Code.

*Quere:* Whether the circumstances that a party to a compromise affixed her signature to the same on misrepresentation or ignorance of its meaning and without enquiring as to its meaning in consequence of her confidence in her agent, are sufficient to render the compromise

C. P. CODE (1908), O. 47, R. 1

void or voidable. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER.

43 M. L. J. 290. 31 M. L. T. 132 (H. C.):  
(1922) M. W. N. 495. 16 L. W. 440:  
(1922) Mad. 446

—O. 47, R. 1 and O. 41 R. 11—*Dismissal of second appeal—Review—New and important evidence—Discovery of.*

The High Court will not accept a review of a judgment in a second appeal dismissed under O. 41, R. 11 C. P. Code on the ground that new evidence to prove a fact has been discovered. 41 C. 809 foll. (*Sanderson C. J. and Richardson, J.*) SAILABALA DEI *v.* GADADHAR HAZRA.  
36 C. L. J. 76: (1922) Cal. 165

—O. 47, R. 1—Order as to costs—Review. See (1921) DIG. COL. 325 BRAJA SUNDAR DAS *v.* JAGANNATH DHAR.  
3 Pat. L. T. 67:  
(1922) P. 1.

—O. 47, R. 1—*Review—Consent decree—Fraud.*

The ground of fraud, when practised upon a party in connection with a petition of compromise upon which a decree was made, is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. 13 C. W. N. 1197; 10 C. W. N. 286 Ref. (*Walmsley and Buckland, JJ.*) CHANDRA MOHAN GHOSAL *v.* PROSUNNA KUMAR MAITY.  
64 I. C. 259.

—O. 47, R. 1—Review—Effect of—Presentation of petition. See (1921) DIG. COL. 326 BHAGWAN BAKHSH SINGH *v.* MAURAJI KUNWAR  
(1922) Oudh. 148: 66 I. C. 205

—O. 47, R. 1—*Review—Grounds for—Discovery of new and important matter—Subsequent decision.*

A judgment delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based; for the new and important matter alleged to have been discovered must have existed at the date of the decree 24 M. 1 50 C. 119, foll. 51 I. C. 625 dist. (*Newbould, J.*) KALI PRASANNA GUHA CHOUDHURI *v.* BHAGABATI DEBYA.  
64 I. C. 324.

—O. 47, R. 1—*Review—Grounds for—Reversal of High Court's decision by Privy Council—Effect of.*

The ground for review under O. 47, R. 1, C. P. Code must be something which existed at the date of the decree and the rule does not authorise the review of a decision which was right when it was made on the ground of the happening of some subsequent event. Where the lower court had decided a case following the decision of the High Court in a connected case which was subsequently reversed on appeal by the Privy Council the reversal of the High Court's judgment is not a ground for review of the lower court's judgment 24 M. 1 (P. C.); 4 M. L. T. 86 foll. 13 Bom. 340; 33 A. 566 31 B. 128; 13 M. L. T. 225; 3 Pat. L. J. 372 Ref. (*Kumaraswami Sastri, J.*) GANNA BATHULA VENKAMMA *v.* GANNABATHULA RANGA RAO.  
43 M. L. J. 334  
(1922) M. W. N. 304: 15 L. W. 593:  
(1922) Mad. 227

C. P. CODE (1908), O. 47, R. 1,

—O. 47, R. 1—Review—Grounds for—*Diversity of opinion.*

The mere fact that another Judge is inclined to take a different view of the case from that taken by a Judge who originally decided the case, is no ground for review. 2 U. B. R. 608 : 2 U. B. R. 534 : 2 U. B. R. 7 : 10 I. C. 993 Ref. (*Brown, J.*)  
C) MA KYAW v. MA KYIN (1922) U. B. 16 : 64 I. C. 895.

—O. 47, R. 1—Review—Grounds for—*Omission to raise a point of law—Error apparent on the face of the record*

A mere omission to raise a point of law which had it been raised, might and probably would have brought about a different result is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed 13 Cal 20 C.W.N. 109 (*Dawson-Miller, C. J. and Coutts, J.*) KAMLA PRASAD CHAUDHURI v. KUNJ BEHARI MANDER. (1922) Pat. 1 : (1922) P 119.

—O. 47, R. 1 and 7—Review—Grounds for—"Other sufficient cause"—*Discovery of new and important evidence—Effect of*

The "discovery of new and important evidence" in O. 47, R. 1 C. P. C. would refer only to a discovery made since the order sought to be reviewed was passed. If an application for review is vague and general on this point and yet the Court grants a review, it may be taken to have formed the existence of "other sufficient cause" within O. 47 R. 1 but in the latter case there would be no appeal. (*Piggott and Walsh, JJ.*)  
MUSSAMMAT TIRBENI KUNWAR v. MOHAN LAL. L. R. 3 A. 251 : (1922) All. 366 : 66 I. C. 558.

—O. 47, R. 1—Review—Sufficient cause—*Place of hearing—Notice of—Judgment without consideration of evidence.*

Where in the notice of the hearing of an appeal, the place of hearing was not specified and the Commissioner purported to hear the appeal ex parte on the day fixed and passed a judgment without a consideration of the evidence on record, *Held*, there was sufficient cause for a review of judgment within the meaning of O. 47, R. 1, C. P. Code. (*Hopkins, S. M. and Fremantle, J. M.*) SANJAM SINGH v. DAYA RAM. L. R. 3 A. 249 (Rev.) : 4 U. P. L. R. (B. R.) 70.

—O. 47, R. 1—Scope of—Error of law.

Where there is no mistake in computing the period of notice but only an error in law, in holding that 15 days from the 17th to the 31st inclusive of the month were sufficient, there is no sufficient ground for review. (*Adams, J.*) AKSHY KUMAR BHATTACHARJEE v. AGARWALA. (1922) P. 308.

—O. 47, R. 1—"Sufficient reason" meaning of—Error of law, if a ground.

The words "any other sufficient reason" must be taken *ejusdem generis* with the clauses preceding O. 47, R. 1 History of legislation in India traced. An error of law is not sufficient reason

C. P. CODE (1908), O. 47, R. 8.

for granting review (*Viscount Haldane*) CHHAJU RAM v. NEKI. 30 M. L. T. 295 (P. C.) :

3 Lah. 127 : (1922) P. C. 112 : 43 M. L. J. 332 : 26 C. W. N. 697 : 16 L. W. 37 : (1922) Pat. 435 : L. R. 3 P. C. 109 : 41 P. L. R. 1922 : 36 C. L. J. 459 : 4 U. P. L. R. (P. C.) 99 : 49 I. A. 144 : 24 Bom. L. R. 1238.

—O. 47, R. 1—Review—Pendency of appeal—Effect of.

Where an application for review is preferred before the filing of an appeal, it is the duty of the Court to decide the application on the merits notwithstanding the fact that an appeal has subsequently been filed. 44 Cal. 1011 : 32 M. 415 toll (*Dos and Ross, JJ.*) SHAM LAL SAHU v. MT. NAG KOER. 65 I. O. 125.

—O. 47, R. 4 and 7—Review—Grant of application—Powers of appellate court.

Where the Court of first instance grants an application for review on the ground of discovery of new and important evidence not within the knowledge or power of the applicant at the time of the trial the appellate court will not generally consider the evidence afresh and disturb the conclusion of the lower court. (*Teunon and Newbould, JJ.*) AMBIKA CHARAN HAZRA v. BHANI RAM RATHI. 64 I. C. 219.

—O. 47, R. 4—Review—Notice to "opposite party"—Parties on record See (1921) DIG. COL. 326. SURAJPAL PANDEY v. UTIM PANDEY. 6 Pat. L. J. 625 :

3 Pat. L. T. 117. (1922) P. 281.

—O. 47, R. 5—Judge not party to decree—If can grant review—Effect of.

Where an appeal was heard by two judges, and thereafter on account of the absence of one of them, a review application came before the other judge sitting with a third new Judge and was granted : *Held*, the proceedings were entirely vitiated, as the terms of O. 47, R. 5 prohibited the new judge from taking part in the review. (*Viscount Haldane*) CHHAJU RAM v. NEKI. 43 M. L. J. 332 :

3 Lah. 127 : (1922) P. C. 112 : 30 M. L. T. 295 (P. C.) : 26 C. W. N. 697 : 16 L. W. 37. (1922) Pat. 435 : L. R. 3 P. C. 109 : 41 P. L. R. 1922 : 36 C. L. J. 459 : 4 U. P. L. R. (P. C.) 99 : 49 I. A. 144 : 24 Bom. L. R. 1238.

—O. 47, R. 7—Order granting review—Appeal.

An order granting a review of judgment cannot be questioned under any of the provisions of O. 47, R. 7 C. P. Code. (*Piggott and Walsh, JJ.*) MUNNU LAL v. KUNJ BEHARI LAL. 20 A. L. J. 517 : L. R. 3 A. 295 :

44 All. 605 : 4 U. P. L. R. (A) 66 : (1922) All. 206 : 67 I. C. 317.

—O. 47, R. 8 and 11—Review—Grant of—Appeal—Effect on original decree.

A review commences ordinarily with an ex parte application. The court then may either reject the application at once or may grant a rule calling on the other side to show cause why

C. P. CODE (1908), Sch. II, p. 1.

the review should not be granted. In the second stage, the rule may either be admitted or rejected and it is obvious that the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one respect, the result is the same whether the rule be discharged or on the rehearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been reopened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree—Consequently the order appropriate to a discharge of the rule is the rejection of the application; an order so made terminates the second stage of the proceedings, and there is no third stage for the rehearing of the case. When the application for a review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against that decree can no longer be prosecuted. But the parties can appeal from the final decree passed on review. Cases reviewed (*Mookerjee and Rankin JJ*) *GOURKRISHNA SARKA v. NILMADHAB SHA.* 36 C. L. J. 484.

—Sch. II, paras 1 and 14—Arbitration—Reference to—Power of court to refer—Matters outside suit—Award—Validity of, *See* (1921) DIG. COL. 328, *PEDDAPALAYAM BODACHARI v. PEDDAPALAYAM MUNYACHARI.*

65 I. C. 92.

—Sch. II Para. 1—Parties to reference—Objection to attachment under O. 21, R. 58, C. P. C.—Judgment debtor necessary party.

Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration the judgment-debtor is a necessary party to the reference (*P. C. Banerji, J.*) *BASDEO SAHAI v. MUST. SARASWATI.*

64 I. C. 469

—Sch. II Para. 1—Reference—Minor parties—Duty of Court

Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors (*Kennedy, J. C. and Raymond, A. J. C.*) *EMNABAI v. FAKIR MAHOMED.*

15 S. L. R. 165 : (1922) S. 1. 65 I. C. 50.

—Sch. II, para. 1—Reference—Parties—Omission of some of the parties to join—Validity of award.

All the parties interested in a suit must join in the reference to arbitration and where only some of the parties agree to refer the award on such reference is void. (*N. R. Chatterjee and Newbold JJ*) *DEBENDRA NATH BISWAS v. JOGENDRA NATH BISWAS.* 64 I. C. 221.

—Sch. II, paras 5 and 17—Reference to arbitration without the intervention of a court—one of the arbitrators refusing to act—Remedy. *See* (1921) DIG. COL. 529. *BHAGWAN DAS v. GURDAYAL.* 64 I. C. 459.

C. P. CODE (1908), Sch. II, p. 15.

—Sch. II, Para. 8—Filing of award—Date fixed for—Non appearance of parties—Effect of—Dismissal of suit.

Where a judge dismissed a suit for failure of the parties to attend on the date fixed for filing of the award even though the award was not filed on that date, the order of dismissal is improper and would be set aside.

Since the filing of an award is an act of the arbitrator, the parties need not be present in court. A court has no power to supersede an arbitration in anticipation that the award will not be filed before the due date, (*Das, J.*) *MAHARAJ BHAGAT v. HARIHAR BHAGAT.* 3 Pat. L. T. 346 : 65 I. C. 144.

—Sch. II, paras 14 and 15—Arbitration—Misconduct—Acting on evidence adduced by one party behind the back of the other.

If an arbitrator receives documents from one party and bases his award upon those documents without giving the other party an opportunity of seeing those documents and of meeting the inferences deducible therefrom, he is guilty of misconduct and the other party can appeal to have the award set aside on that ground. (*Martineau, J.*) *DELHI CLOTH AND GENERAL MILLS Co. v. KIDARI PERSHAD.* 4 U. P. L. R. (Lah) 15 : 64 I. C. 363 : 22 P. L. R. 1922.

—Sch. II, Paras. 14 and 15—Arbitration—Award—Misconduct—Knowledge privately obtained by one of the arbitrators communicated to others, effect of. *See* (1921) DIG. COL. 329 *MOHIDIN SAHIB v. RAMASWAMI CHETTY*

65 I. C. 676.

—Sch. II para 15—Arbitration—Reference—Dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Propriety of—Misconduct—Delegation of functions.

Where the parties referred a dispute as regards the management of a trust to arbitration the arbitrators instead of deciding the dispute in favour of one or other of the parties appointed themselves into a committee of management. Held that the arbitrators were not themselves the best judges of whether they were fit persons to be members of a committee of management and it was impossible for them to avoid personal considerations when they came to consider the suitability of themselves as members. The award was therefore bad.

An arbitrator may delegate to a third person the performance of acts of a ministerial character but this doctrine cannot be invoked to cover a case where evidence was taken in the absence of one or more of the arbitrators. (*Ashworth and Simpson, A. J. C.*) *PANDIT SANKATA PRASAD v. JAGANNATH.* 9 O. L. J. 410 : (1922) Oudh 276.

—Sch. II para 15—Arbitrators—Joint deliberation essential—Absence of one or some of the arbitrators—Effect on award—Waiver.

No doubt all the arbitrators must be present during the whole of the deliberations but it is open to the parties to waive the absence of one of them both at the time when the evidence is taken and the time when their conclusion is

C. P. CODE (1908), Sch. II, p. 15.

reached. (*Greaves and Ghose, J*) RAMA NATH MISRA v. RAMRANIAN MISAR. 67 I. C. 866 (2).

—Sch. II, para. 15—*Arbitrator—Misconduct—Private communication with parties.*

Where an arbitrator makes private communication with one of the parties to the proceedings before him without the knowledge of the other, he is guilty of legal misconduct which justifies the setting aside of the award. If, however, the reference itself authorises such communication, then there is nothing wrong in the conduct of the arbitrator. 4 A. L. J. 159 foll. (*Piggott and Walsh, JJ*) SIA RAM v. CHET RAM. L R. 3 A. 84

—Sch. II para 15—*Arbitrator—Misconduct—Private enquiries—Making of—When objectionable.*

Where the parties produced no evidence and the arbitrators made enquiries from the neighbours of the parties and there was nothing to show that the inquiries were not made in the presence of the parties, the award, though no doubt based on hearsay and conjecture must be upheld. (*Le Rossignol, J*) BUDH RAM v. CHANDU 67 I C 866 (1)

—Sch. II, para 15—*Arbitration—Private inquiries authorised by agreement of parties Award based on such—No misconduct* See C. P. CODE, S 115 AND SCH. II, para. 15. 20 A L J. 125

—Sch. II, Para 15—*Misconduct—Private enquiry by arbitrator.*

Where the terms of a reference to arbitration do not authorise the making of private enquiries by the arbitrator behind the back of the parties, the arbitrator making such inquiries is guilty of misconduct. If a court in such a case supersedes the arbitration, it cannot be said to act illegally or with material irregularity. (*Piggott and Walsh, JJ.*) GANGASAHAI v. BALDEO SINGH. 20 A. L. J. 117 : L R. 3 A. 104 : (1922) A. 64 65 I. C. 779.

—Sch. II, Para. 15—*Misconduct—Private enquiries by arbitrator—Effect of*

Where the parties had given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at, the arbitrator cannot be said to be guilty of misconduct if he bases his award on private inquiries and the court acts without jurisdiction if it refuses to pass a decree in terms of the award on that ground. (*Piggott and Walsh, JJ.*) HAJI HUSAIN BAKSH v. FIRM OF LACHHMAN DAS MATHURA DAS L R. 3 A. 106 : 64 I. C. 934

—Sch. II, Paras 15 (1) (c) and 16—*Award—Invalidity of—Appeal—Revision*

The words "being otherwise invalid" in Sch. II para 15 (1) (c) are intended to give effect to the principle of finality to awards.

Where the judgment is according to the award there is no appeal nor a revision. 29 C. 167 Ref. (*Keenedy, J. C. and Raymond, A. J. C.*) EMNABAI v. FAKIR MAHOMED 15 S. L. B. 165 : (1922) S 1 : 65 I. C. 50.

—Sch. II, para 16.—*Arbitration—Award—Decree passed before expiry of time for filing*

C. P. CODE (1908), Sch. II, p. 18.

objections. See (1921) DIG. COL. 332 MANI RAM v. RAM ASRAY. 64 I. C. 90.

—Sch. II. Para 16 cl. (2)—*Appeal—Revision—Decree on award without hearing objections.*

Where a court passes a decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence, there is a revision, but not an appeal against the decree. 89 P. R. 1902 foll. 12 A. 422, 29 A. 584 dist. (*Abdul Raouf, J*) BHAGAT DARBARI RAM v. BHIKHA RAM. 3 Lah L J. 487 : 20 P L R. 1922.

—Sch. II paras 17 and 5—*Arbitration—Reference without intervention of court—Refusal of arbitrator to act—Right to obtain order of reference.*

On a reference to arbitration without the intervention of the court, one of the parties declined to act after the proceedings were begun. Held that it was competent to the court to make an order of reference under para 17 Sch. II C. P. Code on the application of one of the parties and to appoint a new arbitrator under para. 5 even in the absence of a provision to that effect in the deed of agreement. (*Walsh and Ryves, JJ.*) FAZAL ILAHI v. PRAG NARAIN. 44 All. 523 : 20 A. L. J. 327 : L. R. 3 A. 434 : 4 U P. L. R. (A) 156 : (1922) A. 133 : 67 I. C. 739.

—Sch. II, para 17—*Minor—Mahomedan minors—Mother de facto guardian—Not competent to agree to reference to arbitration affecting minor's property—Consent invalid—Subsequent consent by certificated guardian—Effect of.* See MAHOMEDAN LAW—GUARDIANSHIP. 26 C. W. N. 246.

—Sch. II para 17—*Right to obtain reference through court.*

Where a party has gone to arbitration in which he had refused to go to arbitration an order of reference would have been made under para 17 Sch. II C. P. Code, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under para 17 Sch. II C. P. Code. (*Walsh and Ryves, JJ.*) FAZAL ILAHI v. PRAG NARAIN. 44 A. 523 : 20 A. L. J. 327 : L. R. 3 A. 434 : 4 U. P. L. R. (A). 156 : (1922) All. 133 : 67 I. C. 739.

—Sch. II, para. 18—*Arbitration—Pendency of—Institution of suit—Effect of.*

The institution of a suit has not *ipso facto* the effect of superseding a previous reference to arbitration, dealing with the same subject matter; but if after the institution of the suit neither party applies for a stay of the hearing of the suit under Sch. II, para 18 of the C. P. Code either at the time of the settlement of issues or before, the effect of such a failure is to supersede the arbitration for good; and any decision which might be arrived at in that suit would be binding on the parties as if no such reference to arbitration had been made prior to the suit. 41 Mad. 115, 12 A. L. J. 75 ref. If an application is made

C. P. CODE (1908), Sch. II, p. 18.

under Sch. II, para 11 for the stay of a suit and such stay is granted, the arbitration can proceed; but if such stay is refused and the order refusing the stay becomes final, the arbitrator becomes *functus officio*. There is, however, a third contingency, viz., where no application for stay is made within the time allowed by law. The effect of the institution of the suit and its decision would in such a case equally be to supersede the arbitration and render any award made therein after the institution of the suit unenforceable (*Kanharya Lal, J. C.*) *BAINAB v. BUDHUA*.

25 O. C. 63 (1922) Oudh 158 : 68 I. C. 235.

—Sch. II, paras 18 and 20—Award—Institution of suit pending arbitration—Effect of—Power of arbitrators—Stay of suit.

Where for the determination of the controversy between the parties, two competent tribunals are available, the court and the arbitrators, and the plff. chooses the latter but in fact has recourse to the former, it is not open to the deft. to enforce specific performance of the contract or to plead the contract as a conclusive bar to the suit, but the deft. may apply to the court to stay the suit in the exercise of its judicial discretion so as to enable either of the parties to obtain a decision from the arbitrators. When the court is apprised that the suit has been instituted in contravention of an arbitration agreement the court has a discretion to stay the suit. The burden lies on the plff. to show that some sufficient reason exists why the matter should not be left to be decided by the arbitrators and not on the deft. to show that no such reason exists, it is the *prima facie* duty of the court to act on the agreement between the parties.

46 C. 1041 ; 47 Cal. 752 : 41 M. 115 Rel.

As soon as the suit is instituted the arbitrators lose their authority. If the deft. still desires that the controversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under Sch. II para. 18 C. P. Code. If the application is refused by the court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award, they are free to bring their proceedings to a termination and make an award in accordance with law. If, on the other hand the arbitrators have made an award after the institution of the suit, the award cannot be pleaded as an effective bar of the suit. The award so made should be brought up before the court under Sch. II para. 20 C. P. Code; the court will refuse to enforce it under para 21 read with para 14 (c); and as the award will thus stand cancelled because made without jurisdiction, the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. (*Mookerjee and Chotner, JJ*) *SARAT CHANDRA SEN v. RAJKUMAR MOOKERJEE*.

26 C. W. N. 967 : 35 C. L. J. 482.

—Sch. II, Para. 18—Contract to supply goods—Arbitration clause—Non-delivery of part of goods—Stay of suit—Discretion. See (1921.) DIG. COL. 333 *GANESH DAS ISHAR DAS v. DURGA DAT JAGAN NATH.* (1922) Lah. 97.

C. P. CODE (1908), Sch. II, p. 20

—Sch. II, paras 18 and 23—Reference to arbitration—Stay of suit—Removal of stay—Power to proceed with the trial of the suit. See (1921) DIG. COL. 334 *LAXMAN UPENDRA SHAMBOG v. MANJUNATH DAMODER* 64 I. C. 289.

—Sch. II, Para. 18—Reference to arbitration—Subsequent suit—Waiver of right to arbitration.

Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit he must be deemed to have waived his right to arbitration. 47 Cal. 752, 41 Mad 115 not foll. (*Piggott and Walsh JJ*) *CHIMMAN LAL POSTI MAL v. FIRM PHOOL CHAND FATEHCHAND*.

44 A 292 : L. E. A. 96 : 20 A. L. J. 128 : (1922) All. 48 : 65 I. C. 795.

—Sch. II, para. 18—Stay of suit—Arbitration clause in indent—Bills of Exchange—Acceptance by buyer.

A buyer placed an indent for the purchase of certain cotton goods with the seller, who, after shipment of the goods drew bills of exchange against the buyer. The buyer accepted the bills but subsequently refused to pay. In a suit by the seller upon the accepted but unpaid bills, the buyer relied on a clause in the indent that if any claim or dispute arose in connection with the contract it should be referred to arbitration and applied for stay of proceedings under Sch. II para 18 of the C. P. Code. The seller relied on a clause in the indent to the effect that the bills drawn by the sellers on the buyers must be accepted and paid at maturity notwithstanding any objection the buyers may have regarding any variation in the terms of the indent. *Held*, that the buyer could not claim a stay of proceedings in the suit, 2 Lah. 19 dist. (*Scott Smith and Abdul Qadir, JJ*) *RADHA BIHARI DIWAN SINGH v. G.B. ALEXANDER*. 2 Lah. 335 : (1922) Lah. 353 : 66 I. C. 43.

—Sch. II para. 20—Absence of arbitrator—Objection—Waiver.

If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. (*Greaves and Ghose JJ*) *RAMNATH MISRA v. RAMRANGAM MISRA*. (1922) Cal. 181.

—Sch. II, para. 20—Applicability—Stranger to arbitration—Application to file.

A person who is a stranger to the submission to reference and under no obligation to abide by the award could not be said to be a person interested in the award within Sch. II para 20 C. P. Code. (*Ashworth and Simpson A. J. C.*) *PANDIT SANKARA PRASAD v. JAGANNATH*.

9 O. L. J. 410 (1922) Oudh. 276.

—Sch. II, paras 20 and 21—Arbitration—Award—Private reference—Compromise modifying award—Decree on award.

*Held by Daniels and Lyle A. J. C.* (*Kanhaiya Lal, J. C. dissenting*) that a court is competent on an application under Sch. II para 20 C. P. C. to pass a decree on an award as modified by a lawful compromise filed by the parties and that

C. P. CODE (1908) Sch II p. 20.

from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified, 31 C 516, 45 B 245; 37 B, 639; 2 Lah. 114, 27 A. 526, 29 M. 403, 4 Pat. L. J. 394; 30 P. R. 1914; 21 C. L. J. 248 Ref. (*Kanhaya Lal, J. C. and Daniels, A. J. C.*) *HAKIM FAZAL AHMAD v. ENAYAT AHMAD*. 9 O. L. J. 219 : (1922) Oudh 189 : 68 I. C. 209

— — — Sch. II, Paras 20 and 21—*Arbitration—Private reference—Institution of suit prior to commencement of proceedings by arbitrators—Effect of—Award—Enforceability of—Jurisdiction of arbitrators—Legality of the contract of submission—Enquiry into—Suit to set aside the award—Maintainability.*

Where an action has been commenced on a contract containing a provision for reference to an arbitrator of any disputes arising under the contract and is pending, no application to stay the action having been made or such application having been made and refused, an award made by the arbitrator under the provision for reference upon the subject matter of the action, subsequent to the commencement thereof and without the consent of the plaintiff is invalid and will not afford defence to the action. When the same matter comes before two tribunals a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication by the private tribunal. Neither can that adjudication be pleaded as a bar to the action, nor can it be allowed to affect the merits of the decision given by the public tribunal. The law does not permit the same question to be decided by a court of law as well as by an arbitrator, and it is only when the dispute between the two tribunals is identical that a decision given by the arbitrator must be treated as ultra vires. There is no authority in support of the proposition that an award made after the commencement of an action must be treated as invalid even though the award deals with a question on which is not in controversy in the action. 47 C. 752, 47 C. 849, 41 M. 115, 56 I. C. 150 dist. An award made after the commencement is not invalid if it deals with a question not in controversy in the action. (*Shadi Lal, C. J. and Campbell, J.*) *JAI NARAIN BALEN LAL v. NARAIN DAS JAINI MAL*.

3 Lah. 296.

— — — Sch. II para 21—*Award—Judgment and decree—Subsequent suit to set aside the award.*

Matters heard and determined in proceedings under para 21 of Sch II to the C. P. Code cannot be reopened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith. 25 C. 757 Ref. (*Teunon and Richardson, JJ.*) *GURU CHARAN SIKRAR v. UMA CHARAN SIKRAR*. 26 C. W. N. 940.

— — — Sch. II para 21—*Private reference—Arbitration—Award—Death of parties pending*

C. P. CODE (1908) Sch III p. 7.

*hearing—Minor representatives not impleaded—Effect of—No prejudice.*

The parties to a dispute referred it to arbitration agreeing that they and their heirs would be bound by the award. The adult parties adduced all the oral evidence and filed all the documents before the arbitrators. During the hearing of the arguments it was brought to the notice of the arbitrators that one of the parties had died, thereupon the arbitrators gave time to bring on record the minor representatives of the deceased and for appointment of a guardian. Nothing was done within the time and thereupon the arbitrators gave their award. On an application to the court to file the award, it was objected that the award was not binding because the minors had not been represented in the proceedings. Held that having regard to the terms of the reference and to the fact that the interests of the minor were properly represented by the other parties on record, the award was binding on all the parties.

It is true as a general principle that a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. There is no rule of procedure by which the arbitrators could substitute the legal representatives of a deceased party or appoint guardians ad litem for infants. If it be held that the arbitrators could not go on with the arbitration if the representatives or some other persons did not choose to come before the arbitrators, the result would be that although the reference would not abate on the death of a party under the law the arbitrators would in fact be unable to make an award and the arbitration would come to an end. The question therefore whether the award given in the absence of the representatives of a deceased party would be binding or not depends on the circumstances of the case. If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon. 31 All. 572; 15 C. L. J. 360 dist. (*Woodroffe and Ghose JJ.*) *BINAYAKDAS ACHARYA CHOWDHURY v. SASI BHUSAN CHOWDHURY*. 26 C. W. N. 804 : (1922) Cal. 226.

— — — Sch. II, para 21 (2) — *Ex parte decree based on an arbitration award—Setting aside—C. P. C., O. 9, R. 13. See (1921) DIG. COL. 335*

*MAHABIR PRASAD v. BAL KISHUN DAS*. 1 Pat. 48 : 3 Pat. L. T. 29 : (1922) Pat. 76 : (1922) P. 376.

— — — Sch. II para 22—*If controls S. 21 of the Specific Relief Act, See SPECIFIC RELIEF ACT, S. 21.* 64 I. C. 204.

— — — Sch. III, paras 7 and 11 — *Execution before collector—Exclusion of time—When permissible*

## C. P. CODE (1903) Sch III p, 11.

The period during which execution proceedings are pending before the collector can be excluded only in cases where a provision has been made under Sch III para 7. for the satisfaction of the decree and where the decree-holder has in consequence been temporarily deprived of his remedy. Where no such provision is made for the payment of a decree, the mere fact that the collector is taking steps to satisfy another decree holder who had attached the same property is no ground for excluding time. 1 N. L. R. 180 Dist (Dhobley A. J. C.) BHARAO V. LAHANU.

64 I. C. 855

Sch. III para 11 — Execution of decree by collector—Power of debtor to alienate property—Scope of the restriction—Permission of Collector

While a decree is under execution by the Collector it is illegal for a civil court to issue process against the property and this illegality is not cured by the mere fact that subsequently the collector ceased to have charge of the execution proceedings. The permission of the collector for a mortgage by the judgment debtor need not take the form of a certificate under O. 21, R. 83 C. P. Code. It is enough if the collector knows of the mortgage and gives sanction to it in writing (Daniels J. C. and Dalal A. J. C.) SHEIKH MAHOMED MUZAFFAR ALI v. BHAGWATI PRASAD SINGH

66 I. C. 642.

Sch. III, para 11—Object of—Attachment before judgment—Mortgage during pendency of

The object of Sch III para 11 C. P. C. is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment cannot defeat that object for by such attachment alone the property is not exposed to the risk of such loss. Attachment before judgment is not a process in execution of decree for at the time of attachment there is no decree and no process that could be issued in execution of the same is consequently an attachment before judgment is not prohibited by Sch III para 11 C. P. Code. 26 C. 531 Ref. (Kolval, A. J. C.) BANSILAL v. SITRAM.

(1922) Nag. 238 : 68 I. C. 188.

CIVIL RULES OF PRACTICE (1905) MAD. R. 277 and exception there to—Scope and applicability—"In any matter connected therewith"—Meaning—Connected suits—Exception to rule—Refusal to engage services of pleader—What amounts to. See (1921) (COL. 335) RAMALINGAM PILLAI v. THE OFFICIAL RECEIVER, TRICHINOPOLY.

64 I. C. 524.

CO-HEIRS—Adverse possession—Possession of one not adverse. See ADVERSE POSSESSION 4 U P L R. (B. R.) 10.

CO-MORTGAGORS—Sale by one of equity of redemption—Effect on others.

The sale by one co-mortgagor of the whole equity of redemption to the mortgagee is illegal and the latter cannot found upon it a title by adverse possession against those whose shares

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had been illegally sold. (Scott Smith, J.) AMIR v. NADIR ALI 68 I C 733

COMPANY—Articles of Association—Agreement by promoters before incorporation affixed—Effect.

Affixing a copy of an agreement between the promoters of a company and third parties, to the Articles of Association cannot in law amount to the formation of a contract between the company and such third party. (Chevis, J.) SURENDRA AND COY v. PUNJAB TANNERY COY. 68 I C 787.

Contract by promoters before incorporation—If binding—Ratification.

A Company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation though it may enter into a new contract embodying the terms of the old one or adopting the old one. (Chevis J.) SURENDRO AND COY v. PUNJAB TANNERY COY.

68 I C 787.

Liquidation—Secured creditor—Rights—Right to interest—Winding up order.

In matters of liquidation the rules relating to bankruptcy are, as far as possible, applicable. When a company goes into liquidation a secured creditor may realise his security and prove for any outstanding balance. The remaining assets would be liable for such principal and interest as was due on the date of the winding up order. A secured creditor is in the case of liquidation on the same footing as in that of insolvency proceedings. The property hypotheated is liable for the whole claim, principal and interest, up to date of realization, and it is only the liability of the remaining assets that could be affected by the winding up order, 7 B 455; 12 B 272; 15 I. C. 850; 38 B. 359 Rel. (Broadway and Martineau, JJ). RAM CHAND v. BANK OF UPPER INDIA.

3 Lah. 59 : (1922) Lah. 281.

Shares—Transfer incomplete—Effect, See GIFT.

48 Cal. 986

Shares—Transfer of—Formalities necessary for—Inchoate transfer—Rights of transferee—C.P. Code O. 21, Rr 46, 76, 79 and 80—Discretion of directors in recognising transfer.

A deed of transfer of shares in a company not complying with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company, is invalid as against a person, who has purchased the shares in a sale in execution held under the provisions of the C. P. Code. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Indian Companies Act and the Articles of Association, may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by transfer can be regarded as an agreement to convey, capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then, the transfer is inchoate and the transferee cannot claim priority over a court auction

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purchaser of the shares. (1902) 2 K. B. 427 and 40 Mad. 1134 foll 31 Bom. 76 not foll.

*Obiter* :—It is open to the Directors of a Company in the bona fide discretion vested in them under the Indian Companies Act and the Articles of Association, to refuse to recognise the purchaser of the shares of the company in a court auction, as a shareholder in the company (*Kumaraswami Sastri and Deva Doss JJ*) *TADE PALLI NAGABHUSHANAM v. SRI RAM RAMACHANDRA RAO*. 45 Mad. 537 : 42 M. L. J. 449.

30 M. L. T. 231 (H.C.) : 15 L. W. 470  
(1922) M. W. N. 331.

— *Winding up—Fraud—Waiver*

The mere fact that there has been a fraud in the promotion or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order as the majority of share holders may waive the fraud. (*Sanderson C J and Richardson, J*) *ORIENTAL NAVIGATION COY v BANARAM AGARWALLA*

49 Cal 399  
(1922) Cal. 865.

**COMPANIES ACT (VI of 1882) S. 4**—Unregistered Business Association of more than twenty members—Suit by one member for refund of capital advanced. See (1921) DIG. COL. 337 *RAM KUMAR v. NEM CHAND*. 64 I. C. 447

**COMPANIES ACT, (VII of 1913) S. 4—Sub S. 1—Partnership—Test of—Debtor and creditor—Agreement between creditors inter se**

The use of the word "partner" or "partnership" in an agreement between several persons jointly advancing money does not necessarily show that there was a partnership between them. The parties may call themselves partners, but if it appears that one party is to do nothing more than advance money to the other and is to be repaid by a share of the profits they must be treated as debtor and creditor. 4 All. 74 foll. (*Dhobley, 4, J. C*) *MAHOMED JUSUF v. PIR MAHOMED*.

(1922) Nag. 67 : 65 I. C. 368.

— **S. 38**—Application for rectification of register—Question of title—Discretionary power of court to refuse to decide such question—Appeal—Enquiry into transfer—Waiver. See (1921) DIG. COL. 338 *UNION INDIAN SUGAR MILLS CO., LTD. v. JAI DEO*. 44 A. 51 : L. R. 3 A. 56 : (1922) All. 258 : 65 I. C. 291.

— **Ss. 38 and 91 B—Company—Articles of association—Quorum of directors—Resolution of directors to allot unissued shares to some directors—Validity** See (1921) DIG. COL. 338, *SIR HORMUSJI A WADIA In re*. 64 I. C. 933.

— **S. 72—Promissory note—Signed by Secretary, Treasurer and agent—Liability of company.**

A company purchased certain machinery and in lieu thereof one of its secretaries and treasurers executed a promote signing it in his own name. The promote was on a sheet of paper printed with the name of the company and bearing a Stamp impression of the company. Held the promote was signed on behalf of the company and it was therefore liable on the note. (*MacLeod, C. J. and Coyajee, J.*) *POONA CHITRAHALA STEAM PRESS v. GAJANAN INDUSTRIAL AND TRADING CO.*

24 Bom. L. R. 355 : 67 I. C. 941.

## COMPANIES ACT S. 284.

— **S. 101—Additional District Judge—Jurisdiction of Punjab Courts Act (1888) S. 36.**

The Additional District Judge has jurisdiction to make all orders which the District Judge can make in the winding up of a company. (*Lord Phillimore*) *BEHARI LAL-BULAKI RAM v. KUNDAL LAL*. (1922) P. C. 361.

— **Ss. 150 and 166—Order for payment—Right of transferee to enforce—Dissolution—Liquidation—Effect of.**

A person to whom the liquidator has transferred a payment order made by the court under S. 150 of the Companies Act against a contributory is entitled to invoke the summary jurisdiction of the court for the purpose of recovering money due from the latter.

The circumstance that the company has been finally dissolved does not prevent the assignee from seeking relief from the liquidation Court and render it necessary for him to bring an action for the recovery of the money. (*Shadi Lal C. J. and Wilberforce, J.*) *BAWA PARDUMAN SINGH v. THE PIONEER JEWELLERY COMPANY, LIMITED*. 3 Lah. L. J. 382 : 67 I. C. 443

— **S. 162—Compulsory winding up—Resolution for voluntary winding up.**

Where the Judge had not decided whether there was a valid resolution for voluntary winding up ; or that there was any valid ground for making a winding up order, but he directed the meeting of share-holders to be held and then, because there was a considerable majority of the share-holders who voted at that meeting in favour of winding up and then made the compulsory winding up order. Held : it was not a sufficient ground for the compulsory winding up order. The mere fact that a majority of the share holders, who voted at the meeting, were in favour of winding up the company either under supervision of the court or by the court compulsorily is not sufficient to justify the court in making the compulsory winding up, especially where there was no valid resolution for voluntary winding up. (*Sanderson, C. J. and Richardson, J*) *ORIENTAL NAVIGATION CO. LTD. v. BHANARAM AGARWALLA*. 49 Cal 399 : (1922) Cal. 365.

— **S. 179 (c)—Sale—Lessee as buyer—Validity.**

In the course of the winding up a company the official liquidator found it convenient to let out a Mill for a fixed period, and sell it when the market was favourable. Before the expiry of the lease, circumstances occurred which made a sale necessary and so the court gave the lessees an option to purchase and sanctioned a sale. Held, under the circumstances, it was the only possible course for the court to follow. (*Lord Phillimore*) *BEHARI LAL v. KUNDAL LAL*.

(1922) P. C. 361 (P. C.)

— **S. 234—Procedure—Winding up commenced before new Act came into force—Appeal—Notice.**

Where proceedings in winding up were commenced before Act VII of 1913 came into force, S. 284 lays down that for all purposes connected with the winding up, the old Act should be regarded as in force. An appeal against the order



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of the District Judge must be filed and notice served in such a case within 3 weeks of the order as laid down in S. 169 of the old Act (*Chevis J.*)  
**HAM RAJ v. PUNJAB TANNERY COMPANY.**  
 68 I C 792

**COMPROMISE — Binding nature of — Alienation by widow—Suit to set aside—Compromise—Subsequent claimants when affected.**

A Hindu widow in possession of husband's estate alienated it in favour of her son-in-law. The reversioner brought a suit for declaration that the alienation was null and void. To avoid a costly and protracted litigation the parties entered into a compromise as a result of which they made certain arrangements for the enjoyment and disposal of the properties. Held that the compromise was valid and binding on persons deriving titles from the alienee. It was also not competent to plaintiff who had not been born at the date of the compromise to impeach it by a suit (*Broadway and Abdul Qadir JJ*) **MT MALTO v. FAKIRI.**  
 4. Lah. L J 27 (1922) Lah 115.

**Binding nature of — Compromise by guardian—Actings of the parties—Estoppel**

Even where a compromise or settlement is considered to be defective or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the acts and conduct of the parties are founded upon it, as in the case of a part performance of an agreement, the locus penitentiae which exists in a situation where the parties started upon nothing but an engagement which is not final or complete is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches after the bargain has been acted upon.

The conduct of minors however cannot be pleaded in defeasance of their right to repudiate the act of their guardians during their minority. But if their guardians had acted for their benefit, and after attaining majority they continued to derive the benefit which the transaction conferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interest of one of them, (*Kanhaya Lal J. C*) **RAGHUBAR v. RAM BHAROSE.**  
 (1922) Oudh 217:  
 66 I C 412.

**Counsel's powers as to—Limitation—Failure of client to repudiate in time—Effect. See LEGAL PRACTITIONER.**  
 3 Pat. L T 371.

**Decree—Compromise going beyond the subject matter of the suit—Procedure—Form of the decree. See C. P. CODE, O, 23, R. 3.**  
 65 I C 147.

**Effect of—Disputed title—Mistake of law.**

A compromise of a disputed title or a doubtful right is not rendered invalid because it proceeds on a wrong legal ground. The justification for the compromise is that the parties do not know what the courts will ultimately decide and prefer to settle the matter amicably and avoid

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the expense of further litigation. If a compromise could be attacked on the ground that if the issue had gone to trial the court would have decided it differently, the whole object of the agreement would be defeated and no compromise would be safe from attack. (*Daniels and Lyle, A J C.*)  
**KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD**  
 25 O. C. 189 9 O. L J 235 : (1922) Oudh 236.

**COMPROMISE DECREE—Effect of—Decree when operative.**

A compromise becomes operative when it is embodied in the decree. Therefore if the compromise fixes any time for the doing of an act, the time is to be calculated from the date of the decree and not from the date of the compromise. (*Daniels J. C.*) **ILAHJI RAZA KHAN v. MT. TAIBA BEGAM.**  
 9 O L J. 53 · 66 I C 273.

**Effect of—Binding on parties.**

A compromise decree is just as binding on the parties as a decree on contest but the decree has no greater validity than the compromise itself. (*Chatterjee and Panton, JJ.*) **RAJENDRA KUMAR BOSE v. BISWARUP DEY.**  
 35 C. L J 173 :  
 64 I C 603.

**Family arrangement—Settlement of bona fide dispute—Limited owner—Compromise when binding on reversioner. See HINDU LAW—LIMITED OWNER.**  
 20 A L J 251.

**Knowledge of facts—Essential to validity of. See (1921) DIG. COL. 343. SATISH CHANDRA GHOSH v. KALIDASI**  
 26 C W. N 177 :  
 (1922) Cal 202 : 68 I. C 577.

**Legality of—Public trust—Succession to office. See (1921) DIG. COL. 343 VENKATACHALAM CHETTIAR v. RAMANATHAN CHETTIAR.**  
 15 L. W. 111 : 31 M. L. T. 52 (H. C.) :  
 (1922) Mad. 429.

**Setting aside—Effect of—Status quo ante. See (1921) DIG. COL. 344. RAJA RAJESWARA SETHUPATHI AVERGAL v. KUPPUSWAMI AIYAR.**  
 68 I. C. 352.

**Setting aside—Fraud of agent—Ignorance of contents—Remedy by suit—Application for review. See C. P. CODE, O, 47, R. 1**  
 43 M. L. J. 290

**CONFESSION — Informality of procedure in recording—Effect. See CR. P. CODE, Ss. 164 & 364.**  
 4 Lah. L J. 225.

**Retraction of—When a safe basis for conviction. See CRIMINAL TRIAL—CONFESSION.**  
 3 Pat. L. T. 99.

**Retraction of, at the Sessions—Procedure to be adopted by Judge. See CR. P. CODE Ss 164 286 AND 342.**  
 L. R. 3 A. 101 (Cr)

**CONSENT DECREE—Order passed by consent—Effect of—Subsequent retraction.**

Where a judgment debtor consents to his money being paid over to the decree holder on furnishing security for restitution and in consequence the decree holder furnishes the required security, it is not subsequently open to the judgment debtor to withdraw that consent. An order passed by

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consent is conclusive between the parties 8 C. 51, 6 A. 269, 7 A. 102, 18 A. L. J. 625 ref. (*Daniels and Waser Hasan, A.J.C.*) RANI BIJAI RAJ KOER v. THAKUR JAI INDRA BAHADUR SINGH. 9 O. L. J. 5 : (1922) Oudh 34 : 66 I. C. 982.

**CONSIDERATION** — Presumption — Old mortgage, not questioned at any time—Presumption of passing of consideration. See BURDEN OF PROOF, CONSIDERATION. 42 M. L. J. 339

**CONSTITUTIONAL LAW—Colonies—Contract—Formalities** — Non-compliance with—Contract not enforceable—*British Columbia*.

The character of any constitution which follows, as that of British Columbia does, the type of responsible government in the British Empire, requires that the Sovereign or his representative should act on the advice of ministers responsible to Parliament, that is to say, should not act individually but constitutionally. A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorised it, either directly, or under the provisions of a statute. (1865) L. R. I. Q. B. 173, (1916) 2 A. C. 610 Rel. Where therefore a contract for the acquisition of land by the Government was entered into by a minister of British Columbia without obtaining the sanction of the Lieutenant-Governor as required under the Public Works Act, the contract is unenforceable as against the Government (*Viscount Haldane*.) NEIL F. MACKAY v. THE ATTORNEY GENERAL OF BRITISH COLUMBIA. 31 M. L. T. 87 (P. C.)

**CONTEMPT OF COURT—High Court—Committal for contempt—Jurisdiction.**

In matters of contempt the court acts not to defend the dignity of any court or Judge but to safeguard the proper administration of justice and to ensure that the confidence of the public in that administration shall not be in any way impaired. The High Court has jurisdiction to punish for contempt a person who makes scandalous attacks on its integrity and impartiality. (*Marten and Crump, JJ.*) SATYABODHA RAM CHANDRA ADABADDI In re 24 Bom L E 928 : 69 I C 84.

**—Newspaper comment—Contempt of lower court—Jurisdiction of High Court to take action in respect of.**

The opponent, the editor of a weekly newspaper issued at Dharwar, published an article commenting on certain proceedings in the Court of the First Class Magistrate at Dharwar. The comments attributed partiality to the Magistrate in favour of the prosecution, criticised the proceedings in his Court in an unfair manner, and suggested that he acted under the instructions of the District Magistrate and not in accordance with his own conscience. The Government of Bombay applied to the High Court for a rule calling upon the opponent to show cause why he should not be committed for contempt of Court in respect of the publication of the article. At the hearing of the rule the opponent raised a preliminary objection that the High Court had no jurisdiction to deal with the contempt of inferior Criminal Courts.

Held, that the comments constituted a contempt of the Magistrate's Court, that the publication of

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the article constituted also a contempt of the High Court as tending to impede the due administration of justice and that, therefore, the opponent was liable to be dealt with by the High Court

Per *Macleod, C. J.*—The High Court possesses the same powers of punishing for contempt as the Court of the King's Bench Division by virtue of the Common Law of England.

Per *Shah, J.*—The High Court has no power to punish for contempt of Criminal Courts subordinate to it.

It is difficult to hold that because a contempt of Court is punishable under the English Common Law it is punishable as such in India even though the Indian law does not make it punishable. It would be in effect creating a new offence to hold that a contempt of a subordinate Court as such is punishable

The High Court has no powers with reference to the contempts of other Courts similar to those of the King's Bench in England, which it exercises under the Common Law of England. It has no powers such as the Court of King's Bench in England has being the *custos morum* of all the subjects of the realm under the Common Law of the land. The mere fact that the High Court has powers of superintendence over the subordinate courts does not give it any such jurisdiction. (*Macleod, C. J. and Shah, J.*) EMPEROR v. BALKRISHNA GOVIND KULKARNI. 46 Bom. 592 : 24 Bom. L. E. 16 : 65 I. C. 753 : (1922) Bom. 52 : 23 Cr L J. 177.

**CONTRACT — Breach — Agreement not to claim damages for breach—Effect.**

Where in a contract for the sale of goods it was provided that in the event of the vendor failing to deliver the goods, the contract will be cancelled but that there would be no right to claim damages, Held, the vendor could not arbitrarily refuse to carry out the contract, but should adduce reasonable grounds for the refusal—(1919) A. C. 1 folid. (*Macleod, C. J. and Shah J.*) CHUNILAL DAYABHAI & Co., v. AHMEDABAD SPINNING AND WEAVING CO 24 Bom. L. E. 295 : (1922) Bom. 44 : 67 I. C. 223.

**—Breach of—Sale of goods — Mutual obligations—What plaintiff has to prove.**

In a contract for the sale of indigo, under which plaintiff agreed to pay a certain sum of money and the defendant a certain quantity of indigo as per sample given, if the plaintiff sues for damages for breach of contract, he must first show that on the due date, he was ready and willing to perform his part of the bargain. It may not be necessary to prove that he made an actual tender of the money, but it was incumbent on him to show he had made arrangements for the purchase of money and was in a position to hand it over as soon as he was satisfied that the bulk of the goods agreed with the sample. (*Rafique and Lindsays JJ.*) MAHOMED ISMAIL KHAN v. HASAN ALI KHAN. 4 U. P. L. E. 37 (A) : 67 I. C. 602i

**—C. I. F. contract — Terms and incidents of.**

Under a C. I. F. contract for the sale of goods the seller undertakes to sell the specified goods, to ship them to the place agreed upon, to obtain

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a contract of affreightment and policies of insurance and to hand over the bill of lading and the policies to the buyer. Such a contract provides for the delivery of the goods to be made by handing over the documents to the buyer and when this is done, the seller has performed the contract in full and is relieved of further liability.

English cases reviewed. (*Robinson, C. J. and Duckworth J.*) *S. K. R. S. L. CHETTY FIRM v. AMARCHAND MADHOWJEE AND CO.*

66 I C 579.

—Construction—Commercial contracts—Mode of delivery—Stipulation as to.

In construing mercantile contracts courts will assume that any clause inserted therein was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. A party to the contract is entitled to delivery of goods in the manner stipulated and he cannot be compelled to take something else in substitution for it however effective a substitute it might be. (*Schwabe C. J. and Krishan, J.*)

*ADAM HAJI PEERA MAHOMED ISHAIK v. HUSSAIN AKBARI*, 43 M. L. J. 199 : (1922) M. W. N. 434 : 31 M. L. T. 40 (H. C.)

—Construction—Delivery of goods.

A contract for the sale of goods "delivery to be taken *ex* scale in all October" means that the goods are to be taken whenever in all that month sellers call upon buyers to do so. Consequently 31st October is the last day for the performance of the contract and a breach of the contract takes place only on that date. (*Maung Kin and Prati, JJ.*) *HUNT HUAT AND CO. v. SIN GEE MOH AND CO.*

66 I C 510.

—Construction—Contract for conveyance—Duty to make out marketable title—Execution of conveyance—Delay.

Where under a contract for sale between a vendor and purchaser the vendor was to make out a marketable title to the properties whereupon the purchaser was to accept the title and complete the purchase within a month, failing which interest on the moneys advanced by the purchaser were to cease. *Held*, that the vendor was bound to make out a marketable title and he having failed to do so was not entitled to refuse execution of the conveyance on the ground that the purchase did not complete the transaction as stipulated. (*Mr. Ameer, Ali.*) *BANKE BEHARI DHUR v. GALSTAIN.*

27 C. W. N. 77.

(1922) P. C. 339 : 31 M. L. T. 159 (P. C.)

—Construction—Indent—Custom of the trade—Liability of importer to his constituents. See (1921) DIG. COL. 345 N. ROY AND CO. v. SURANA DALAL AND CO.

64 I C 935.

—Construction—Provision for reference to arbitration—Contract between vendor and importer—Incorporation in contract of sale—Institution of suit. See (1921) DIG. COL. 346. *CHATURBHUSI CHANDANMULL v. BASDEO DAS DAGA.*

48 Cal. 796 : 66 I. C. 198

—Construction—Sale of goods—Contract to purchase from plaintiff's goods which

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plaintiff had previously thereto purchased from another—Tender by plff. of similar goods relating to other contracts—Repudiation.

Plaintiff had agreed to purchase from B and Co. certain bales of yarn of specified shipments. The contract between plaintiff and B and Co. provided as follows: "B and Co. are relieved from liability for non-shipment owing to causes specified herein and buyers are not entitled to cancel the contract owing to delay caused by any of the specified causes provided that such delay in shipment shall not exceed three months. The buyers are also debarred from objecting to goods being shipped prior to the contract." The defendants in their turn agreed to purchase these very goods from plaintiffs and the contract while incorporating by reference the terms of plaintiff's contract with B and Co. went on to provide "Please note that you have to take delivery of goods as received by us and we are not responsible for the late shipment or non-shipment of the goods or part of the goods." The plaintiffs tendered other goods of similar quality but forming part of some other contract of plaintiffs with B and the defendants wanted better particulars about shipment, etc., before they would accept the goods.

*Held*, that the defendants were bound to take the goods as and when they were received by the plaintiffs without reference to the date of shipment but the defendants were not bound to accept goods relating to other contracts of plaintiffs with B and Co. even though they are of the same quality, mark and quantity.

*Held*, further, that the defendants' letter asking for fuller particulars in the absence of which they declined to accept the goods was not a repudiation of the contract which disentitled them from raising in defence in the suit that the goods were not such as they were bound to accept under their contract. *Brathwaite v. Foreign Hardwood Co.* 2 K. B. 543 *Consorzio v. Northumberland* 88 L. J. K. B., 1194 *Bowes v. Shand* L. R. 2 A. C., 455 : Referred to (*Wallis, C. J. and Ramesam, J.*) *S. A. SIVARAMA AIYAR v. K. M. SUBBIAR AND SONS* (1922) Mad. 28 : 15 L. W. 9.

—Construction—Sale of goods—Delivery to be taken within a specified period—No delivery taken or given within the specified period—Delivery of part of goods after the fixed period—Refusal to take delivery—Liability in damages. See CONTRACT ACT, S. 55 24 Bom. L. R. 142.

—Implied term—Contract of agency—Supply of goods.

An implication of a term in a contract ought to be made when it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been within the contemplation of either party. Where a person agrees to serve as the sole commission agent for the sale of goods of another for a fixed period and agrees not to act for another, there is an implied obligation on the part of the principal to supply the agent with a reasonable quantity of goods so as to enable the agent to earn his commission. To hold that the principal may at his choice send or not send goods for disposal by the agent would be tantamount to completely ignoring the founda-

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tion of the contract between the parties (*Kennedy, J. C. and Raymond, A. J. C.*) *LANDAN v AHMED AYUB.*

15 S. L. R. 140 (1922) S 25  
 —Price of goods sold and delivered in various items—Liability and limitation separate for each item as delivered—Appropriation of payment—Revision—Extent of powers See (1921) DIG. COL 347 *ABDUL AZIZ v MUNNA LAL*

L R 3 A. 42.

—Ratification—Agreement of promoters of company with third party before incorporation—If binding on company—New contract—Affixing of agreement to Articles of Association—Effect of. See *COMPANY.*

68 L. C 787

—Sale—Deposit by purchaser with seller—Repudiation of contract by purchaser—Whether entitled to return of deposit.

There is nothing either in the Specific Relief Act or in the Contract Act which touches the question of deposit. But it is clear that, even when there is no clause in the contract as to the forfeiture of deposit if the purchaser repudiates the contract, he cannot get back the money as the contract has gone off through his default. This will equally be so even though the buyer is not put to any loss by the repudiation. L R 10 Ch App 512 and 24 Cal. 897 Referred to. (*Chatterjee and Pearson, J.J.*) *MANGOBINDA DATTA v. BAISOGMAFF* (1922) Cal. 104 : 67 I C 714.

—Sale of goods—German steamers carrying goods seized during war—Arrival in a different ship long after—Doctrine of "frustration."

In pursuance of a contract for sale of goods, headed "contract shipment and arrival", goods were sent in a German steamer, which on the outbreak of war was seized and condemned as prize. Two years later the goods arrived in a different steamer, but were not given to the buyer. In a suit for damages for non-delivery, held, plaintiff was not entitled to delivery of the goods.

Per *Sanderson, C. J.* The arrival of the goods under the particular circumstances was not such an arrival as was contemplated by the parties to the contract. The purpose of the contract and the intention of the parties had been upset by the capture and the prolonged delay.

Per *Richardson, J.* According to the doctrine of "frustration" a subsequent event on contingency beyond the ken of the parties at the time of the transaction, for the occurrence of which neither of them is responsible and for which they have not provided may sometime operate to undermine and avoid the contract—English case law referred to (*Sanderson, C. J. and Richardson, J.*) *GOURI SHANKAR AGARWALLA v. H. P. MOITRA.*

26 C. W. N. 573.

—Stranger to—Right to enforce—Assignment of all the property of the transferor—Credit of transferor—Suit for recovery of debt from transferee—Maintainability.

Where a person gets a transfer of all the assets of his transferor and subjects himself to the payment of his debts a creditor of the transferor to whom such a transfer is communicated has a right to proceed against the transferee. A suit by the creditor against the transferee is in such a

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case not open to the objection that there is no privity of contract between the parties. 41 Cal. 157; 41 Mad 488; 26 Mad. 686 ref. 4 Cal. 897, 8 Cal. 79 foll. (*Kumaraswami Sastri, J.*) *G RAMASWAMI AIYAR v DEIVASIGAMANI PILLAI.*

43 M. L. J. 129 : (1922) M. W. N. 442 :

16 L. W. 282 : 31 M. L. T 156 (H. C.) : (1922) Mad. 397.

—Stranger to—Right to enforce—Privity—Subsequent dealings.

Though at the outset a person was a stranger to a contract, still if subsequent dealings have brought him into privity with the parties it is open to the courts to grant relief to him on the contract 41 Cal 137 Ref. (*Lindsay and Kanhaiya Lal, J.J.*) *NEHAL SINGH v FATEH CHAND.*

20 A. L. J. 708 : (1922) All 426 : 44 A 702 : 68 I C 778.

—Stranger to—Right to take benefit.

There is no universal rule that a stranger to a contract can in no circumstances claim a benefit thereunder 32 A 410; 41 C. 737; 46 Cal, 160 Rel. It is competent to a tenant to invoke the benefit of a contract between the Govt and the settlement holder even though he may not be a party thereto 11 C. L. J 68; 37 C. 449, 3 Pat L J 394 : 17 C. L. J 70 Ref. (*Mookerjee and Cuming J.J.*) *RANI HEMANTA KUMARI DEBI v. THE MIDNAPORE ZEMINDARI & Co* 35 C. L. J. 493.

—Trade usage—Date of performance falling on Sunday—If may be performed on Monday—Usage when valid—Conditions.

Where the date of performance of a contract falls on a Sunday, there is a well-known trade usage that it can be performed on the next day, especially where an European importer, is concerned. The usage of which evidence is let in, must be such as not to render the written contract insensible, inconsistent or unreasonable. (*Mookerjee A. C. J. and Fletcher, J.*) *KASIRAM PANIA v. HURNUNDROY FULCHAND.*

26 C. W. N. 354.

—Wagering contract—Nature of, explained—Speculative transaction—Distinction—Delivery and actual commodity, tests. See (1921) DIG. COL. 348 *SRI NEWAS v. RAMDEO.*

(1922) A. 360 : 64 I. C. 65.

CONTRACT ACT (IX of 1872). S. 2—Consideration—Omission to sue—Effect of.

Where a person in consideration of a promise desists from enforcing by suit a claim for an alleged infringement of his right the promise is one supported by consideration and can be enforced as a contract (*Abdul Raouf and Campbell, J.J.*) *PARSHOTTAM SINGH v. RALLIA SINGH.*

4 U. P. L. R. (A). 36 : (1922) Lah. 269 : 65 I. C. 524.

—S. 2—Offer and acceptance—Auction—Bids—Nature of—Withdrawal of bid before property is knocked down—Effect of.

A bidding at an auction is merely an offer which can be retracted until it is accepted. Appellant made a bid at an auction (the highest bid that was made) but before the property was knocked down, he discovered the property sold

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was subject to a mortgage and attempted to retract the bid. The auctioneer nevertheless knocked the property down to him for the figure that he had bid. On an application filed by the owner of the property for declaring appellant as the auction purchaser at the sale held that the appellant's bid was no more than an offer and he was entitled to withdraw the same before it was accepted by the property being knocked down to him by the auctioneer. *Payne v. Cave* (1789) 3 Term Rep 148, *Jones v. Nancy* (1824) 147 E. R. 925; *Freer v. Rimmer* (1814) 14 Sim. 391; *Warlow v. Harrison* (1858) 1 Ell and Ell. 295; *Denton v. Great Northern Railway* 5 E. and B. 860. *Harris v. Nickerson* (1873) 8 Q. B. 286; *Carlisle v. Carbolic Smoke Ball Co.* (1899) 2 C. J. 73, *Mamominus v. Fortescue* (1907) 2 K. B. 1; *Johnston v. Beys* (1893) 1 Q. B. 256; *Agra Bank v. Hamlin* 14 Mad. 235, *Raja of Bobili v. Suryanarayana Rao* 42 Mad. 776 ref. to (*Coult's Trotter and Ramesam, JJ.*) *JORAVARMULL CHAMPALAL v. JEYGOPALDAS GHANSHANDAS*.  
43 M. L. J. 132. (1922) M. W. N. 564:  
16 L. W. 816 : 31 M. L. T. 401 (H. C.):  
(1922) Mad. 486

—S. 2—Offer—Invitation to offer—Quotation of prices.

An offer must be distinguished from an invitation for an offer. A letter from a prospective buyer asking for quotations from a merchant is an invitation for an offer. If the merchant sent his quotations and the buyer accepts them and orders goods that constitutes the proposal, which the seller may or may not accept. (*Wilberforce, J.*) *FIRM OF DURGAPARSHAD MITSADDI LAL v. FIRM OF RULIA MAL DOGAR MAL*.  
4 Lah. L. J. 176 : 65 I. C. 282.  
29 P. L. R. 1922. (1922) Lah. 100.

—S. 7—Acceptance—Nature of

To convert a proposal into a promise, the acceptance must be unqualified and without condition. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal into a promise so as to create a contract (*Jwala Prasad and Adami, JJ.*) *NIROD CHANDRA ROY v. RAJA KIRTYA NANDA SINGH*. (1922). Pat. 24.

—S. 11—Minor—Sale in favour of—Enforceability.

There is nothing in law to prevent a sale of immoveable property in favour of a minor and the minor can sue for possession of the property as such vendee. 43 M. 312 not foll; 40 M. 308, 38 A. 62; 38 A. 164 Ref. (*Prideaux, A. J. C.*) *BALKRISNA v. LAKHU*. (1922) Nag. 239 : 68 I. C. 191.

—S. 11—Minority—Contract of guardian—Right of minor to enforce. See MINOR.

65 I. C. 459.

—Ss. 11 and 65—Minor—Execution of bond—Consideration paid—No misrepresentation—Suit for cancellation of bond—Duty to restore benefit

A person of the age of 19 for whom a certified guardian had been appointed under the Guardians and Wards Act executed a bond on obtaining in cash the consideration therefor.

## CONTRACT ACT, S. 16.

There was no fraud or misrepresentation on the part of the minor and the creditor *bona fide* believed that the executant of the bond was a major. In a suit by the minor for cancellation of the bond, held that the plff. was entitled to a decree only on his returning the money he got from the defendant but without interest and costs. (*Simpson, A. J. C.*) *MUHAMMAD ANWAR KHAN v. JHANDA SINGH*.  
9 O. L. J. 404 :  
(1922) Oudh 271.

—S. 12—Soundness of mind—Contractual capacity—Presumption in favour of sanity—Mere weakness of mind—Effect on contract.

The test of soundness of mind under S. 12 of the Contract Act is that the contractor or donor is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test. Mere weakness of mind is not sufficient as laid down in I. L. R. 27 A. 1 P. C. Although it is not necessary to prove utter mental darkness or congenital idiocy, there must be proof that the donor or contractor was incapable of understanding business, and forming rational judgment as to its effect. Even if occasional aberrations are proved, they would not vitiate transactions not entered into under their influence. (*Jwala Prasad and Adami, JJ.*) *MAHOMED YAKUB v. ABDUL QUDDUS*. 68 I. C. 372.

—S. 15—Coercion—Meaning of—If controls meaning in S. 72. See CONTRACT ACT, S. 72.  
65 I. C. 517.

—S. 16—Champertous bargain—Relief against—Power of court—Unconscionable bargain. See (1921) DIG. COL. 349 *ABUL KASIM BEG v. EHSANUL GHANI*. 65 I. C. 129.

—Ss. 16 and 74—High rate of interest—Power of court to reduce—Undue influence—Costs.

In cases where there is no proof of undue influence a court has no power to reduce the contract rate of interest merely on the ground it is very high. 28 A. 570 P. C. : 20 O. C. 318; 8 O. L. J. 418. 24 O. C. 313 foll. But the court disallowed costs on the ground that the interest decreed was high. (*Daniels, A. J. C.*) *SHEIKH FAZAL AZIM v. LALA GIRDHARI LAL*.  
9 O. L. J. 442.

—S. 16—Necessitous character of borrower—Lender alone in a position to lend—No inference of undue influence. See MORTGAGE—INTEREST  
1 Pat. 263.

—S. 16—Undue influence—Evidence of—Urgent need of money on the part of the borrower.

Urgent need of money on the part of the borrower is not by itself sufficient to prove undue influence or to show that the lender was in a position to dominate the will of the borrower. 34 C. 150; 3 O. L. J. 418 Rel. (*Daniels, A. J. C.*) *MT. BASHIRAM v. BISHAMBHAR NATH*.  
9 O. L. J. 439 : (1922) Oudh 268.

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**S. 16—Undue influence—Gift—Son taking under—Validity of gift.**

Where there is a gift by a father in favour of his son neither the fact that the father was of old age nor the fact that the son lived with his father raises any presumption of undue influence especially when it is shown that the father, old as he was, was able to exercise an independent and intelligent mind over what he was doing. (*Jwala Prasad and Adami, JJ.*) **MAHOMED YAKUB v. ABDUL QUDDUS.** 68 I. C. 372.

**S. 16—Undue influence—High rate of interest—Necessity—Need of money.**

The mere fact of the existence of an urgent necessity on the part of the borrower is not sufficient to raise the presumption that undue influence was exercised. 34 C. 150, 8 O.C. 193. Nor does the existence of urgent need accompanied by a high rate of interest establish such a presumption. In ordinary circumstance, the more pressing the necessity the higher the rate of interest is likely to be for the borrowers have not time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. In order to establish undue influence, as defined by S. 16 of the Contract Act it must be shown that the lender took advantage of the necessity and of the position of the borrower and imposed unconscionable terms. (*Daniels and Lyle, A. J. C.*) **MAHRAJ PRAG DIN v. BHAGWATI SAHA** 66 I. C. 687.

**S. 16—Undue influence—Plea of—Proof—Elements of—Need of money—High rate of interest**

To establish a plea of undue influence it must be shown that plff. (mortgagee) was in a position to dominate the will of the defendants (mortgagors) and secondly that he used that position to obtain an unfair advantage. If the terms of the contract appear on the face of them to be unconscionable or are shown to be so, the second point may be presumed. Urge if need of money on the part of the borrower is not in itself sufficient to place the lender in a position to dominate his will. (*Daniels, J. C. and Dalal, A. J. C.*) **SHEIK MAHOMED MUZAFFAR ALI KHAN v. BHAGWAT PRASAD SINGH.** 66 I. C. 642.

**S. 16—Undue influence—Proof of exercise of—Indebtedness.**

The mere fact that one of the parties to a contract was antecedently indebted to the other is not sufficient proof of undue influence. (*Prideaux A. J. C.*) **MAHADEO v. KISHANLAL.**

(1922) Nag. 219 : 68 I. C. 597.

**Ss 16 and 19—Undue influence—Proof of—Pardanashin lady—Deed of gift—Burden of proof.**

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. Where a deed of gift by a pardanashin lady is impeached on the ground of undue influence the questions that arise are (1) was the transaction a righteous transaction, i. e., was it a thing which a right minded person might be required to do? (2) was it an improvident act, (3) was it a matter requiring advice? (4) did the intention of making the fact originate with the

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donor? Where the relation between the parties is such that one of them is in a position to influence the other and the bargain is with the influencer and in itself unconscionable then, the person in a position to use his dominating power has the burden thrown on him of establishing affirmatively that no domination was practiced so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent. 43 Mad. 516 : 18 Cal 545 ref. (*Dalal and Wazir Hasan, A. J. C.*) **CHAURAS KUAR v. ABHAI RAJ KUAR.** (1922) Oudh 59 : 65 I. C. 380.

**S. 17—Fraud—Contract of service—Concealment of Contract forbidding service elsewhere.**

One of the conditions of the plaintiff's employment under the debt. firm was that plff. was not to engage in any business of his own or join any other firm so long as he remained in the service of the debt. firm. Without the knowledge of the debt. firm plaintiff joined another in business transactions and induced the debt. firm to enter into contracts with that third person without disclosing his association with him. Held that the contracts were voidable at the instance of the debt. firm they having been procured as a result of the fraud practised by plff. and by his concealment of the fact that he was entering into contracts in contravention of the terms of his agreement with the debt. firm (*Chevis and Campbell, JJ.*) **SEDH MAL v. JOTI PRASAD.** 66 I. C. 441.

**S. 19—Fraud—Dishonest concealment of identity of contracting party—Agent secretly procuring a running contract with his principal—Contract voidable.** See CONTRACT ACT, Ss. 215 AND 19. 16 L. W. 345.

**S. 19—Fraud—Performance of contract otherwise valid secured by fraud—Effect.** See (1921) DIG. COL. 350. **FAZAL DALLANA v. MANGALDAS.** 46 Bom. 489. 66 I. C. 726.

**S. 20—Scope of—Doctrine of frustration** See CONTRACT ACT, Ss. 56, 9 AND 20. 26 C. W. N. 573.

**S. 28—Champtious agreement—Sharing in litigation—Public policy.**

A fair agreement to share property recovered in litigation in consideration of advancing moneys for carrying on the litigation is not illegal or opposed to public policy. 23 C. 843 : 15 A. 312 P. C. Rel. (*Scott Smith and Martineau, JJ.*) **INDAR SINGH v. MUNSHI.** 4 Lah. L. J. 861.

**S. 23—Consideration—Abandonment of prosecution in non-compoundable case—Document void.**

Where the consideration for a bond is found to be an agreement to abandon the prosecution in a non-compoundable case, the bond is void even if part of the consideration is good in law. (*Newbould and Panton, JJ.*) **KARUNA KRISHNA CHAUDHURY v. RAKHALDAS MUKERJEE.** 68 I. C. 721.

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—S. 23—Contract—Clause tending to defeat the provisions of the Agra Tenancy Act—Enforceability.

A sale deed which tends to defeat the provisions of the Agra Tenancy Act on the subject of the creation of exproprietary tenancies is void and unenforceable. Where the defendants, the executors of the deed, expressly stipulated that they would surrender actual possession and enjoyment of the *Sir* and *Khudkashi* lands in respect of which they became by statute expropriatory tenants from the date of the execution of the deed of sale, such a stipulation is void as being contrary to public policy. Any stipulation by way of penalty, inserted in a sale deed in order to enforce the fulfilment of such a covenant on the part of the vendor is also void and unenforceable. Where the entire clause stipulating for the surrender of the expropriatory tenure and for a penalty in the event of the failure of the vendor to make such a surrender can be wiped out of the document without interfering in any way with the other stipulations, the latter can be enforced (*Piggot and Walsh, JJ.*) *BITHAL DAS v. RAGHUNATH DAS* L. R. 3 A. 464 (Rev) (1922) All. 430

—S. 23—Contract not enforceable at law—Agreement to sub-lease salt pan in contravention of terms of license—Not specifically enforceable. See BOM. SALT ACT. SS. 11 AND 47 24 Bom. L. R. 111.

—Ss 23 and 24—Document containing legal and illegal engagements—Enforceability.

One cannot ask the court to make a new contract in plea of that which is illegal, but where in the same instrument there are distinct engagements, some of which use legal and some illegal the performance of those which are legal can be enforced (*Miller, C. J. and Adams, J.*) *GRANT v. EKLAL JHA.* 3 Pat. L. T. 387 (1922) P 171 : 67 I. C. 49.

—S. 23—Illegal contract—Money advanced—Suit for recovery—Maintainability.

Where it is no part of the contract between the lender and the borrower that the money lent should be utilised for immoral purposes and the lender has no control over the application of the money, he is not prevented from recovering the money on the principle of *Ex turpi causa non oritur actio*. (*Spencer and Devadoss, JJ.*) *NATARAJULU NAICKER v. SUBRAHMANIAN CHETTIAR.* (1922) M. W. N. 450 : 16 L. W. 705 : (1922) Mad 181

—S. 23—Inam—Service inam—Alienation of Swasthivachakam Service Inam—Opposed to public policy—Grant burdened with the performance of a service of a public nature. See INAM, SERVICE INAM. 42 M. L. J. 477 (F. B.)

—S. 23—Public policy—Agreement by Government tenant to share whatever right may be acquired by him—Enforceability of.

In consideration of plaintiff helping the defendant in bringing under cultivation the land granted by the Punjab Government to the latter as an occupancy tenant, defendant agreed to give plaintiff one-half share of whatever

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rights he might acquire in the land. Plaintiff carried out his part of the agreement by contributing the necessary amount of labour. Defendant subsequently acquired full proprietary rights in the land of the tenancy. In a suit for specific performance of the agreement. *Held*, that the agreement was not against public policy and the suit must be decreed. (*Abdul Raoof and Harrison, JJ.*) *NATHU v. ALLAH DITTA.* 3 Lah. 92 : 3 Lah. L. J. 505 : 64 I. C. 18 : (1922) Lah. 287

—S. 23—Public policy—Pre-nuptial agreement between parties for maintenance in case of dissensions—Agreement not void. See (1921) DIG COL 352. *MAHOMED MUIN-UD-DIN v. JAMAL FATIMA.* 43 All. 650 : L. R. 3 A. 21.

—S. 23—Public policy—Surety—Bail—Deposit of money as consideration—Recovery of.

Where a person stands surety or stands bail for another on receipt of cash consideration from the person for whom the surety or bail is offered, it is not open to the latter to recover the money paid as consideration for the suretyship of the bail. The contract is opposed to public policy and cannot be enforced. (*Le Rossignol and Campbell, JJ.*) *KISHAN LAL v. DURGA PARSHAD.* 65 I. C. 137.

—S. 23—Religious Office—Offerings—Agreement for division—Public policy

An agreement between the *panda* and *pariwal* of a temple to share the offerings made by pilgrims is not contrary to public policy. (*Kanhariya Lal and Sulaiman, JJ.*) *KALLU TEWARI v. RAJINDER PRASAD* 20 A. L. J. 807 : L. R. 3 A. 474.

—S. 23—Rule against perpetuities—Rule of public policy—Contract to reconvey land or for pre-emption—Contract offending the rule, void and unenforceable. See T. P. ACT, SS. 14 AND 54 24 Bom. L. R. 449.

—S. 24—Usufructuary mortgage—Occupancy holding—Mortgage void—Personal covenant also void and unenforceable. See T. P. ACT, S. 68, 20 A. L. J. 318

—S. 25—Consideration for Contract—Omission to sue—Bona fide claim

The forbearance to enforce in a Court of law a claim bona fide believed to exist and to be enforceable, would be a good consideration for a contract. (*Gokul Prasad and Stuart, JJ.*) *GULAB CHAND v. KAMAL SINGH.* 44 All. 424 : 20 A. L. J. 285 : 4 U. P. L. R. (A) 154 : L. R. 3 A. 242 : 1922 All. 260 : 67 I. C. 4.

—S. 25 (2)—Debt—Renewal of debt contracted during minority.

Although a promise by an infant is in law a mere nullity and void, it is otherwise where the agreement is made by a person of full age to compensate a promisee who has already voluntarily done something for the promisor, even at a time when the promisor was a minor and unable to contract. (*Abdul Raoof and Moti Sagar, JJ.*) *RAM RATTAN v. BASANT RAI.* 2 Lah. 263 : 3 Lah. L. J. 563 : 64 I. C. 121.

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—S. 25 (3)—Accounts—Barred items—Balance promised to be paid—Signature—Effect of.

Where after checking some accounts and signing them, account is opened with the words "the balance of the old account has to be paid" the agreement falls within S. 25 (3) of the Contract Act and can be enforced. (*Ryes and Gokni Prasad, J.*) BENAYAK PRASAD PANDE *v* BISHEN DUTT PATHAK. L. R. 3 A. 308.

—S. 25 (3)—Applicability of—Minor Bond executed by guardian—Bar of limitation—Subsequent renewal by minor—Enforceability See MINOR. 65 I. C. 716

—S. 25 (3)—Barred debt—Acknowledgment—Promise to pay—Hatchitta.

A hatchitta which was merely an acknowledgment of a debt does not come within S. 25 (3). There must be promise to pay the debt for the purposes of the section. (*Suhrawardy and Cumming, JJ.*) PANCHANAN PODDAR *v* KHITISH CHANDRA. 67 I. C. 298.

—S. 25 (3)—Debt contracted by manager for family purpose—Debt barred—Subsequent pro-note by junior members—Consideration. See (1921) DIG. COL. 352. RAMA PATTAR *v*. VISWANATHA PATTAR. 45 Mad. 345 :

15 L. W. 130 : (1922) M. W. N. 27 : 30 M. L. T. 209 (H. C.) : (1922) Mad. 23

—S. 27—Agreement in restraint of trade—Sale of good will—Right to a ferry. See (1921) DIG. COL. 353. CHANDRA KANTA DAS *v*. PARASULLAH MULLICK.

48 Cal. 1030 : 26 C. W. N. 345 : 24 Bom. L. R. 603 : 65 I. C. 271. (P. C.) : (1922) P. C. 167

—S. 27—Contract in restraint of trade—Partial restraint—Illegality—Damages.

Where the parties entered into an agreement whereby each was to sell beef and goat's flesh for only 14 and 16 days respectively in the month for a period of 4 or 5 years, the agreement is in partial restraint of trade and therefore unenforceable. The agreement being illegal and void, damages for its breach cannot be awarded. 29 B. 107 ; 13 M. 472 ; 1 M. 134 ; 19 C. 765 Ref. (*Brown, A. J. C.*) MAHOMED *v*. ONA MAHOMED IBRAHIM.

1 Bur. L. J. 72 : (1922) U. B. 9.

—S. 27—Restraint of trade—Contract of personal service—Provision against service elsewhere.

Where a contract of personal service for a specified period contains a stipulation prohibiting the servant from serving a third party during that period, the stipulation is valid and does not offend S. 27 of the Contract Act. (*Robinson, C. J. and Heald, J.*) INDO-BURMA OIL FIELDS, LTD. *v*. BURMA OIL COMPANY, LTD. 11 L. B. R. 26 :

64 I. C. 794.

—Ss. 30 and 222—Commission agent—Wagering Contract—Indemnity.

Where an agent enters into a wagering contract he cannot claim to be indemnified by the principal for losses incurred thereby. In the case of a commission agent the onus is on him

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to show that he entered into the contract as agent and not principal. (*Martineau, J.*) FIRM OF SHIB LAL RAM LAL *v* FIRM OF HARI RAM CHHADAMILAL. (1922) Lah. 408 : 67 I. C. 959.

—S. 30—Common intention — Onus of proof

Where a plea of wager is set up, in defence the onus of proof is on the defendant ; and he has to prove that the common intention of the parties was to pay by way of difference and not by delivery. The question of common intention is one of fact in every case. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) RADHOMAL KESHOWDAS *v*. HOLOMAL KESUMAL. 15 S. L. R. 193 : 66 I. C. 489

—S. 30—Wagering contract—Essentials of—Sale of a crop.

The essence of gaming and wagering is that one party to win and the other to lose on a future event, which, at the time of the contract, is of an uncertain nature that is to say, if the event turns but one way he will lose, but if it turns the other way he will win. (*Richards v. Stoick* (1911) 1 K. B. 295 foll. The sale of a growing crop for cash is not gaming or wagering though the consideration is to be paid in kind out of the proceeds of the harvest. (*Macnair, A. J. C.*) VITHOBA *v*. SITARAM. 65 I. C. 324.

—S. 30—Wagering contract—Burden of proof—Onus on defendant.

The plaintiff sold two bales of yarn to the defendant, who at a later date re-sold them to the plaintiff at lower rates. The plaintiff sued to recover the difference between the two bales as damages. The defendant contended that the plaintiff was not entitled to recover, the contracts being a wagering one. At the hearing the Court examined both the plaintiff and the defendant, neither of them was cross examined by the other side. As neither party produced any evidence, the Court decided the suit on the pleadings and statements of parties and dismissed the suit.

Held, that the suit should be decreed inasmuch as the defendant has absolutely failed to prove, what he was bound to prove in order to succeed in his defence, that the suit transactions were of the nature of wagering contracts.

If the defendant does not choose to go into the witness-box on his own behalf that is a matter for himself to decide. In any ordinary case, however, the Court is entitled to consider that as a point against the defendant. The plaintiff is not bound to issue a summons to the defendant and unless the defendant gives evidence on his own behalf so as to give the plaintiff an opportunity of cross-examining him, then the Court is entitled to infer everything against the defendant. (*Macleod, C. J., and Shah, J.*) RAJMAL RAMNARAYAN *v*. BUDANSAHEB ABDULSAHEB.

24 Bom. L. R. 115 : (1922) Bom. 81 : 66 I. C. 943.

—S. 30 — Wagering contract—Defence of wager—Onus on defendant to prove that both parties agreed neither to ask for nor to give delivery—Tejmandi transactions.

In the transaction known as *teji* the buyer of the *teji* pays the seller a premium or *teji* over and above the contract price of the



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commodity or goods at the market raises the buyer or the *teji* who is also a buyer of the commodity or goods can ask the seller of the *teji* to give him the commodity or goods or the value of such commodity or goods at the market rate on the settling day. If the market falls the buyer of the *teji* merely loses his premium.

*Teji* and *vaida* transactions are on exactly the same footing and unless it can be positively proved that the parties agreed neither to ask for nor to give delivery the transactions are not wagering contracts.

On 6th January 1919, the plaintiff brought from the defendant twenty-five cases of Japanese camphor at the rate of Rs. 2-12-0 a tin for delivery on the 15th April 1919. He paid the defendant Rs. 125 as *teji* at the rate of one anna on every Rs. 2-12-0. On 7th February 1919, he further brought for the same delivery one hundred cases of camphor at Rs. 2-13-0 a tin and paid the defendant Rs. 500 as *teji* at the rate of one anna on every Rs. 2-13-0. On 15th February, he again brought one hundred and fifty cases of camphor for the same delivery at Rs. 2-15-0 a tin and paid the defendant Rs. 750 as *teji* at the rate of one anna on every Rs. 2-15-0. The price of the camphor rose to Rs. 5-2-0 per tin and the plaintiff wrote to the defendant, on the 14th April 1919, that he would take delivery on the next day. On the 15th of April 1919 he went to the defendant and tendered the contract price and asked for delivery of the camphor. The defendant had no camphor to deliver and he replied to the plaintiff's letter that the plaintiff was not entitled to any delivery as the transactions were wagering and therefore invalid. The plaintiff sued the defendant claiming the difference between the rate at which he bought the camphor and its price on the settling day.

Held, that, as the defendant had failed to prove that there was an agreement or understanding between him and the plaintiff that in case the market rose the plaintiff should not require the defendant to deliver to him any camphor, the transactions were not wagering contracts.

The transactions known as *teji mandi*, *teji* and *mandi* explained and discussed. (*Kincaid, J.*)

MANUBHAI PREMANAND v. KESHAVJI RAMDAS.  
24 Bom. L. R. 60 : 65 I. C. 682 :  
(1922) Bom. 66.

—S. 30—Wagering contracts—*Teji* and *mandi* contracts when void as a wager.

The mere fact that a contract is a *Teji* contract or a *mandi* contract or a *Teji* and *mandi* contract with double option does not give rise to an inference that it is a wagering contract and therefore void. The question depends on the common intention of the parties and is one of fact. It may be that if a party desires to prove that a particular contract of the above description was a wagering contract, he may be able to do so with slight proof. The mere fact of a contract being a *Teji* and *mandi* contract is not by itself sufficient to take it out of the ordinary rule that the party who pleads that the contract is void as being in the nature of a wager has to prove that fact. 37 B. 264 : 42 Bom. L. R. 590 : 24 Bom. L. R. 60 Ref. (*Shah,*

## CONTRACT ACT, S. 45.

A. C. J. and Crump, J.) MANILAL DHARAMSI v. ALLIBHAI CHAGLA  
24 Bom. L. R. 812 :  
(1922) Bom. 408 : 68 I. C. 481.

—S. 30—Wagering contract—Speculation  
See (1921) DIG. COL. 355 BISSESWAR LAL KEDIA & Co v. BASIR ALI.  
64 I. C. 809.

—S. 30—Wagering contracts—Test of.

Contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from and to each other. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS v FIRM OF GAJANMAL.  
15 S. L. R. 5.

—S. 38—Tender—Condition.

If the tender is accompanied by a condition which prevented it being a perfect and complete tender, the other parties are under no obligation to accept it, it follows therefore that that cannot be regarded as the equivalent of payment. (*Lord Buckmaster*) NARAIN DAS v. ABINASH CHANDER  
L. R. 3 P. C. 129 : 31 M. L. T. 217 (P. C.) :  
16 L. W. 780 : (1922) P. C. 347 :  
(1922) M. W. N. 791 : 4 U. P. L. R. (P. C.) 111.

—Ss. 43 and 253—Partnership—Loan by partner to the partnership—Suit for recovery of—Maintainability.

A partner in a firm can have a dual capacity, that of creditor of the firm as well as that of partner in it.

Where a partner of a firm advances money to the firm beyond the amount agreed to be subscribed as capital, such payment is a loan and in the absence of any stipulation to the contrary, the leading partner is entitled to interest on the money so paid or advanced.

The partner who so lends is a promisee of the firm, but he is also one of the joint promisors to himself, and under the second paragraph of S. 43 of the Contract Act he can only call upon each of the other joint promisors to contribute equally to the payment to be made to himself as promisee. (*Halifax, A. J. C.*) GOVIND v. GAJRAJ SINGH.  
64 I. C. 183.

—S. 45—Co-mortgagees—Payment to one—If effective as a discharge.

Payment of the mortgage money to one of several co-mortgagees without the consent of the others is not a complete discharge of the mortgage debt binding on all the mortgagees even though the name of the payee was entered in the revenue record as sole mortgagees, 68 P. R. 1917 foll : 7 P. R. 1913; 35 P. L. R. 1916 ref. (*Broadway, J.*) MAYA RAM v. HABIB.  
3 Lah. L. J. 502.

—S. 45—Co-mortgagees—Payment to one—When effective as a discharge.

Payment of the entire mortgage money to one of several co-mortgagees without the consent of the others, does not operate as a good discharge of the liability of the mortgagor. 68 P. R. 1217 foll. (*Shadi Lal, C. J. and Harrison, J.*) MT. MALAN v. TARA SINGH.  
4 Lah. L. J. 23 : (1922) Lah. 64.

## CONTRACT ACT, S 54.

—S 54—Sale of goods—Delivery of telegram—Condition of contract—Breach—Rescission.

Where on a contract for the sale of goods the seller agrees to give the buyer a delivery telegram for the goods sold, the provision as to the delivery telegram is a condition of the contract and if for any reason, it is broken the buyer is entitled to rescind the contract and sue the seller in damages. A covenant as to delivery is as much an essential part of a contract for the sale of goods as a covenant for payment of price or any other condition in the contract. (1919) 1 K B. 198 ; (1920) 2 K B. 1 (9). (*Schwabe C J. and Krishnan J.*) ADAM HAJI PEERA MAHOMED ISHAK v. HUSSAIN AKBARI.

43 M. L. J. 199 ; (1922) M. W. N. 434 :  
31 M. L. T. 40 (H. C.)

—S. 55—Contract—Construction—Sale of goods—Delivery to be taken within a specified period—Default—Delivery of part of goods after expiry of time fixed—Refusal to take delivery of the rest—Damages.

On 18th September 1913, the plaintiffs entered into a contract with the defendants for the sale of two hundred bales of yarn No. 20s and 20½s. The yarn was to be delivered in October-November 1913 as manufactured. Under the terms of the contract if the defendants failed to take delivery of the bales from time to time as they became ready the plaintiffs were entitled to resell them on the defendants' account and risk by public auction or private sale and the defendants were bound to make good to the plaintiffs any loss that they might suffer by the re-sale. No delivery was asked for by the defendants during October-November 1913 and no goods were manufactured by the plaintiffs against this contract. Up to July 1914 the defendants took delivery in small quantities of sixty-six bales of 20s and forty two bales of 20½s. On 9th July 1914, the plaintiffs wrote to the defendants to arrange to take immediate delivery of the remaining ninety-two bales. On 13th January 1915, the plaintiffs gave notice to the defendants that if they did not take delivery within twelve days they would resell the bales by public auction. On 10th of February 1915, the bales were sold by auction and they realised Rs 9,951-1-6 against the contract price of Rs. 14,946-1-6 leaving a difference of Rs 4,995. The plaintiffs claimed from the defendants this amount together with interest and godown rent and fire insurance as per terms of the contract, in all Rs. 5,858-6-3. The defendants replied that under the contract the delivery was to be in October-November 1913 that the defendants were ready and willing to take delivery of the bales but as the bales were not ready the plaintiffs were not in a position to give delivery and the defendants therefore repudiated their liability in the matter. The plaintiffs having sued the defendants to recover the amount :

*Held*, (1) that, as there was no evidence to show that the terms of the contract were altered by mutual consent and therefore the contract remained in existence after the end of November as altered by the parties, the Court could not say what was the altered contract ;

(2) that whenever after the end of November 1913 the defendants asked for delivery it was op-

## CONTRACT ACT, S 55.

tional to the plaintiffs to give them delivery and if the plaintiffs chose to give them delivery at the rates mentioned in the previous contract, that was a separate transaction, and the Court could not imply from the plaintiffs having given delivery of some bales in December 1913 to the defendants, that the parties had entered into a new contract whereby the plaintiffs agreed to give delivery to the defendants of the remaining bales according as the defendants should choose to ask for them ;

(3) that the Court could only read the contract according to the plain intention of the words in the written contract, and that as the parties did nothing under the contract within the contract period, the written contract thereby came to an end. (*Macleod. J.*) THE PHOENIX MILLS LTD. v. MADHAV DAS RUPCHAND.

24 Bom. L. R. 142 69 I. C. 2.

—S. 55—Contract for sale of immovable property—Time made essence of the contract by Notice—Breach—Notice unreasonable—Specific performance.

By an agreement dated 27th February 1919 the defendant agreed to sell to the plaintiff certain immovable property and the plaintiff paid to the defendant Rs 500 as earnest money. Clause (3) of the agreement provided that the sale should be completed within three months from the date thereof and time was made of the essence of the contract. Subsequently both the parties agreed that the time for completion of the contract should be extended beyond the three months mentioned in the clause. There was considerable delay on both sides in preparing requisitions for title, in answering requisitions, and in the preparation and approval of the draft conveyance. After some correspondence as to the engrossment of the conveyance, the defendant wrote to the plaintiff on 27th August 1919, that unless the sale was completed before 1st September 1919, time being of the essence of the contract, the contract would be treated as broken by the plaintiff and the earnest money would be forfeited. The plaintiff did nothing further until the 2nd September 1919 on which date he sent the engrossment of the conveyance to the defendant who in reply wrote on the same day that he had forfeited the earnest money. The plaintiff, thereafter, tendered the purchase money but it was refused. The plaintiff, thereupon, filed a suit for specific performance of the agreement of 27th February 1919.

*Held*, (1) that as there were no special circumstances which would demand that the contract should be completed on the 1st September 1919, the notice given on 27th August 1919 to complete the contract in four days was not a reasonable notice ;

(2) that considering the extremely leisurely way in which both the parties had proceeded from the date of the contract, there was no reason why the defendant should be entitled to demand of the plaintiff that the matter should be completed within four days and that in default the contract should be considered as broken ;

(3) that there was nothing in the surrounding circumstances to indicate that the defendant would be so prejudiced by further delay in the

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completion of the contract that equity would not assist the plff. in getting it performed; and

(4) that the plff. was, therefore, entitled to the assistance of the Court in obtaining specific performance. 40 Bom. 289 followed. (*Macleod, C. J., and Shah, J.*) MUSSA MAHOMED v. MOTILAL ITCHALAL.

24 Bom. L. R. 203 :  
(1922) Bom. 14 : 69 I. C. 13.

—S. 55—Option to repurchase land under contract of sale—Time if of the essence of the contract.

Though in the case of a contract for sale of land, time may or may not be of the essence of the contract, in the case of an option for repurchase before a fixed date, time is of the essence and option must be exercised before that date, 42 M. 802, 30 M. L. J. 186 Ref. (*Maung Kyin, J.*) MAUNG PORVIN v. MAUNG SHWE KIN.

1 Bur. L. J. 167

—S. 55—Sale of goods—Delivery in instalments—Delay—Rescission—Liability.

Under a contract for the sale of yarn, the goods were to be delivered on steamer at Madras in July, August and September, in three shipments. No yarn was shipped in July and August but ten bales were shipped together in September. The defendant had made no complaint of even the delays in the deliveries but just before the tender of the goods, gave notice to the plaintiffs of his intention to put an end to the entire contract. In a suit by plff. for damages for breach of the contract.

*Held*, the partial breach did not go to the root of the contract, as by non-delivery of the thing contracted for, the whole object of the contract was not frustrated. Hence defendant was not entitled to rescind the entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment. (*Ayling, Offg. C. J., and Odgers, J.*) MESSRS SWAMI & CO. v. NUKALA VENKATASUBBIAH.

(1922) M. W. N. 47 : 69 I. C. 41.

—Ss. 55 and 63—Sale of goods—Omission to deliver at agreed time—Extension of time Default in delivery—Damages. See (1921) DIG. COL. 357 MAHOMED HABIBULLAH v. BIRD & Co.

24 Bom. L. R. 687 : (1922) P. C. 178

—Ss. 56, 9 and 20—Scope of—Frustration,

Per *Richardson, J.* : S. 56 of the Contract Act applies only to physical impossibility and therefore does not cover every case of frustration. S. 9 however recognises that promises may be implied.

S. 20 deals with the case of a common mistake at the time of the transaction "as to a matter of fact essential to the agreement". Perhaps a general principle of frustration depending on construction might be so stated as to cover that. (*Sanderson, C. J., and Richardson, J.*) GOURI SHANKAR AGARWALLA v. MOITRA.

26 C. W. N. 573.

—Ss. 56 and 65—Contract of lease—Acquisition of land by Government—Impossibility

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lity of performance—Compensation for advantage received. See CONTRACT ACT, Ss. 65 AND 56.

20 A. L. J. 41.

—Ss. 56, 35 (2)—Surety for production of judgment debtor—Imprisonment—Effect.

Where a person stands surety to produce a person in court on a particular day, but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform and the agreement becomes void. The agreement is not one falling under the second part of S. 35 of the contract Act. (*Mac Coll, J. C.*) MAUNG KY WE v. MAUNG SAN TIN.

1 Bur. L. J. 236.

—Ss. 59 to 61—Decree debt—Payment of portion—How to be appropriated—Principal or interest

In the absence of any agreement to the contrary, payments made by a judgment debtor have first to be appropriated towards the interest and the balance of the payment, if any, is then to be credited to the principal. Ss. 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying these sections can well apply to interest as well. 8 B. L. R. 110 (P. C.) relied upon (*Jwala Prasad and Bucknill, JJ.*) MALIK MOKHTAR AHMED v. MR. BIBI RAHIM-UN-NISSA BEGUM.

(1922) Pat. 66 :

(1922) P. 369 : 67 I. C. 606.

—Ss. 59 and 60—Debtor and creditor—Appropriation—Payment by debtor—Principal or interest. See (1921) DIG. COL. 358 SETH NEMI CHAND v. SETH RADAKISHEN.

48 Cal. 839 : 30 M. L. T. 39 :

26 C. W. N. 153 (P. C.) : (1922) P. C. 26.

—S. 61—Payment—Credit towards arrears of rent—Burden of proof.

If a creditor has credited certain payments towards arrears of rents it is for him to show that arrears were due and what they amounted to, and in the absence of evidence on these points it must be held that he was not entitled to do so. (*Coutts and Adams, JJ.*) SIBNARAYAN SAH v. MAISA TADA PRODHAN.

(1922) P. 446.

—S. 62—Contract—Novation—Breach of contract. See (1921) DIG. COL. 359. K. M. P. R. N. M. FIRM v. THE PERUMAL CHETTY.

45 Mad. 180 : 42 M. L. J. 236 :

(1922) Mad. 314 : 67 I. C. 905.

—S. 62—Contract—Rescission—Stipulation empowering a party to rescind—Legality of.

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong. 1919 A. C. 1. Ref. The mere fact that the option to rescind the contract is not made dependent on the happening of any specified contingency, but an option to terminate the contract for any reasons whatsoever, does not render the contract void for want

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of mutuality. (*Mulla, J.*) CHOTALAL LALLUBHAI v. CHAMPSEY UMERSEY AND SONS.

24 Bom. L. R. 877.

—S. 62—*Later contract—When operates as a discharge of an earlier contract.*

Under S. 62 of the Contract Act contract does not absorb a prior contract unless it is itself a valid one. Where therefore a perpetual lease is found to be invalid, it is open to the lessee to fall back on an earlier lease. (*Hopkins S. M. and Burn, J. M.*) BALDEO v. WARIS ALI,

4 U. P. L. R. (Rev) 37.

—S. 62—Novation Essentials of. See (1921) DIG COL. 359, SRIMATI BAR KUARIN ALAK MANJARI KUARI v. SIRCAR BARNARD & CO. (1922) Pat 24 : (1922) P. 49.

—S. 62—*Novation—Hundi—Renewal—Insufficiently stamped Hundi—Effect of—Suit on original cause of action.*

Where an insufficiently stamped hundi was given in renewal of a prior hundi, the plaintiff could fall back on the prior hundi. The giving of the second hundi would have operated as a discharge of the first one only if the new contract could have been legally enforced and as the plff could not sue on the second hundi as being unstamped, he could fall back on the first one; and S. 62 of the Contract Act was no bar to his doing so. 27 M. 540 Rel. (*Martineau J.*) SUNDAR DAS v. PURAN SINGH  
11 P. W. R. 1922.  
(1922) Lah. 56 : 67 I. C. 856.

—S. 62—*Novation—Substituted contract falling through—Rescission—Right to enforce old contract.*

Where a debtor has disabled himself from performing his promise under a later contract which had been intended to be a substitute for an earlier one it is open to the creditor to enforce the earlier contract rescinding the later and S. 62 of the Contract Act is no bar. 66 P. R. 1888 foll. 15 P. W. R. 1918; 63 P. R. 1917, 53 P. R. 1916; 41 Cal. 137 dist. (*Wilberforce and Martineau, JJ.*) NAJAF SHAH v. RANGA RAM.  
2 Lah. 323 :  
66 I. C. 47.

—S. 63—*Acceptance of performance—cheque for smaller amount accepted and cashed—Effect of.*

Defendant sent a cheque to plff. for a portion of the sum claimed by the latter with a condition that this sum was being paid in full discharge of the total amount due to plff. The plff. retained the cheque and eventually cashed it. Two days after cashing the cheque, plff. wrote the debt that the cheque had been cashed but he did not agree to receive the amount in full discharge of the payment of the sum due to him.

Held, that the mere fact that the plff. retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of his debt, does not raise any conclusive presumption that they had accepted it as a conditional offer made by debt. 6 A. L. J. 617; 22 Q. B. D. 610 Ref. (*Stuart and Sulaiman, JJ.*) BASDEO RAM SARUP v. DALSUKHRAI SEWAK RAM.  
20 A. L. J. 717 : L. R. 3 A. 548 :  
(1922) All. 461 : 68 I. C. 783.

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—S. 63—*Contract—Breach—Damages—Return of consideration.*

Where a party to a contract of marriage having accepted cash and jewels repudiates the marriage he is bound to return what he has taken. 15 C. 319 (*Coutts and Bucknill, JJ.*) MATHURA PRASAD SINGH v. SATYA NARAIN PRASAD SAHAI.

65 I. C. 81

—S. 63—*Waiver—Evidence of—Mortgage—Discharge of*

Waiver may be evidenced by conduct inconsistent with the continuance of the rights waived. There is nothing in law to prevent a discharge by acceptance of something in lieu of the performance of the contract. (*Prideaux, A. J. C.*) KAWADAJI v. GANGARAM.  
64 I. C. 461

—S. 63—*Scope of.*

S. 63 of the contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage—There must be an agreement or mutual understanding to waive (*Abdul Raof and Campbell, JJ.*) ASMAT ULLAH v. MESSORS BEHARI LAL AND SONS  
68 I. C. 912.

—Ss. 64 and 65—*Mistake—Restoration of benefit.*

Where the parties are found to have been in ignorance of any discrepancy, then it follows that both of them were labouring under a mistake of fact and when restoration of one party to his original position takes place he cannot recover from the other party without surrendering the benefit which he derived under the mistaken act. This principle is not limited only to cases of agreements, which are provided for by Ss. 64 and 65 of the Contract Act but extends even to acts committed under a common mistake of fact. (*Wazir Hasan, A. J. C.*) MAQBUL AHMAD v. FARHAT ALI  
4 U. P. L. R. (J. C.) 6.  
(1922) Oudh. 152 : 66 I. C. 461.

—S. 64—*Scope of—Contract—Rescinding—Effect of—Further performance dispensed with.*

Where an agreement is rescinded its further performance cannot be enforced. S. 64 of the Contract Act will apply where an agreement has been rescinded. S. 64 is not restricted to contracts voidable under S. 39 but extends also to cases of contracts voidable by reason of breach under S. 39. (*Lyle and Ashworth A. J. C.*) MAHAMMAD MUMTAZ ALI KHAN v. ALTAFUL RAHMAN.  
25 O. C. 169 : (1922) Oudh. 259.

—Ss. 65 and 56—*Contract of lease—Impossibility of performance—Compensation for advantage received.*

Where by reason of the acquisition of a lower garden by Government under the Land Acquisition Act the plff. lessee was deprived of the garden and the contract having become impossible of performance under S. 65 of the Contract Act, the plff. was entitled to be compensated by the debt for the loss sustained by him. (*Banerji, J.*) MUHAMMAD HASHIM v. MISRI.  
44 A. 229 : 20 A. L. J. 41 : 65 I. C. 253 :  
L. R. 3 A. 575 : (1922) All. 6.

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## —S. 65—Minor—Cancellation of contract—Duty to restore benefit.

A minor who seeks to recover the property sold by him after cancellation of the sale, must restore the benefit he had received. 11 O. C. 1 foll., 40 All., 558; 8 O. L. J. 287 Ref. (*Daniels, J. C.*) *RAGHUNATH SINGH v. DADONDE SINGH*.

24 O. C. 348. 9 O. L. J. 31 : (1922) O. C. 30 : 64 I. C. 771.

## —S. 65—Mutual mistake—Repudiation—Duty to restore benefit.

Where one of the parties to a compromise repudiates it on the ground that it was made under a mutual mistake it is his duty at the same time to restore any benefit that he has received under it. (*Freemanille, J. M.*) *SHRI RADHA KRISHNAJI MAHARAJ v. DUNIYA PRASAD*.

L. R. 3 A. 139 (Rev.).

## —S. 65—Void contract—Payment under—Right to recover.

S. 65 of the Contract Act applies even though the contract was not void *ab initio* but becomes void subsequently and a suit to recover money paid under such a contract is maintainable. (*Abdul Raoof and Martineau, J.J.*) *BADLU v. SHEO CHAND*.

56 P. L. R. (1922) : 67 I. C. 357.

## —S. 68—Minor—Necessaries—What are—Litigation expenses—Payment of father's debts.

The general rule is that a minor is incapable of entering into contract and that such a contract is absolutely void and unenforceable. S. 68 of the Contract Act is an exception to the above rule and the minor's estate is liable for the necessities supplied to him. Moneys paid to a minor for the discharge of his father's debts cannot be called necessities but moneys borrowed by him for meeting the necessary costs of a Civil or Criminal proceeding affecting him or his estate would be necessities within S. 68 of the Contract. 2 N. L. R. 25; 21 C. 872 dist., 30 C. 539 (P. C.) Ref. (*Dhobly, A. J. C.*) *NILKANTH v. CHANDRA BHAN*.

18 N. L. R. 119 : 64 I. C. 851.

## —Ss. 69 and 70—Contribution—Patnidar and darpatnidar—Suit for rent—Sale—Deposit of decretal money and statutory compensation by Co-sharer not a party—Suit for contribution.

The plaintiff who was part owner of a darpatni which had been sold by the patnidar in execution of a decree for rent obtained by him in a suit in which the plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five percent of the purchase money due to the auction purchaser and then sued the other co-sharers for contribution.

*Held*, that though the decree was not binding on the plaintiff, as the entire darpatni had been put up to sale, the plaintiff had the right to sue under S. 70 of the Contract Act, though not under S. 69 and that not merely in respect of the decretal amount but also of the statutory compensation money in tended for the auction purchaser 38 Cal. 1, 16 C. L. J. 156; 16 C. W. N. 975 ref. (*Richardson and Huda, J.J.*) *KANGAL CHANDRA PAL v. GOPI NATH PAL*.

24 C. W. N. 1068 : 68 I. C. 104.

## CONTRACT ACT, S. 70

## —Ss. 69 and 70—Payment by one person on behalf of another interested in payment of money—Option to decline payment when necessary.

Neither under S. 69 nor under S. 70 of the Indian Contract Act, is it the case that a person who makes a payment to protect his own interest can recover the amount which he pays from the person on whose behalf he ostensibly pays it, unless it can be shown in the case of S. 69 that the person was bound in law to pay the money or in the case of S. 70 that the person for whom he paid the money had not only benefited from the payment but also had the opportunity of expressing his acceptance or rejection of such benefit.

A payment of this description made by a person in order to avoid the sale of certain property in which he himself has an interest, can be recovered under this section if the person paying had a reasonable apprehension that his interest in the property would be adversely affected. It is not necessary that it should be established that the sale would have actually prejudiced the position of the person who pays the money (*Bucknill, J.*) *SRIMATI SURADHANI DEBI v. HARICHARAN MAHTON*.

3 Pat. L. T. 122 : 64 I. C. 226 : (1922) P. 337.

## —S. 69—Person interested in payment—Usufructuary mortgagee in possession—Sale of property in execution—Deposit under O. 21, R. 89, C. P. Code—Right to recover.

In execution of a money decree against the debt by a third person property usufructuarly mortgaged to plaintiff was sold. Plaintiff deposited the required amount to set aside the sale under O. 21, R. 89 and sued debt, for the same. *Held* that in the circumstances plaintiff was not a mere volunteer but a person interested and therefore was entitled to be reimbursed. (*Banerji, J.*) *BENI MADHO v. SANWAR DAT*.

20 A. L. J. 42 : 64 I. C. 918.

## —S. 69—Scope of—Liability to pay—By whom enforceable.

There is no justification at all for the proposition that the legal liability to pay contemplated by the section in respect of the person who does not make the payment is only such a liability as can be enforced by the person to whom the payment is made.

The words "interested in the payment of money" do not exclude the case of a person who in addition to being so interested is also bound to make the payment and the words "bound by law to pay" include all cases of persons legally bound to pay whether under such contract or otherwise and in the case of a contract whether it is enforceable by the person to whom the payment is to be made or not. (*Hallifax, A.J.C.*) *UMED SINGH v. BIHARI LAL*.

(1922) Nag. 50.

—S. 70—Lawfully interested—Meaning of—Widow's estate—Payment of money by Hindu reversioner to avert sale for road cess. See (1921) Dig. Col. 362 *GOPESWAR BANERJEE v. RAJA SUNDARI DEBI*.

49 Cal. 270 : (1922) Cal. 353 : 67 I. C. 40.

## —S. 70—Payment for the benefit of plaintiff as well as defendant—Option to decline benefit—Suit for recovery of money—Limitation.

## CONTRACT ACT, S. 72.

Under S. 70 of the Contract Act the party sought to be made liable must have not only benefited but must have had the opportunity of accepting or rejecting the benefit 16 M. L. T. 375 Ref.

*Per Devadoss, J.* Where a person does an act which is greatly beneficial to himself and which is sure to benefit another the former cannot claim contribution from the latter. In other words, where a person is bound to do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a person cannot be said to do the thing for another within the meaning of S. 70 of the Contract Act. 45 I.C. 786, 33 M. L. 21 C 496, 16 M. L. T. 375 Ref. The period of limitation for a suit under S. 70 of the Contract Act is that prescribed by art. 120 of the Lim. Act, (*Odgers and Devadoss, JJ.*) T. M. SUNDARA AIVAR v. T. M. ANANTHAPUDMANABA AIVAR. 43 M. L. J. 271. 31 M. L. T. 164 (H. C.): 16 L. W. 231. (1922) M. W. N. 608.

16 L. W. 231. (1922) M. W. N. 608.

## S. 72—Money paid under Coercion—Meaning of.

The word "coercion" referred to in S. 72 of the Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition of "Coercion" in S. 15 of the Act 40 C 598 P. C. Rel. (*Chatterjee and Panton, JJ.*) ADHOR CHANDRA DASS v. RAMESWAR MANNA, 65 I. C. 517.

## S. 72—Money paid under a mistake of fact—If recoverable.

Money paid under a mistake of fact on the part of both the parties is recoverable. (*Sir Lancelot Sanderson, C. J. and Chotzner, J.*) ERFANUDDI v. BHARAT CHANDRA SARKAR. (1922) Cal. 1 (2).

## S. 72—Sale of goods—Delivery of excess quantity by mistake—Subsequent sale to third persons—Right to equitable restitution

Where plff. sold 70 bales of grey mulls, each bale to contain 100 pieces, to deft and deft, in his turn *bona fide* sold the bales as containing each 100 pieces to several persons, and it was eventually ascertained that plff. had delivered an excess number of pieces. Held that deft was not liable to return or pay the price of the excess number of pieces. The doctrine of equitable restitution has no application where the deft. labouring under the same mistake as the plff. has *bona fide* parted with the goods to others. (*Countis Trotter and Ramesam, JJ.*) K. M. P. R. FIRM v. THE OFFICIAL ASSIGNEE OF MADRAS. 43 M. L. J. 142: 16 L. W. 75: (1922) M. W. N. 498

43 M. L. J. 142: 16 L. W. 75: (1922) M. W. N. 498

## S. 73—Breach of Contract—Damages—Measure of—Settlement between buyer and stranger—If can be taken advantage of

If a vendor of goods commits a breach of his contract to deliver goods at a future date he cannot take advantage of a settlement effected between his buyer and a stranger as regards the same goods which has the effect of reducing the damages which the buyer has sustained 17 Q. B. D 316 (1914) 2 A. C. 510, (1920) 2 K. B. 11 Folid. The measure of damages must be governed by the

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market rate at the due date. (*Kemp, A. J. C.*) FIRM OF SANTDAS DEVKISHENDAS v. FIRM OF NIDHANSINGH JAVARSINGH. 15 S. L. R. 214. 66 I. C. 267.

## S. 73—Contingent contract—Damages, measure of.

The defendant entered into a contract with plaintiffs that if any grain should remain in his hands, after he had satisfied the demands of his *asamis* for seed grain, he would sell the balance of his stock, the amount of which was named to the plaintiffs at a named rate. It was common ground that the contract was to be completed within a week. The defendant parted with no grain at all to his *asamis* and failed to deliver any grain to the plaintiffs. Held, the contract was an ordinary contract which was not to be carried out or only to be partially carried out if certain events accrued, namely the taking of some of the grain by *asamies*. Those events had not occurred and hence the contract should be enforced. The question of measure of damages is one quite apart from the fact that the contract is a contingent contract. The contingency on which the contract was to be enforced having occurred damages have to be ascertained in the usual manner. (*Batten, J. C.*) SATH KANCHEDILAL v. MOTIRAM. (1922) Nag. 192: 68 I. C. 720.

## S. 73—Contract — Unfulfilled contract—Right to implement. See CONTRACT ACT, S. 190. 1 Bur. L. J. 219.

## S. 73—Damages—Contract for sale of land—Breach—Delay in suing for damages—Measure of damages.

Where a plaintiff sues for damages for a breach of contract to sell immovable property, to ascertain the market value of the land for the purpose of the measure of damages the court will consider what the land would fetch if put upon the open market by a willing seller. This may be ascertained from earlier sales of the same property or by comparison with other similar plots in the locality which have been the subject of sale. Private offers of purchase are of small value in such a case. (*Kemp, A. J. C.*) NAROO-SHANKAR v. RAJUMAL. 15 S. L. R. 21.

## Ss. 73 and 74—Damages—Deposit—Breach of contract—Forfeiture—Repudiation of contract.

In a contract of sale a deposit serves two purposes. If the purchase is carried out, it goes against the purchase money but its primary purpose is this, it is a guarantee that the purchaser means business. Money paid as deposit is paid on the implied understanding that if the purchaser refuses to complete the deposit is to be the property of the payee. If the purchaser repudiates the contract he forfeits the deposit and cannot claim its refund on the ground that the purchaser has had no loss. 19 A. 489; 43 A. 166; 17 C. W. N. 100; 24 C. W. N. 40; 38 M. 178 Ref. (*Chatterjee and Pearson, JJ.*) MANGOBINDA DATTA v. BAISOGOMAFF. 67 I. C. 114.

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## —S. 73—Damages—Measure of.

The measure of damages in a case of breach of contract to deliver, is the sum by which the contract price fell short of the price at which the purchaser might have obtained goods of like quality at the time when they should have been delivered. (*Abdul Raoof and Campbell, JJ.*) *ASMAT ULLAH v. MESSRS. BEHARI LAL AND SONS* 68 I. C. 912.

—S. 73—Measure of damages—Contract for sale of goods—Delay in delivery—Refusal See (1921) DIG. COL. 363. *A. L. S. V. CHETTY v. MAUNG KYIN KE.* (1922) L. B. 1 : 64 I. C. 60.

## —S. 73—Damages—Measure of—Breach of contract—Sale of goods.

In a suit for breach of Contract to deliver goods on a certain date the market price on that date is the standard for the computation of compensation and not on a later date on which the goods may have been demanded and refused. The position of a seller would be very precarious, indeed, if such were the case and he would be entirely at the mercy of the purchaser who could demand goods on any date he liked after breach and then claim damages on the basis of the rates prevailing on that date if the goods remained undelivered (*Broadway and Motisagar, JJ.*) *FIRM OF MAUSA RAM GORDHAN DAS v. FIRM OF MANGAL SAIN DUNI CHAND,* (1922) Lah. 149 : 65 I. C. 497.

## —S. 73—Damages—Measure of—Sale of goods—Date of breach.

On 13th September 1920, the pliffs. sold to the defts. one hundred bales of yarn of which seventy-five were for ready and twenty-five for September delivery. The defts. took delivery of twenty-four bales on 17th September 1920, twelve bales on 4th October 1920, and a further lot of twelve bales on 21st October 1920, but they failed to take delivery of the remaining fifty-two bales. After writing several letters to the defts. the pliffs. sold the bales by public auction on 2nd March 1921, and claimed Rs. 11035-1-4 as difference in the contract price and the amount realised on sale. The defts. contended that the date of the breach of contract as regards twenty-five bales of September delivery was at the end of September 1920, and that of twentyseven bales of ready delivery was in September 1920; but that they were not liable to pay damages on the basis of rates prevailing in January or March 1921.

*Held*, (1) that the property in the goods did not pass to the defts. and the pliffs. could not, therefore, rely on the auction sale in March 1921:

(2) that there was no understanding between the parties after the due date that if the defts. failed to take delivery of the goods the pliffs. were entitled to go into the market and sell at the then market price: and

(3) that the whole of the forty-eight bales of which delivery was taken must be taken to be appropriated to the ready contract, and that the date of the breach as regards ready delivery was eight days from 13th September 1920 and as regards September delivery it was 30th September 1920 (*Marten, J.*) *TOYO, MENKA KAISHA, LTD. v. CHASILDAS BATHURAI*

24 Bom. L. R. 149 : (1922) Bom. 203 : 69 I. C. 29.

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## —S. 73—Damages—Measure of—Default of Plaintiff—Effect.

Where the defendant has committed a technical breach of contract and the plaintiff himself had no intention of performing his terms of the contract, the plff. is entitled merely to nominal damages (*Shadi Lal C. J and Wilberforce J.*) *WELD & COMPANY v. HAR CHARN DAS.* 4 Lah. L. J. 317.

## —S. 73—Damages—Measure of—Sale of goods—C. I. F.—Breach.

A C. I. F. contract is not a sale of documents relating to goods but a sale of the goods by delivery of documents. Consequently where the seller does not put the goods on board the Ship the true measure of damages is the difference between the contract price and the market price at the time of breach (*Robinson C. J and Duckworth J.*) *S. K. R. S. L. CHETTY FIRM v. HMAR-CHAND MADHOWJEE & Co.* 66 I. C. 579.

## —S. 73—Damages—Measure of—Infringement of right—Nominal damages.

Though every breach of duty arising out of contract gives rise to an action for damages without proof of actual damage the amount of damages recoverable is as a general rule, governed by the extent of the actual damages sustained in consequence of the defendant's act. In cases admitting proof of such damage the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required; nor in all cases is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Only such approximation to certainty is required as would satisfy the mind of a prudent and reasonable person. Cases on the subject reviewed. (*Mookerjee and Chotzner, JJ.*) *KINGSLEY v. THE SECRETARY OF STATE FOR INDIA.*

36 C. L. J. 271.

—S. 73—Measure of damages—Contract for sale of goods. Delay in delivery—Refusal. See (1921) DIG. COL. 363. *A. L. S. V. CHETTY v. MAUNG KYIN KE.* (1922) L. B. 1 : 64 I. C. 60.

## —S. 73—Damages—Sale of goods—Breach—Late shipment—Late arrival.

Under a contract in writing dated 21—8—1918 defts. agreed to buy from plaintiffs 25 bales of yarn. The contract was in these terms: "This day we have purchased from you the undermentioned goods in accordance with the bazaar rules cotton yarn of Japan shipment for February, March 1918 is to be given whenever the same arrive earlier or later, and on the safe arrival of the same by steamer." On 25—9—1918 defts. wrote to pliffs. that unless the goods were delivered in 8 days the contract was to be treated as cancelled. On 12—10—1918 the goods arrived in Bombay and the pliffs. required the defts. to take delivery. On 15—10—1918 defts. replied that that the 8 days' period having already expired the contract was cancelled and that they were not bound to pay for the goods or take delivery of them. In an action for damages, *Held*

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that having regard to the express provisions of the contract with reference to late shipment, the September shipment was contract shipment which the defendants were bound to accept. The date of breach was 15-10-1918 when defendants improperly repudiated the contract. As the property in the goods had not passed to the defendants, plffs. were entitled to recover the difference between the contract price and the market price on the day of the breach. (*Mulla, J.*) **CHOTALAL LALLU BHAI v. CHAMPSEY UMERSEY AND SONS.** 24 Bom. L. R. 877

———**S. 73—Damages—Sale of goods—Instalment delivery—Default—Breach—Damages—Right to sue for**

Where there is a contract by the plaintiffs to supply goods to the defendants from time to time as they required for their business, if the sellers clearly show their intention not to be bound by and to repudiate the contract, the buyers if they please, may treat the notice of intention as inoperative and await the time when contract is to be executed and then hold the sellers responsible for all consequences of non performance, but in that case they keep the contract alive for the benefit of the sellers as well as their own the buyers remain subject to all their obligations and liabilities under the contract and enable the sellers not only to complete the contract, if so advised, notwithstanding their previous repudiation of it but also to take advantage of any supervening circumstances which would justify them in declining to complete it. On the other hand the buyers may, if they think proper, treat the repudiation of the sellers as a wrongful putting an end to the contract and may at once bring their action as on a breach of it, and in such action they will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded them the means of mitigating their damage. *Frost v. Knight* (1872) L. R. 7 Ex. 111, 113; *Cost v. Ambergate, etc. Ry. Co.* (1851) 17 Q. B. 127; *Brathwaite v. Foreign Hardwood Co* (1905) 2 K. B. 543; *McLachlin v. Nickoll and Knight* (1920) 1 K. B. 693 Rel (*Mulla, J.*) **NAJAN AHMAD HAJI ALI v. SALEMA HOMED PEERMAHOMED.** 24 Bom. L. R. 998.

———**S. 73—Damages—Sale of goods—Breach—Repudiation—Measure of damages.**

Where defendant has utterly repudiated a contract or put it out of his power to perform it, the plff. may at his option sue at once or wait till the time when the act was to be done. But the measure of damages is the same in both cases viz. the difference between the contract rate and the market rate on the due date. The election to take advantage of the repudiation of the contract goes only to the question of breach and not to the question of damages, and the damages are to be calculated with reference to the date of breach only where no time was fixed for acceptance, because there is then no other measure possible. (*Maung Kin and Pratt, JJ.*) **HUNT HUAT AND CO., v. SIN GEE MOH AND CO.** 66 I. C. 510.

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———**S. 73—Damages—Sale of goods—Resission—Right to return of advance—Further damages**

Where the plff. lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties at the time when the contract was made. (*Schwabe C. J. and Krishnan J.*) **ADAM HAJI PERA MAHOMED ISHAK v. HUSSAIN AKBARI**

43 M. L. J. 199 (1922) M. W. N. 434 : 31 M. L. T. 40 (H. C.)

———**S. 73—Usufructuary mortgage—Stipulation to pay additional interest if mortgage not registered—If enforceable.**

An agreement to pay additional interest in case the mortgagor failed to get the registered bond constituting a usufructuary mortgage is a stipulation by way of penalty and is unenforceable when possession was actually given to the mortgagee (*Lyle, A. J. C.*) **JHAN SINGH v GAURI SHANKAR.** (1922) Oudh 123.

———**S. 74—Contract—Breach of—Penalty—Damages ascertained by parties—Duty of Court.**

The idea is very common that what is called a "penalty clause" in a contract is a mere *brutum fulmen*, an agreement that neither party has any intention of enforcing at all to any extent. Such an agreement would certainly not be mentioned in the Contract Act, and in fact would not be agreement at all. A penalty clause merely fixes a maximum for damages which would be difficult to estimate in terms of money, and anyhow does not deprive the aggrieved party of his right to damages that can be so estimated. 12 N. L. R. 177 Ref. (*Hallifax, A. J. C.*) **BALAJI v. SUKAMIYA.** 68 I. C. 605.

———**S. 74—Damages—Breach of contract—Earnest money—Forfeiture—Effect of**

In the absence of a written contract the question as to what is and what is not earnest money, must be decided on the evidence on record.

Where a person who has deposited earnest money is guilty of a breach of contract, he must forfeit the earnest money. (*Stuart and Sulaiman, JJ.*) **MADHO DAS v. GOKUL DAS.**

20 A. L. J. 742 : L. R. 3 A. 488 : (1922) All. 478 : 4 U. P. L. R. (A) 208 : 68 I. C. 761.

———**S. 74—High rate of interest—Power of Court to reduce—Circumstances justifying.**

Where there is only one rate of interest and that rate is exorbitant the Court has no power to reduce the rate in the absence of proof of fraud undue influence or oppression. (*Maclean, C. J. and Geidt, J.*) **NARENDRA NATH SARKAR v. MONIREDDI HOWLADHAR.** 35 C. L. J. 209 : 69 I. C. 109.

———**S. 74—High rate of interest—No power to interfere in the absence of undue influence. See CONTRACT ACT, SS. 16 AND 74.**

9 O. L. J. 442.

———**S. 74—Interest—Power to relieve against—Penalty.**

It is not open to the court to interfere with the rate of interest stipulated between the parties unless the court is satisfied that the rate of



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interest charged is a penalty within S. 74 of the Contract Act. In other cases the court would be making a new contract between the parties. (*Greaves and Ghose, J.J.*) *SRIMATI SATYABHAMA SUNDARI v. MAHOMED ESAHAKMEAH.*

68 I. C. 497

## —S. 74—Interest—Rate of.

Have regard to the local conditions in India 12 per cent is very proper and reasonable rate to impose, though it may appear a very high rate of interest (P. 319 C. 1.) (*Buckmaster*) *NARAIN DAS v. ABINASH CHANDER.*

L. E. 3 P. C. 129 : 31 M. L. T. 217 (P. C.) :

16 L. W. 780 : (1922) P. C. 347 :

(1922) M. W. N. 791 : 4 U. P. L. R. (P. C.) 111 :

—S. 74—Interest—Reduction on punctual payment—Penalty. See (1921) DIG. COL. 365. *KULADA PRASAD CHOWDHURY v. RAMANANDA PATNAIK.*

48 Cal. 1036.

## —S. 74—Mortgage—Interest—Stipulation for—Penalty

Where a mortgage deed provides that the mortgagee should be in possession of the property in lieu of interest and the period fixed for redemption was four years, a provision that interest was to be paid in addition after the 4 years is no stipulation for increased interest and S. 74 of the Contract Act is not applicable to the case (*Scott-Smith, J.*) *LACHHMAN v. SANTA,*

14 P. L. R. (1922) : 64 I. C. 350.

## —S. 74—Kabuliat—Stipulation to pay heavy rent—Penalty.

The contract was that at the end of 4 years when the lease terminated the defendants should pay to their landlord half the amount of the produce of land. In the event of their objection to do so or preventing the landlords from having the produce assessed then the stipulation in the kabuliyat was that they should pay at Rs. 10 per bigha, held that the stipulation has purely a penalty as understood in law and being a much higher rate of rent than is usual in such cases is purely a penalty and not meant to be a substantive part of the contract binding on the parties. (*Dawson Miller, C. J. and Adams, J.*) *PITHU MANI v. JHUKSAR SINGH.*

(1922) P. 240.

## —S. 74—Penalty—Chit fund—Stipulations in bond executed by successful bidder—When a penalty—Instalment bond—Waiver of default for one or two instalments—Effect of.

The defendant was a subscriber to a chit conducted by plaintiff and was the successful bidder at the second auction held in connection with the chit which was to run over 12 instalments. On taking the prize, the debt executed in favour of the plaintiff, the stakeholder, a bond providing *inter alia* that in case debt failed to pay his subscriptions, he was not only to forfeit the dividend, interest and premium, but was also to pay the whole amount on demand with interest thereon at 1½ per cent mensem from the date of the auction and that the debt should within 15 days execute another document to the plaintiff for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of the bond. Debt. executed the other document

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above referred to and paid the third, fourth and fifth instalments duly and defaulted in the payment of the sixth. In a suit by plaintiff, to recover the amount due under the bond held that the terms of the bond as regards (1) the defendant's liability for future instalments from the date of default (2) his deprivation of the dividend and interest and (3) the imposition on him of liability for interest on the amount due from him at 18 per cent from the date of his default, did not, either each taken by itself or all together, amount to a penal stipulation.

In cases like this the court has to decide whether the terms are unreasonable as a whole and whether they are so unreasonable that the parties never contemplated that they should receive effect.

The waiver by the plaintiff of his right to enforce the terms of the bond in connection with fourth and fifth instalments did not affect his right to use the coercive measures provided by the bond in cases of future default. (*Oldfield and Ramesam, J.J.*) *VAITHINATHA IYER v. GOVINDASWAMI ODAYAR.*

42 M. L. J. 551. (1922) M. W. N. 203 : (1922) Mad. 67 : 67 I. C. 995.

## —S. 74—Penalty—Compound interest in default of payment of simple interest

A provision for payment of compound interest at the same rate as the simple interest on default of payment of the latter is not a penalty. (*Coutts and Ross, J.J.*) *RAMCHANDRA PRASAD v. MAHABIR PRASAD SINGH.*

64 I. C. 247.

## —S. 74—Penalty—Enhancement of interest from the date of bond—Compensation.

Where a bond provides for the payment of interest annually and on default further provides that interest should be charged at double the original rate from the date of the deed, the stipulation for enhancement of interest is a penalty and would be relieved against by the Court. At the same time a reasonable portion of the interest should be allowed by way of compensation to the creditor. 155 P. L. R. 1901, 10 I. C. 572, 25 I. C. 702 ref. (*Scott Smith, J.*) *RAMCHAND v. JAGIRI MAL.*

4 Lah. L. J. 270 : (1922) Lah. 268.

## —S. 74—Penalty—Interest and principal consolidated together and made payable in instalments—Default—Provision for payment of whole—Power of Court to relieve against.

If in an instrument in which the principal and interest have been consolidated and the total amount is payable by instalments, there is a default clause that on failure to pay an instalment, the whole sum will become at once due, such a provision is a penalty. Even where no interest is payable until default but an exorbitant rate is payable on default, it is open to the court to treat the stipulation as a penalty. 42 C. 652 ; 36 M. 229 foll. (*Batten, J. C.*) *BHAGWANSA v. AMIN.*

(1922) Nag. 49 : 65 I. C. 963.

—S. 74—Penalty—High rate of interest. See (1921) DIG. COL. 366 *TOHLU MAL v. BUTA.*

67 I. C. 132.

## —S. 74—Penalty—Mortgage—Enhanced interest.

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Where there is ample security as in the case of a mortgage an increase of the rate of interest from 24 per cent to 36 per cent from the date of default is a penalty (*Robinson, C J and Macgregor, J.*) *KO THINE v. ISMAIL CASSIM MORAD*  
1 Bur L J. 117. 68 I C 887.

—S. 74—Penalty—Right of resale of goods—Power to sell on breach of conditions.

Where in a contract for the sale of goods a right of resale is reserved to the vendor on breach of certain conditions the vendor can avail himself of the right of resale on the breach and the power to resell is not a stipulation by way of penalty. (*Kanhaya Lal, J. C.*) *NAZIRKHAN v. MIRZA MAHOMED ABID.*  
25 O C 186  
(1922) Oudh 265

—S. 74—Scope of.

The terms of a mortgage deed were as follow. "The mortgagors having admitted a previous mortgage executed with regard to a debt due by them agreed to pay the amount by bi-annual instalments. They further agreed that in case of default of payment of any two instalments in succession the plaintiffs would be entitled to interest at one per cent per mensem with annual rests from the date of the bond." Held: the case is not affected by the change in S. 74 as it stands at present, but even if it could be brought within the change the interest at one percent. per mensem compoundable annually is not penal or extortionate and the defendants are not entitled to resile from the contract into which they entered with open eyes. (1885) A.W.N. 65 Referred to. (*Gokul Prasad, J.*) *BUDH SINGH v BALDEO SAHAL.*  
(1922) All. 284.

—S. 74—Stipulation for compound interest—It a penalty See MORTGAGE—INTEREST.  
1 Pat. 263

—S. 74—Vendor and Purchaser—Deposit—Forfeiture.

Where a contract of sale goes off owing to the default of the purchaser, the vendor is entitled to retain the deposit made by the purchaser. 38 M 178; 19 All 489, 33 All 166 ref. (*Drake Brockman, J. C.*) *MANGULAL v MT. NANHI.*  
5 N L J. 1: (1922) Nag. 104: 67 I C 806.

—S. 74—Exception—Administration Bond—Penalty—Relief against.

In proceedings under the Probate and Administration Act a bond executed in favour of a District Delegate in respect of the grant of letters to the estate of a deceased person does not come within the Exception to S. 74 of the Contract Act. (*Sanderson, C J. and Richardson, J.*) *CHANDRA MOHAN KAK v. SRIMATI RAHINI DAS.*  
64 I. C. 366

—S. 78—Sale of goods—Property when passes—Postponement of delivery.

On a sale of ascertained goods the property in the goods passes to the purchaser as soon as the contract of sale is made even though the delivery of the goods is postponed at his request and to suit his own convenience (*Gokul Prasad and Stuart, JJ.*) *DWARKA DAS AJODHYA PRASAD v. RAM RATAN*  
20 A. L. J. 579: L. R. 3 A 424:  
(1922) All. 458: 68 I C. 239.

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—S. 78—Sale of specific goods—Position of buyer—Claim for price—Wholesale and delivery.

Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get goods weighed and delivered to him. The weightment is only for the consideration of the buyer and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him. Where the contract was for the sale of the entire heap of bark stored in the godown amounting approximately to 446 maunds it was practically a sale of specific or ascertained goods and it was the duty of the purchaser to get the goods weighed and delivered on the due date (*Kanhaya Lal, J. C.*) *ANNAN v SHEIKH DUBAR*  
9.0, L. J. 389: 4 U. P. L. R. (O C) 95.  
68 I. C. 969.

—Ss. 83, and 91—Sale of goods—Appropriation—What constitutes—Delivery—Bill of lading—Discounting draft.

The Commonest form of appropriating goods, to a contract for the sale of unascertained goods is by delivering them to a carrier. A very common mode of doing business is for one merchant to give an order to another to send him certain goods. Here it becomes the seller's duty to appropriate the goods to the contract. The seller is by the express or implied terms of the contract authorised to select and appropriate the goods, the buyer having given a previous implied assent to the seller's appropriating the difficulty in such cases is to determine what constitutes the appropriation. The question is one of intention but there are certain well established rules.—

(1). In the case of a contract for the sale of unascertained goods the delivery by the seller to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property.

(2). If however the vendor when shipping the articles which he intends to deliver under the contract takes the bill of lading to his own order and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property and consequently there is no final appropriation and the property does not on shipment pass to the purchaser.

(3). If the vendor deals with or claims to retain the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft or payment or tender of the price, is conditional only, and until such acceptance or payment or tender the property in the goods does not pass to the purchaser.

(4). If the seller discounts a draft upon the buyer with a bank and authorises the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred according to general mercantile understanding is that the seller intends to transfer the ownership

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when the draft is accepted but intends also to remain the owner until this has been done. S. 83 of the Contract Act applies to cases where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation where in pursuance of the contract the seller delivers the goods to a carrier for the purpose of transmission to the buyers but retains a *jus disponendi* until certain conditions are fulfilled (5) the property in the goods does not pass to the buyer until the conditions imposed by him are fulfilled. This rule applies not only to delivery of goods to carriers by sea but to delivery to carriers by land. (*Mulla, J.*) **THE FORD AUTOMOBILES (INDIA) LTD v. THE DELHI MOTOR AND ENGINEERING CO.** 24 Bom. L. R. 1140.

—Ss. 102, 108 and 178—*Documents of title—Railway receipt Assignment—Mode of—Rights of transferee and consignee—T. P. Act, S. 137.*

Railway receipts are not negotiable by law and are not rendered negotiable by S. 137 of the T. P. Act. Nor was there any thing to show that such receipts were negotiable by the mercantile custom of Rangoon. S. 137 of the T. P. Act merely provides that the methods of assignment in ch. 8 of the Act shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable. It merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made.

In order that such transfer should have in the case of railway receipts the effect of transferring the ownership of the goods, it must be established that they are not negotiable. (*Robinson, C. J. and Macgregor, J.*) **S. R. N. S. ARUNACHELLAM CHETTY FIRM v. KO PO YAN.**

1 Bur. L. J. 90 : 11 L. B. R. 341 : 68 I. C. 695.

—S. 107—*Resale of goods unpaid price—Rights of seller to resell goods at purchaser's risk—Rescission of Contract—English and Indian law.*

So far as the English Law is concerned, when an unpaid seller of goods resells them under an expressed power reserved by him, he thereby rescinds the contract. Under the Contract Act, there is no reason why an unpaid vendor should not resell the goods "on account and risk of the purchaser" as specified in the contract and enforce at the same time all other rights given to him by the contract in so far as those rights are not affected by the resale. (*Shadi Lal, C. J. and Campbell J.*) **JAI NARAIN BALU LAL v. NARAIN DAS JAINIMAL,** 3 Lah. 296

—S. 107—*Sale of ascertained goods—Property when passes—Failure to pay purchase price—Effect of—Resale—Profits—Right to,*

Where the subject matter of a contract of sale consists of ascertained goods, the property in the goods passes to the purchaser on the conclusion of the contract of sale. Thereafter though the goods remain with the seller, the purchaser has a right to demand delivery. The non-payment of the price or a portion thereof does not put an end to the contract but if there is a clause in the

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contract to that effect the seller, might insist on the purchaser forfeiting the balance of the deposit he can avail himself of it and he can sell the remainder of the goods on account of the purchaser.

S. 107 of the Contract Act applies only where notice has been given by the seller to the buyer of his intention to resell after the lapse of a reasonable time (*Sanderson, C. J. and Richardson, J.*) **SHIB NARAIN PAL. v. RAM BILASH MARWARI.**

65 I. O. 263.

—S. 107—*Seller's Right of resale when arises.*

Before the sellers can exercise the right of resale under S. 107 Contract Act, and claim damages on that footing the property in the goods must have passed to the buyers. (*Maung Kin and Pratt, J.J.*) **HUNT HUAT AND CO v. SIN GEE MOH AND CO** 66 I. C. 510.

—Ss. 108 and 178—*Gratuitous bailment of jewels—Bailee pledging goods and selling them—Bona fide purchaser without notice—Rights of. See (1921) DIG. COL. 367, KATTA RAMASWAMI GUPTA v. KAMALAMMAL*

45 Mad. 173 : 42 M. L. J. 32 : 30 M. L. T. 156 : (1922) Mad. 44.

—S. 108—*Animals—Sale by person having qualified possession—Title to property when passes.*

Where a hirer of certain buffaloes makes them over to another in settlement of a debt the latter does not get a title to the property, as the vendor had only a qualified possession and for a specific purpose. (*Duckworth, J.*) **MAUNG NYAN v. KO MAUNG,** 1 Bur. L. J. 164.

—S. 108—*Share certificate—Bank transfer—Delivery of transfer form and share certificate—Effect of. See (1921) 367, FAZAL D 'ALLANA v. MANGALDAS.* 46 Bom. 489 66 I. C. 726

—S. 108 Except I—*Hiring a sewing machine with option or purchase—Sale by hirer before exercising option—Rights of purchaser. See (1921) DIG. COL. 368. AHMAD JAN v. SINGER SEWING MACHINE CO, RAWALPINDI.*

67 I. C. 638.

—S. 113—*Sale of goods—Merchantability—Test of—Damages to major portion of goods—Effect of.*

The effect of S. 113 of the Contract Act is that when there is no express warranty in the sale of goods, there is an implied warranty of merchantability. The question whether goods are 'merchantable' in law is a question of mixed fact and law. A bale of a thousand pieces of piecegoods of which nine-tenths are damaged, however slightly, is radically unmerchantable and a seller cannot force such goods on an unwilling buyer. In such there is no room for the application of the principle of *de minimis*. 8 L. W. 192, (1910) 2 K. B. 937 ; (1910) 2 K. B. 831 Ref. (*Coutts Trotter and Ramesam, J.J.*) **MESSRS NALLI & CO. v. V. A. A. R. FIRM.** 43 M. L. J. 208.

16 L. W. 145 : (1922) M. W. N. 468

## CONTRACT ACT, S. 118,

—S 118—*Sale of goods—Appropriation—Acceptance—Passing of property—Default in payment—Effect of.*

Where goods agreed to be sold are not ascertained at the time of making the agreement, but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other the sale is complete and the property in the goods passes to the buyer. In order that the property may pass to the buyer it is necessary that the goods appropriated to the contract by the seller must answer the description in the agreement. As regards the buyer's assent, the assent may be express or implied.

Where the goods answer the description in the agreement, the act of the sellers in sending the invoices to the buyers amounts to a notification of appropriation by the sellers. The subsequent acts of the buyers, namely, the request to the plaintiff's muddam to clear the goods on their behalf, coupled with the payment of customs duty and clearing charges to the muddam and the payment of the Port Trust rent constitute an assent to the appropriation by buyers with the result that the property in the goods passes to them (1901) 1 K B. 608, 1906 A. C. 419; (1919) 1 K. B. 459; (1218) A. C. 157; 42 Cal. 334 Ref.

The provisions of S. 118 of the Contract Act do not apply where the property in the goods has passed to the buyer; for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer, since the appropriation can only be of goods of the contract description, the conditions of the contract are ex hypothesi complied with. The case contemplated by S 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price. (*Mulla, J.*) *BUCH AND Co. v. GORDHANDAS MAVJI*.

24 Bom. L. R. 991

—S. 118—*Sale of goods—Retention by buyer—Return of goods—Warranty—Reasonable time.*

Where the goods are sold and delivered to a buyer it is open to the buyer to have the goods in his custody for a reasonable time in order that he may examine them and see whether they comply with the warranty. At the same time, the buyer loses his rights to reject the goods by any act amounting to acceptance. Mere receipt of goods is no acceptance but such receipt will become an acceptance if the goods are not rejected within a reasonable time. 23 C. L. J. 415. What is reasonable time is purely a question of fact and has to be decided on the circumstances of each case. A period of 18 days was held not to be a reasonable time in the case of cotton goods. (*Broadway and Martineau, JJ.*) *FIRM OF PROBHU DIAL BANWARI LAL OF DELHI v. DIN NATH KAPUR*. 4 U. P. L. R. (L.) 26; (1922) Lah. 127; 65 I. C. 484.

## CONTRACT ACT, S. 161.

—S. 134—*Sureties—Discharge of obligation—Two Sureties for a pro-note—Discharge by one of the sureties—Execution of fresh pro-note by one of the sureties—Effect of.*

Where one of two co sureties discharges the principal debt without the knowledge of the other by the execution of a fresh promissory note to the original creditor's transferee he is not entitled to contribution as against the co surety on his discharging the latter note. (*Phillips and Odgers, JJ.*) *KONDAPALLI LAKSHMINARASAYYA v. KONDAPALLI VENKATKRISHNAYYA* 15 L. W. 143; (1922) Mad. 119.

—S. 139—*Bank deposits—Security for—Liquidation—Creditor's applying for dividends—Effect—Liability for interest.*

Where a person stood surety for depositing money in a bank and the bank subsequently failed and the creditor after diligently registering himself as a creditor and obtaining his dividend in liquidation, sued the surety for the balance.

Held he had not done anything inconsistent with the rights of the surety, on the other hand, if he had omitted to do what he actually did, his inaction might have been relied upon as an omission to do an act which his duty to the surety required him to do.

The liability of the surety being co extensive with that of the principal debtor, the fact that the latter may not have sufficient means to pay interest is not an adequate ground for relieving the surety from liability. (*Shadi Lal, C. J., and Wilberforce, J.*) *MALAWA RAM v. SWAMI DAS*

4 Lah. L. J. 183; (1922) Lah. 89.

—Ss. 148 and 160—*Scope of—Pawn or pledge—Assignee from pawnor—Directions from—Effect of.*

It is the pawnor, and not an assignee from him that can give directions to the pawnee as regards the delivery or disposal of the pledged property. The directions must be definite and reasonable in order to be binding on the pledgee. (*Kotwal, A. J. C.*) *TEK CHAND v. MAHADEO*.

(1922) Nag. 127; 65 I. C. 65.

—Ss. 149 and 151—*Railway—Carriage of goods—Liability of railway that of bailee—Rules restricting liability—How far valid. See RAILWAYS ACT, Ss. 72, 47.*

20 A. L. J. 31.

—S. 151—*Bailment—Hotel keeper—Loss of goods belonging to guest—Liability for.*

The liability of a hotel-keeper to his guests is governed by S. 151 of the Contract Act and his liability is that of a bailee. Where the hotel keeper fails to show that he took such care to ensure the safety of the property of the guests as a man of ordinary prudence would, under the circumstances, take of his own goods, he is liable for the loss of the goods. The English common law does not regulate the liability of hotel-keepers in this country. (*Ryves and Gokul Prasad, JJ.*) *MESSRS JAN AND SON v. A. CAMERON*.

L. R. 3 A. 373; 20 A. L. J. 728; (1922) All. 471; 68 I. C. 679.

—S. 161—*Railway—Carriage of goods—Risknote Form A, absence of—Delay in transit—*

## CONTRACT ACT, S. 162.

Liability for damages See RAILWAYS ACT, S. 72.  
L R 3 A 101

## ———S. 162—Bailment—Deposit—Death of depository—Liability of heir.

The Contract Act is not an exhaustive Code with reference to the law of bailments. Bailments are of two kinds, voluntary and involuntary. Where a depository dies and the subject of the deposit passes into the hands of his heir, the latter becomes an involuntary bailee. A depository is a bailee within chapter IX of the Contract Act 33 M. 56 Ref. (*Ghose, J.*) *PROMOTHO NATH MULICK v. PRODYMN KUMAR MULICK*

26 C. W. N. 772

## ———S. 178—Possession of agent for sale—Pledge—Validity of.

Where a person is entrusted with certain machinery in order that he might dispose of it his possession is rightful and a bona fide pledge of the property from him gets a good title thereto. (*Macgregor, J.*) *SINGER SEWING MACHINE CO. v. YEN KUN.*

1 Bur. L. J. 45.

## ———S. 190—Agent for sale—Appointment of sub-agent—Contract—Right to implement Lien of agent—Retainer.

Plaintiff contracted to supply mineral ore to defendant for sale on the London market at an agreed rate. Defendant who had no place of business in London appointed his London agents as sub-agents and they entered into forward contracts for the supply of ore. The plaintiff failed to carry out the terms of his contract and to supply ore whereupon the sub-agents purchased ore from other sources and carried out their contracts with third persons, debiting the extra charges against plaintiff. The defendant retained moneys due to the plaintiff towards the expenses entailed by the latter's non-fulfilment of the contract. *Held* that the defendant being a factor as well as an agent for sale, had authority under the circumstances to appoint a sub-agent and that the defendant was entitled by way of general or particular lien to retain moneys belonging to the plaintiff in his hands 39 M. 355, 42 Ch. D. 424; 1911 A. C. 105; 1912 A. C. 673 foll. (*Praet and Duckworth, JJ.*) *THE LEIBOAK SYNDICATE v. FINLAY FLEMING CO.*

1 Bur. L. J. 219.

## ———Ss. 201 and 209—Termination of agency—Suit against agent after death of principal—Liability of agent. See LIM. ACT, ARTS. 89 AND 120.

26 C. W. N. 320

## ———S. 211—Suit by principal against agent's representatives for account—Liability for loss.

Where an agent has caused loss to the principal by not carrying out his directions and by supplying goods contrary to his directions the agent or his legal representatives are liable for the value of the goods so supplied. (*Abdul Raouf and Campbell, JJ.*) *FRAMJEE SHAPURJEE GANDHI v. MR. KARAM DAS.*

66 I. C. 446.

## ———Ss. 215 and 19—Principal and agent—Dealing by agent in the business of the agency without the knowledge of the principal—

## CONTRACT ACT, S. 217.

*Contract voidable at the option of principal—English and Indian law.*

Plaintiff entered into a running contract with defendants for the supply, at a fixed price of a large quantity of tiles of a certain manufacture for the sale of which defendants had been appointed sole agents. It was found as a fact that the plaintiff was acting for and a mere alias of the dubash and local agent of the defendants who had entered into the contract without any knowledge of the fact. The defendants on becoming aware of their own agent's interest in the contract repudiated it and refused to perform it further. In an action for damages by the plaintiff *Held*, that the defendants were entitled to avoid the contract both under S. 19 and under S. 215 of the Contract Act and that the plaintiff's suit was unsustainable. The concealment by the dubash and local agents of the defendants of the fact that he was dealing with them through the plaintiff was dishonest and his procuring a running contract for the supply of tiles on a large scale with the object of competing with his principals in the market which it was his duty to exploit for their benefit was prejudicial to the defendants. The case therefore satisfied S. 215 of the Contract Act. Even apart from S. 215 the dishonest concealment by the plaintiff of the identity of the contracting party constituted fraud and entitled the defendants to avoid the contract. (*Schwabe, C. J. and Wallace, J.*) *ACHUTHA NAIDU v. MESSRS. OAKLEY BOWDEN AND CO.*

43 M. L. J. 444 : 16 L. W. 345 :  
(1922) M. W. N. 576 : (1922) Mad 497.

## ———S. 217—Principal and agent—Agency for sale of sugar—Agent depositing moneys with principal—Insolvency of principal—Right of agent to set-off.

The respondents were the agents of Arbuthnot & Co. which carried on a large business *inter alia* as sugar manufacturers. The appellant was the Official Trustee of Madras representing a company called Mysore Sugar Refining Company. The relation between the Arbuthnot and the Mysore Sugar Refining Company was this. The Mysore Sugar Refining Company was incorporated by Arbuthnot & Co. in 1905. It consisted entirely of representatives of the Arbuthnot & Co. or persons under their control. The whole of its capital came from Arbuthnot & Co. The respondents were appointed by Arbuthnot & Co. in 1901 as agents for sale of sugar in Mysore and they had also made deposits of money with Arbuthnot & Co. The respondents knew nothing whatever of the Mysore Sugar Refining Company. The Arbuthnot & Co. became insolvents in 1906. The appellant claimed to recover the proceeds of sugar manufactured by their company and sold by the respondents and claimed to do this without reference to the deposits which the respondents had made with the Arbuthnot and Company and with respect to which the respondents alleged a case of counter claim or set off.

*Held*, that the Mysore Sugar Refining Company could not claim to recover the proceeds of sugar without reference to the cross-claim or set off of the respondents, and that the appellants can claim the benefit of the sums representing the

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sale proceeds of their sugar only subject to every equity which affects those sums in the hands of Arbuthnot & Co. themselves. (*Viscount Haldane*.) *OFFICIAL TRUSTEE OF MADRAS v. A. SUNDARAMURTHI MUDALIAR*.

15 L. W 201 (P. C.)

—Ss. 227 and 237—Principal and agent—Agent acting beyond scope of authority—Third party misled and damaged thereby—Railway Company—Consignment of fire works wrongly accepted for carriage by passenger train—Liability for damages—Special damages. See (1921) DIG. COL. 371. *FAZAL ILAHI v. EAST INDIA RAILWAY COMPANY*. (1922) All. 324 : 64 I. C. 868.

## —S. 230—Contract by agent—Personal liability

In order to make an agent personally liable under a contract entered into by him it must be clearly established that the agent had not disclosed the name of his principal. If, however, the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent, a mere formal disclosure is clearly and necessary to make the principal liable on the contract. (*Broadway and Abdul Qadir, JJ.*) *LYALLPUR SUGAR COMPANY v. MUL RAJ*. 65 I. C. 473.

## —S. 230—Principal and agent—Acting for foreign principal—Liability of agent.

The presumption in S. 230 (1) of the Contract Act is a rebuttable presumption which can be rebutted. But the mere fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. (*Scott Smith and Abdul Qadir, JJ.*) *FAZAL ILAHI v. THE IMPERIAL CHEMICAL CO., DELHI*. 67 I. C. 157.

## —S. 230 (1)—Contract by agent—Personal liability.

Where a man is by profession an agent of some particular firm and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity as an agent in signing a contract raises no such presumption when the terms of the contract itself are clearly to the contrary. *Gadd v Houghton* (1876) 1 Ex.D. 357 rel. (*Chevis, A. C. J., and Wilberforce, J.*) *BEARGAVA AND CO. v. KOBAYASHI*. 65 I. C. 468.

## —S. 238—Principal and agent—Liability of principal for fraud of agent—Misappropriation of goods.

There is nothing in S. 238 of the Contract Act to show that in order to render the principal liable the fraud must be committed for the benefit of the principal. It is enough if the fraud is committed by the agent in the course of his business for his principal i. e. in matters falling within the scope of his authority. (*Chatterjee and Pearson JJ.*) *DINA BANDHU SAHA v. ABDUL LATIF MOLLA*. 68 I. C. 439 : 27 C. W. N. 18.

## —S. 239—Remuneration varying with profits—Relationship.

## CONTRACT ACT, S. 254.

A servant whose remuneration varies with the profits may be partner in popular sense, but is not legally so (*Hallifax, A. J. C.*) *MOULA BUX v. MUHAMMAD AFZAL* (1922) Nag. 96,

## —Ss. 247 and 239—Minor—Partner—Rights and liabilities of.

A person under the age of majority cannot become a partner by contract. 30 C. 539. If he is admitted to the benefits of the partnership under S. 247 of the Contract Act his right is no more than a right to participate in the property of the firm after its obligations have been satisfied. The question whether a minor has been admitted to the benefit of a partnership is one of fact to be pleaded and proved at the trial and cannot be allowed to be raised for the first time on appeal. (*Sir Lawrence Jenkins.*) *SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJEE*. 49 Cal. 560 : (1922) P. C. 237 : 43 M. L. J. 41 : 16 L. W. 536 : (1922) M. W. N. 364 : 26 C. W. N. 954 : 35 C. L. J. 498 : 67 I. C. 124 : L. R. 3 P. C. 133 : 20 A. L. J. 409 : 24 Bom. L. R. 700 : 49 I. A. 108 : 30 M. L. T. 228 (P. C.)

## —Ss. 247 and 11—Partnership—Minor—Admission to the benefits of partnership.

Though S. 247 of the Contract Act provides that a minor may be admitted to the benefits of a partnership, it does not cancel or revoke S. 11 of the Contract Act and make it possible for a minor simultaneously to create a partnership and to admit himself to the benefits of the same. 3 C. W. N. 134 : 10 B. L. R. 312 : 20 M. L. T. 565 Ref. (*Abdul Raof and Harrison, JJ.*) *MAHOMED RAFIQ v. KHAWAJA QAMAR DIN*. 4 U. P. L. R. (L) 63 : 67 I. C. 95.

## —S. 249—Retirement—Liability for subsequent transactions.

When a firm ceases to exist, but some of the partners carry on the business under the same name, the retiring partners cannot be made liable for any transaction entered into after the dissolution. (*Scott Smith and Abdul Raof, JJ.*) *BICHHTIA LAL v. MUNSHI RAM*. 68 I. C. 932.

—S. 253—Partnership—Loan by partner to the firm—Right to interest on the loan—Suit by partner for recovery of the amount. See CONTRACT ACT, Ss. 43 AND 253. 64 I. C. 183.

—S. 253 (7) and (10)—Dissolution of partnership—Retirement or death of partner—Stoppage of business or refusal of a partner to supply capital when required—Dissolution—Limitation Act, Arts. 106 and 120. See (1921) DIG. COL. 372 *HARA MOHAN PODDAR v. SUDARSAN PODDAR*. 66 I. C. 811.

—S. 253 (10)—Principle underlying—Death of one partner—Agreement to continue by widow—Suit for accounts—Limitation. See LIM. ACT, ART. 106. (1922) Lah. 349.

—S. 254 (5)—Partnership—Misconduct of partner—Remedy of aggrieved partner—Dissolution—Damages.

If a partner is treated in such a way by other partners as to make it impossible for the former

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to continue to be a member of the partnership' his remedy is under sub-S. (5) of S. 254. He cannot leave the partnership if its term has been fixed by agreement under the Contract Act. (*Mookerjee, A. C. J and Fletcher, J*) ABDULLAH v. SAFIULLAH. 64 I C 204

—S. 262 — *Property of partnership — Right to dispose of—Rights of creditors.*

Although partnership property has annexed to it a paramount liability for partnership debts, yet there is nothing in law which prevents partners from disposing of it as they like or allowing it to be treated as the sole property of one partner and obliges them to preserve it as partnership property for the benefit of the creditors of the partnership. Any disposition of the property by the agreement of the partners is effective unless made with a view to defraud the creditor, and the creditor is not entitled to be consulted in the matter. (*Kotwal, A. J. C.*) JAMNADAS v. RAMADHAR (1922) Nag. 70 : 64 I. C. 719.

—S. 264—"Persons dealing with a firm"—*Meaning of*

The expression "persons dealing with a firm" indicates only such persons who have been in the habit of dealing with the firm previously. The section does not contemplate such persons who deal with a firm for the first time after the retirement of some of the partners. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL v. MUNSHI RAM. 68 I. C. 932.

—S. 264—*Scope of—Estoppel.*

S. 264 is an illustration of a particular form of estoppel by conduct and a person is not entitled to take advantage of it unless the facts raise a presumption that the absence of notice excited in him a belief which caused him to do something that he would not otherwise have done. The section must not be construed as an absolute proposition of law, but must be read with S. 115 of the evidence Act. (*Scott-Smith and Abdul Raoof, JJ.*) BICHHIA LAL v. MUNSHI RAM 68 I. C. 932.

CONTRIBUTION — *Co-judgment debtors—Discharge of decree by one—Right to contribution—Extent of liability.*

Where a decree is satisfied by one of several joint judgment-debtors, it is open to him to insist on every other judgment-debtor contributing an equal share towards the decree debt and if any of the remaining judgment-debtors is unable to pay, the resulting loss must also be evenly distributed among the remaining judgment-debtors. (*Scott Smith, J*) SHAH MAHOMED v. MAHOMED ROSHAN KHAN. 31 P. L. R. 1922 : (1922) Lah. 148 : 65 I. C. 128.

—*Co-judgment debtors—Extent of liability inter se—Proof of.*

In a suit for a contribution as between co-judgment debtors it is open to them to show the extent of their liability, and the decree in the prior suit does not operate as res-judicata in this respect. (*Ryves and Gokul Prasad, JJ.*) ITWARI LAL v. MATA PRASAD. L. R. 3 A. 425

—*Co-sharers—right to be re-imbursed in respect of money realised by creditor by coercive*

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process—Basis of right. See LIM. ACT, ARTS. 61, 99 AND 120. 26 C. W. N. 340.

—*Costs—Co defendants—Joint decree—Effect of.*

Where two or more persons join in an attack or in a common defence in an action, there is at least an implied contract that they will share the gain or the loss. At any rate equity will infer such a contract and there is a *prima facie* right of contribution among the litigants so joining in an attack or defence. But it may happen that the defendants to a suit may have different, antagonistic and exclusive defences and in such a case in the absence of a contract or some equity between them there will be no contribution. Cases on the subject reviewed. (*Ryves and Stuart, JJ.*) PARSOTTAM DAS KOLAPURI v. LACHMI NARAIN. L. R. 3 A. 557 : 20 A. L. J. 890.

—*Right to—Assignment—Legality of* See T. P. ACT, S. 6 cl (e). 43 M. L. J. 129.

COOPERATIVE CREDIT SOCIETIES ACT (II of 1922) S. 43—Rules framed under—Rules 31 and 34—Award under the rules—Application to Civil Court to enforce award as decree—Transfer of decree—Legality of See C. P. CODE, S. 39. 24 Bom. L. R. 909.

CO-OWNERS—Adverse possession—Sale by one co-owner—Purchaser's possession—Effect. See ADVERSE POSSESSION. (1922) Lah. 205.

—*Ouster—Joint property—Notice to co-sharer of mortgage redeemed.*

Mere notice by one co-sharer who redeemed mortgaged joint property to the other to the effect that, if he did not pay his share of the amount required for paying off the mortgage, he will have no right over the property redeemed is not sufficient to constitute ouster. If since the date of the notice to the defendant has not been in possession of the family property, sufficiently long, it cannot be presumed that such long possession amounts by itself to an ouster. (*Macleod and Shah, JJ.*) KESHAV NARAYAN SHASTRI PRABHANE v. RAMACHANDRA GANESH PRABHANE. (1922) Bom. 156. (1).

—*Rights of — Separate possession—Mutual agreement—One party in possession of excess area—Remedy*

Joint co-owners of a field cannot enjoy possession of the field except by cultivating each separate portions of the field. If they have once agreed to cultivate definite portions, neither can be allowed to bring a suit for joint possession of the portion of the other as it would open the door to large infructuous litigation. If one party is cultivating more than his share, the remedy of the other is to bring a suit for partition 14 N. L. R. 101 Ref. (*Macnair, A. J. C.*) RADHAKISHAN v. DAULAT. 64 I. C. 427.

COPYRIGHT — *Infringement—Test of—Compilation—Directory—Measure of damages—Injunction.*

In an action by plffs. for an injunction and damages on the ground that the defendant's directory constituted an infringement of the plaintiff's

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copyright in their directory, it was found that, a substantial portion of deft's publication was a verbatim copy of the plff's directory, that the inaccuracies in both works were identical, that there was an identity not merely of information but of language, and that where the defts did make enquiry that inquiry was limited to a mere correction and verification of the material collected by plffs.

*Held*, that the defendant's work involved an infringement of plff's copyright. In a case such as this, the plaintiffs are at liberty to claim general damages and also compensation for conversion based on the sales by the defendants. Where damages are not accurately calculable, they are damages at large. (*Le Rossignol and Campbell, JJ.*) KHOSLA BROS. v. THACKER'S DIRECTORIES LTD 67 I. C. 983.

**COPYRIGHT ACT, S. 1**—Original literary work—Publication of extracts from a non-copyright book—Publication not protected by copyright *See* (1921) DIG. COL. 375. COOPER v. MACMILLAN AND CO. 65 I. C. 187.

**CORPORATION**—Contract—Formalities prescribed by statute to be strictly observed. *See* DEED EXECUTION. 36 C. L. J. 109.

**CO-OWNERS**—Adverse possession—Denial of Possession.

**CO SHARERS**—Adverse possession—Denial of title—Limitation when begins to run. *See* ADVERSE POSSESSION, CO SHARER. 20 A. L. J. 545 (P. C.)

———Building on common land—Rights of other co-sharers. *See* (1921) DIG. COL. 376 JAGANATHA MARWARI v. CHANDNI BIBI. 67 I. C. 31.

———Ejectment—Suit by one co-sharer to eject trespasser from common land—Maintainability of. *See* EJECTMENT. 20 A. L. J. 609.

———Ejectment—Suit by one—Form of decree. In a suit by one of the cosharer landlords for ejectment of the defendant who was found to be a trespasser, the court can pass a decree only for the plff's share. (*Brasher, J.*) DIPA v. LAL CHAND. 49 P. L. R. 1922 (1922) Lah. 393 : 68 I. C. 428.

———Exclusive possession for enjoyment—Right to eject—Lessee if can sue for ejectment.

Where co-sharers were in exclusive possession of parts of joint property, a lessee of one of the co-sharers can sue for possession if he is dispossessed by other co-sharers. (*Newbould and Pantou, JJ.*) SHIAM LAL SAHA v. FULIA MOOSAMAT (1922) Cal. 147.

———Government revenue—Default in payment of revenue—Purchase by defaultier or in connivance with him.

A cosharer who has defaulted to pay the Government dues and has thereby brought about the sale of the estate, cannot be permitted if he purchases the estate at the sale, to hold it to his own benefit to the exclusion of his co-owner. The position is similar when a tenant, in violation of his agreement defaults to pay, on behalf of his immediate landlord, the dues of the superior

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holder and thereby brings about a sale of the interest of his landlord. 44 C. 373 ; 16 C. 194 ; 15 C. W. N. 776 ; 12 C. L. J. 336 ; 10 M. I. A. 540 ; 18 W. R. 240 ; 20 C. L. J. 11 Rel. The essence of the matter is that the co-owner or lessee who thus acts in breach of his obligation contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect 12 C. L. J. 336 ; 10 M. I. A. 540 ; 18 W. R. 240 ; 20 C. L. J. 11 ; 24 C. W. N. 201, 30 C. L. J. 475 Rel. (*Mookerjee and Chotauer JJ.*) LALITMOHAN SEN v. MANORANJAN GHOSH CHAUDHURI. 36 C. L. J. 208.

———Joint land—Exclusive cultivation—Right to.

As between cosharers the rule is that where there is land to be cultivated, each sharer may take into his own cultivation out of the culturable land an amount proportionate to his share. If he takes more he must recompense his other cosharers, but until he has taken more he need not recompense anybody (*Stuart, J.*) BHIRUG RAI v. HAZARI RAI. 64 I. C. 922.

———Joint possession—Letting of land by one cosharer—Right of others to joint possession.

Where a tenant has taken a settlement only from the 12 annas sharer landlords, the 4 annas landlord who has not made any settlement is entitled to a decree for joint possession with the tenant 18 C. 10 ; 28 C. 223 ; 19 C. W. N. 407 ; 51 I. C. 31 dist. (*Ross and Coutts, JJ.*) BALGOBIND MANDAR v. DWARKA PRASAD.

1 Pat. 394 : 3 Pat. L. T. 409 : (1922) Pat. 142 : (1922) P. 279 : 66 I. C. 55.

———Joint possession—Right to—Ouster.

In every case in which one cosharer forcibly dispossesses another or keeps another cosharer out of possession there is a good deal of bad feeling between them usually, but that is no reason for depriving the plaintiff of his right to joint possession 44 A. 5 foll. (*Banerji and Goku Prasad, JJ.*) BHIRGU NATH RAI v. APNARAIN RAI. L. R. 3 A. 515. (Rev.)

———Joint possession—Right to—Partition suit.

Where a suit for partition is pending between the cosharers and the rights of the parties to khas possession of different lands will be finally decided the court would be slow to disturb the existing possession of the lands by the cosharers, unless compelled by cogent reasons (*Newbould and Pantou, JJ.*) MAHOMED HYDER ALI KHAN v. MAHOMED WAJED ALI KHAN PANI.

36 C. L. J. 155 : 68 I. C. 285.

———Lambardar—Dues payable to—Agreement between cosharers—Effect.

In a suit by a lambardar against the cosharers for the recovery of lambardari dues, the defence was that the cosharers made collections themselves and paid revenue of their respective shares and that under the terms of the wajib-ul-arz of 1285 fasli the lambardar of the village was not entitled to any remuneration. At the settlement of 1285 fasli before the Board of Revenue had issued the rules under the U. P. Land Rev. Act, there was an agreement between the cosharers



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that the lambardar should receive no remuneration. At a subsequent settlement in 1312 Fash the plff lambardar contended that this agreement was abrogated. There was no evidence that it had been abrogated or reaffirmed. *Held* that if the cosharers as a body desired to contract themselves out of the rule framed by the Board of Revenue, they ought to have agreed upon some nominal remuneration for the lambardar. The lambardar is placed in a strong position; he can bargain with the cosharers for some reasonable remuneration, under threat of standing upon his extreme rights and claiming his full 5 per cent on the land revenue. The agreement relied upon by the defts. (cosharers) even if it survived the enactment of the Board of Revenue's Rules came to an end automatically at the close of the settlement for which it was made and could have no effect on the rights of the lambardar thereafter, at any rate, unless it were proved that it was expressly renewed. (*Mears, C. J. and Piggott, J.*) SHEO CHARAN v. PANNA LAL.

20 A. L. J. 795 : L. R. 3 A. 468 (Rev).

—Lambardar—Lease for a long term—Validity of—Onus.

A lambardar's authority to grant leases is not a statutory authority; on the other hand, there are no statutory restrictions upon his power in this respect. His authority to arrange for the cultivation rests on the fact that he is the agent of the cosharers. He is bound to manage the property in their interests and for their benefit exercising the same ordinary prudence as if the property was his own. Whether it was necessary or prudent to grant a lease for a period of 20 years depends on the circumstances of the case. It cannot be presumed that the period was excessive. Where the cosharers have acquiesced in the lease for 16 years, and then turn round and say that the lease was fraudulent or collusive or unreasonable the onus lies upon them to prove their assertions. (*Hopkins, S. M.*) BIBI KANIZ FATIMA v. SHEORAJ SINGH.

L. R. 3 A. 167 (Rev).

—Lambardar—Lease of land during pendency of litigation—Effect of.

The mere fact that a lambardar gave a lease of land during the pendency of a litigation between him and a cosharer, does not in the absence of collusion between the lessee and the lambardar, vitiate the lease. Though the transaction may be suspicious fraud cannot be assumed on a mere consideration of general probabilities. (*Hopkins, S. M. and Fremantle, J. M.*) KALKA SINGH v. MIRJA ASGHAR HUSAIN.

L. R. 3 A. 425 (Rev) : 4 U. P. L. R. (B. R.) 76.

—Lambardar—Power of—Grant of long leases.

Under exceptional circumstances it is competent to a lambardar in the exercise of his powers as a manager to grant leases for a longer term than what the requirements of the particular year or season may necessitate if he thereby secures the largest amount of benefit to the co sharers both by saving the property from sale. (*Kanhaya Lal J. C. and Dalal A. J. C.*)

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MAHOMED MASUD ALAM v. MAHOMED MAHUMAD ALAM 24 O.C. 3691 : 9 O. L. J. 66 : (1922) Oudh, 40 : 66 I. C. 21.

—Lambardars—Powers of—Agreement between co sharers and lambardar.

The lambardar has no statutory power to settlement. But he is the ostensible agent of the co sharers and if they appoint him their agent generally with certain reservations they must be deemed to give him such authority as is not expressly reserved. The tenants or lessees cannot be expected to know the reservations made unless they are communicated to them and certainly cannot be expected to know that there are other limitations on his authority outside the specified reservations (*Hopkins, S. M.*) BHAIRON v. MOHAN.

L. R. 3 A. 244 (Rev).

—Lambardar—Powers of leasing—Perpetual lease—Lease for 12 years.

A perpetual lease is on the face of it an alienation which a lambardar may not make but a lease for a considerable term of years stands on a different footing and each case has to be considered on its merits. A lease for 12 years is not necessarily unreasonably long, and if the transaction is a profitable one the lambardar may well enter into it (*Hopkins, S. M. and Burn, J. M.*) BALDEO v. WARIS ALI.

4 U. P. L. R. (B. R.) 37.

—Lambardar—Relationship between—Powers of lambardar over common property.

A lambardar has the same powers of management and control over the vacant land as the manager of a joint Hindu family has over the family property 12 N. L. R. 12 Ref. If the lambardar grants a lease of vacant land in excess of his powers it is open to the co-sharer to ignore it and sue for possession. But a co-sharer consenting to the lease is estopped. (*Drake Brockman, J. C.*) KUNJILAL v. CHANDRA SINGH.

17 N. L. R. 169 : 64 I. C. 775.

—Lambardar—Suit for profits—Liability for interest.

In the absence of proof that the lambardar has deliberately or contumaciously declined to render accounts or pay his dues to a co-sharer, he cannot be made liable for interest on sums found due on taking the accounts. 12 O. C. 140. 14 O. C. 150 dist. (*Kanhaya Lal, J. C.*) KAMPTA SINGH v. MATA BHIKA SINGH.

4 U. P. L. R. (O. C.) 24 : 65 I. C. 373 : (1922) Oudh. 107.

—Lambardar—Suit for profits Liability of heirs of Lambardar.

A lambardar is under a duty to take reasonable care in collecting the rents and the liability incurred by the failure to perform that duty survives after his death. The heirs of the deceased lambardar are liable to the extent of the assets of their deceased father which have come into their hands for the co-sharer's share of the profits which might with reasonable care have been collected. Where the difference between the gross rental and the collections is very great, there is a presumption either of dishonesty or of gross negligence on the part of the deceased lambardar and the burden is on his heirs to rebut that

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presumption. (*Lyle, A. J. C.*) SURAJ PRASAD v. DEBI DAYAL, 25 O. C. 49 : (1922) Oudh 149 : 65 I. C. 739

———*Lambardar—Suit for share of profits by mortgagee of share—Maintainability.*

The owners of a half share in a village executed a usufructuary mortgage of their share in an abadi plot in the village. An assignee of the mortgagee sued the Lambardar for a half share of the profits of that plot. *Held* that the suit was not maintainable (*Mitra, O. J. C.*) BABU HARIDAS v. MT. GAHENABAI.

18 N. L. R. 39 : (1922) Nag. 164.

———*Lease by one—Rights of other co-sharers not to be affected*

It is not competent to one co-sharer to lease out a portion of the joint property so as to affect prejudicially the rights of other co-sharers in the property. 18 I. C. 281 foll. (*Fremantle, J. M.*) RAJA RAM SINGH v. RAMAI KEWAT.

L. R. 3 A. 81 (Rev.) : 65 I. C. 577.

———*Patti—Sale and mortgage by one sharer—Effect.*

One of the co-sharers of a patti cannot sell anything more than his joint interest in the plots subject to the result of any partition which may be made among the co-sharers of the patti or village. The purchaser is entitled to have his possession maintained subject to the result of any partition that may take place though his title would be confined to the interest which his vendor held in the plots or was capable of transferring. (*Kanhaiya Lal, J. C.*) JARBANDHAN v. DATA DIN, (1922) Oudh 46.

———*Position of — Lessee from co-sharer—Right to sue for profits.*

It is not competent to a co-sharer or his lessee or transferee to deal with joint land against the wishes of the other co-sharers. Though a lessee or grantee may be a co-sharer for the purpose of a suit for profits that does not mean that he has acquired the full rights of a proprietor for all purposes. Where a lessee of a certain plot of Shamilat land from one of the co-sharers also obtains a lease or mortgage from some of the other co-sharers he is not entitled to deal with the lands as he likes, but he is bound by the terms of the leases in his favour. (*Daniels, A. J. C.*) PANDIT SRI NATH v. NAJMUNNISA.

9 O. L. J. 92 : (1922) Oudh 16 : 66 I. C. 114.

———*Rights in joint undivided property.*

Every co-sharer in joint undivided property has a right to every part of that property until partition—What he can sell is his share or a fraction of his share in the whole of that undivided property. (*Le Rossignol, J. J.*) SARDAR ALI v. FAZIL, 68 I. C. 895.

———*Shamilat land—Abandonment—Sale of Khewat*

Rights in Shamilat lauds are independent rights. A sale of a Khewat holding without any reference to the Shamilat would not result in the conveyance of the Shamilat. The question whether rights in the Shamilat had been abandoned after the sale of Khewat, is one of fact and

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the High Court is bound by the finding of the lower appellate Court. (*Broadway and Marlineau, J. J.*) WALI v. MAHOMED.

4 Lah. L. J. 221 : (1922) Lah. 34 : 65 I. C. 725.

———*Shamilat land — Exclusive right to abadi—Ejectment.*

No individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers. If some co-sharers assert individual rights to a piece of abadi land which they do not possess, they are liable to eviction at the instance of the other co-sharers, for an act of trespass could in no way be remedied at partition. (*Wilberforce, J.*) GARHIA v. MAYA RAM, 64 I. C. 2.

———*Shamilat—Right to—Sale of khewat—Second sale by purchaser with rights of shamilat—Rights of second purchaser. See* (1921) DIG. COL 378 MALIK KHAN v. BHOLA RAM.

4 Lah. L. J. 434.

———*Shamilat—User of excess area for private purposes of the proprietor.*

Where the area over which grazing rights extend is larger than that required by the persons with those rights a proprietor may use the excess for his own purposes. The debts cannot prevent him from developing any excess area and using it to its best purposes. 31 Cal. 503, 86 P. R. 1911 ; 119 P. R. 1899, 100 P. R. 1830 foll. (*Wilberforce, J.*) KARTAR SINGH v. RALLA, 67 I. C. 306.

———*Sir land—Permanent alienation by one—Invalid. See LAND TENURES—SIR.*

L. R. 3 A. 225 (Rev.)

———*Tenancy created by one—Status of tenant.*

Where a cosharer owning part of a proprietary interest puts a tenant in possession of a holding the tenant is not a trespasser. (*Fremantle, J. M.*) RAM BAHADUR SINGH v. RAM NIRANJAIN PATHAK, L. R. 3 A. 165 (Rev.)

COSTS—Co-defendants—Contribution—Right of. When excluded See CONTRIBUTION.

L. R. 3 A. 557.

———*Construction of will—Difficult question between heir and legatee—Costs to come out of the estate.*

Where there was a dispute between the legatee and next of kin as to the validity of certain testamentary dispositions, and the point raised was not free from difficulty, the court ordered the costs of both parties to come out of the estate. (*Lord Phillimore.*) NICOLLE v. NICOLLE

31 M. L. T. 90 (P. v.)

———*Criminal Trial—Power of High Court to grant costs—Power of Privy Council. See CRIMINAL TRIAL.*

43 M. L. J. 369.

———*Criminal trial—Proceedings under S, 195 Cr. P. Code—Power of Court to grant. See CR. P. CODE S. 195 (6) AND (7)*

16 L. W. 505.

———*Disallowance of—High rate of interest decreed—Sufficient ground for refusing costs. See CONTRACT ACT, Ss. 16 AND 74.*

9 O. L. J. 442.

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—Discretion—Costs not following the event—Reasons to be recorded—Interference of appeal. *See* C. P. CODE S. 35. 64 I. C. 262.

—Divorce—Husband's liability for wife's costs. *See* DIVORCE. 66 I. C. 494.

—Practice—Proportionate costs—Mofussil and metropolis.

The practice in the mofussil is that costs should depend on the result of the case and it is usual when a suit partly succeeds for proportionate costs to be given. The important difference between cases in England and on the original side of the High Court and cases in the mofussil is that in cases in the mofussil costs are much more directly proportionate to the amount claimed. (*Newbould and Pantou. JJ.*) KUMUD KANTA CHAKRABURTHY *v.* BIGNOLD. 68 I. C. 664.

—Privy Council—Wrong procedure and dilatoriness—Successful appellant deprived of costs. *See* PRIVY COUNCIL—COSTS

20 A. L. J. 476 (P. C.)

—Representative suit—Costs—Personal liability—Frivolous or vexatious pleas—Appellate Court—Interference. *See* (1921) DIG. COL. 379. JHANWAR DAS *v.* BODH RAJ.

4 Lah. L. J. 210 : (1922) Lah. 229

—Witness—Travelling expenses—Liability of unsuccessful party to pay.

No doubt the party who summons a witness pays his travelling expenses in the first instance. But, clearly, if it is successful he is entitled as against the unsuccessful party against whom costs are awarded to recover all proper expenses including travelling expenses, incurred by summons of the witness and paid in the first instance by the successful party, (*Greaves J.*) HARA SUNDER MAJUMDAR *v.* LAHAMBAR SINGH. 67 I. C. 277.

COUNSEL—Powers of compromise—Failure of client to repudiate in time—Effect. *See* LEGAL PRACTITIONER. 3 Pat. L. T. 371.

COURT FEE—Appeal—Land Acquisition case—Award on footing that land belonged to Government—Award competent under the Act—Appeal by claimant for compensation for value of land. *See* (1921) DIG. COL. 380. MANGALDAS GIRDHARDAS *v.* THE ASST. COLLECTOR, AHMEDABAD. 64 I. C. 582 and 64 I. C. 584.

—Appeal—Rejection of plaint for non payment of court fee—Extension of time. *See* (1921) COL. 381 SHAHU *v.* BAKRI. 67 I. C. 901.

—Cross objections—Mere criticism of judgment.

Mere criticism of a judgment cannot be filed as cross objections. Where there is nothing in the decree to which objection or exception could be taken by a party in whose favour a suit is dismissed with costs, and he files some criticisms of the judgment as cross-objections, it should not be accepted by the office. Such a petition does not require any stamp at all. (*Roe, J.*) SARDEO NARAIN DEO *v.* KUSUM KUMARI. 1 Pat. 258 : (1922) P. 483.

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—Deficiency of, on cross-objections in lower court—No appeal relating thereto—High Court, if can levy.

Where in the lower appellate court there was a deficiency of Court-fee on a memorandum of cross-objections which was not noticed, the High Court has an inherent power to insist on the payment of the same, even though the appeal does not relate to the subject-matter of the memorandum of cross-objections in the lower Court. (*Miller, C. J. and Adami, J.*) RASIK BEHARI PAL CHAUDHURI *v.* HRIDEY NARAYAN. (1922) Pat. 162 : 3 Pat. L. T. 327 : 1 Pat. 471 : (1922) P. 284 : 66 I. C. 769.

—Determination of—Evidence.

To decide if a suit has been valued properly for purposes of Court fees evidence should be recorded on the point. An application for the appointment of a curator under Act XIX of 1841, which contains a description of the value of the property does not impose a corresponding obligation as to the stamp duties leviable on it, and hence is not a safe criterion as to the value of the property. A decision as to valuation based on it cannot be sustained. (*Fawcett, J.C. and Raymond, A. J. C.*) RAMDAS *v.* AJUDHIADAS. 63 I. C. 685.

—Interest—Future interest—Ex-parte decree—Appeal—Interest after period of grace.

A decree-holder is as a matter of right entitled to interest at the rate of 6 per cent. per annum from the date of grace up to the date of realization. If no such interest is allowed and the decree-holder appeals, he is not liable to pay court-fee on interest due in the interval between the expiry of the period of grace and the date of the hearing of the appeal 17 B 41, Ref. (*Adami and Bucknill, JJ.*) BHAGWATI PRASAD SINGH *v.* BISHNU PRAGASH NARAIN. 6 Pat L. J. 676 : (1922) Pat. 73 : 3 Pat. L. T. 310 : (1922) P. 386.

—Letters Patent appeal—Decision of single Judge—Court Fees Act, S. 4. if applies.

Where an appeal is filed under S. 10 of the Letters Patent (Patna) against a decision of a single judge S. 4 of the Court Fees Act cannot apply as it refers only to appeals against the judgment of two or more Judges or of a Division Court and as there is no provision under which court fee is leviable, the appeal must be accepted without any court-fee, (*Coutts, J.*) RAGHUBAR SINGH *v.* JETHU MAHTON. 1 Pat. 384 : (1922) Pat. 88 : 3 Pat. L. T. 194 : (1922) P. 13 : 65 I. C. 675.

—Memorandum of cross objections—Petition by respondent supporting the decree of the lower court—No court fee payable *See* C. P. CODE, O. 41 R. 22. 44 All. 577.

—Mortgage suit—Interest between date of suit and decree—Appeal—Court fee, if payable on interest.

Where the decree in a mortgage suit awarded the amount claimed in the plaint and also the interest from the date of the institution of the suit to the date of decree :

Held, in calculating court fees for purposes of appeal, the amount of interest awarded in addition

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to that claimed in the plaint should also be taken into consideration 10 M. L. J. 144, 13 Mad. 508 and 30 Cal. 516 reld. to. (*Jwala Prasad, A. C. J. and Ross, J.*) *JAMUNA RAI v. RAMTAHAL RAUT* 1 Pat. 19: (1922) P. 387 3 Pat. L. T. 790.

—*Petition to support decree—Whether cross-objections—No advalorem Court fee payable.*

If for the purpose of supporting the decree dismissing plaintiff's claim on any ground, even on a ground other than that taken by the Court of first instance, respondents filed a petition stating the reasons on which they supported the decree, that did not amount to cross-objections for which an *ad valorem* court fee was payable. (*Banerji and Ryves, JJ.*) *RAM PERSAD KALWAR v. MT. AJANASIA.* 44 All. 577 : (1922) All. 280 : 68 I. C. 861.

—*Suit for possession—Decree on condition of paying a certain sum—Appeal.*

Where in a suit for possession a decree is passed on condition of the plaintiff paying a certain sum of money to the defendants as in a redemption suit and the plaintiff appeals against that liability, he must pay *advalorem* court-fee thereon, 59 I. C. 667 Rel. (*Abdul Raoof and Harrison, JJ.*) *TIKKAN RAM v. BOSA RAM.*

4 U. P. L. R. (Lab) 77 : 67 I. C. 106

COURT FEES ACT (VII of 1870)—*Interpretation of—Fiscal enactment—Strict construction.*

The Court Fees Act is an Act dealing with purely fiscal matters, and the rule of construction adopted by the courts that statutes imposing pecuniary burdens on the subject must, in cases of doubt, be interpreted in favour of the subject, applies to the Act. (*Saunders, J. C.*) *JAGANATH KAHAR v. EMPEROR.* (1922) U. B. 14 : 65 I. C. 553 : 23 Gr. L. J. 121 :

—*S. 4—Applicability—Appeal against decision of single Judge under S. 10 Letters Patent (Patna)—No court fee payable, See COURT FEE.* (1922) Pat. 88.

—*S. 4—Letters patent appeal from decision of single Judge—No court-fee payable on.* (See (1921) Dig. COL. 381. *BIADUL PANDE v. MAUNI RANDE.* 44 All. 13 : (1922) All. 164.

—*S. 5—Appeal from original side of High Court—Dispute as to court-fee payable—Power of Judge to decide dispute—Madras High Court Rules, Original Side, Art. 36.*

It is competent to the Chief Justice of the High Court to refer a dispute between a suitor or his attorney and the Officer of the court, as regards the court-fee payable on an appeal from an order of a single Judge on the original side, to the decision of a particular Judge of the High Court under S. 5 of the Court-fees Act. The Court-fee payable on an appeal against a final order on a guardianship petition presented on the original side of the High Court is Rs. 100 under Art. 36 of App. II to the Madras High Court Original Side Rules. (*Coutts Trotter, J.*) *MAHOMED ISHACK SAHIB v. MAHOMED MOIDEEN.* 43 M. L. J. 436 : (1922) M. W. N. 511 : 16 L. W. 210 : (1922) Mad. 421.

## COURT FEES ACT (1870), S. 7 (iv).

—*S. 5—Decision of taxing officer—Finality of.*

Under S. 5 of the Court Fees Act the Taxing Officer has Jurisdiction to fix the amount of fee payable, and if he decides that the valuation put by the appellants upon the relief was incorrect he has the power to correct it. Even if he has done anything which the law does not allow him to do, the Court Fees Act gives the High Court no Jurisdiction to interfere with his decision as to the amount of fee. (*Miller, C. J. and Mullick, J.*) *RAM SEKHAR PRASAD SINGH v. SHEONANDAN DABEY.* (1922) Pat. 337 : 68 I. C. 316.

—*Ss. 7 and 17—"Subject" meaning of—Suit embracing two or three distinct subjects—Court-fees payable on the aggregate and not on each separately.*

In a suit for possession of land with mesne profits and a malikhana claim, plaintiff had valued each of the items separately—*Held*, he was liable to pay Court-fee only on the aggregate amount and not on each item separately, as that was the established practice in Bengal from 1882.

The word "subject" in S. 17 means cause of action and is not to be interpreted with reference to S. 7. (*Chapman and Atkinson, JJ.*) *NAURATAN LAL v. WILFORD JOSEPH STEPHENSON.*

(1922) Pat. 79 : (1922) P. 359

—*S. 7 (1) and Sch. I art. I—Court-fees—Suit for money due in respect of commission agency—Appeal.*

A suit for money being the balance alleged by plaintiffs due to them on a commission agency is not a suit to obtain a declaratory decree nor one where it is not possible to estimate the subject matter in dispute at a money value or which is not otherwise provided for by the Court Fees Act. 13 C. W. N. 815 ; 28 I. C. 262 Ref. The suit falls under S. 7 (1) of the Act and an appeal is to be valued under Sch. I Art. I of the Court Fees Act. 28 M. 394 Ref. (*Fawcett J. C. and Kemp, A. J. C.*) *RAI BAHADUR HARJIMAL v. DHANPATMAL DEWAN CHAND.* 15 S. L. R. 82 : 64 I. C. 626.

—*S. 7 (iv) (b) and (v)—Suit for partition—Prayer for declaration of title—Removal of cloud on title—Court-fee.*

Where in a partition suit the plaintiff distinctly prays for a declaration of his title to and confirmation of possession of certain land in order to disperse a cloud cast on his title by reason of an adverse entry in the Record-of-Rights an *advalorem* Court fee is payable on the value of the plaintiff's share in the land in respect of which the cloud is cast in addition to the fixed fee for partition. (*Dawson Miller, C. J. and Coutts, J.*) *RACHHYA RAUT v. MUSAMMAT CHANDO.*

6 Pat. L. J. 662 : (1922) Pat. 65 : 3 Pat. L. T. 293 : 65 I. C. 294.

—*S. 7 (iv) (c)—Consequential relief—Confirmation of possession—Arbitrary valuation.*

Under S. 7 (iv) (c) of the Court Fees Act it is not open to the plaintiff to fix an arbitrary or incorrect valuation: 36 A. 500 ; 6 C. L. J. 427 ; 14 C. L. J. 47 ; 16 C. L. J. 194, 4 Pat. L. J. 703 Rel. A prayer for confirmation of possession is nothing more than a prayer that the fact of, and

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his right to, possession may be declared but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the court thinks the plaintiff is out of possession. Consequently a prayer for confirmation of possession has come to be regarded as consequential relief. 19 W. R. 18; 22 C. L. J. 415; 23 C. L. J. 561 Ref. (*Miller, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH v. SHEONANDAN DUBEY.

68 I. C. 316 : (1922) Pat. 337

—S. 7 (iv) (c) and (v) (a)—*Court fee—Mortgage—Personal decree for sale—Suit to set aside.*

Plff. sued to set aside an execution sale of certain properties on the ground that the decree having been previously adjusted could not be executed and that the sale was therefore null and void and for a declaration that a personal decree passed against the plff. was inoperative against him. On a question arising as to the Court-fee payable on the plaint. *Held* that the suit was one substantially for possession though framed as one for declaration and consequential reliefs and that Court fee was payable under S. 7 (v) of the Court Fees Act and not under S. 7 (iv). (c). (*Mookerjee and Cumming, JJ.*) RADHA KANTA SAHA v. DEBENDRA NARAYAN SAHA, 49 Cal. 880.

—S. 7 (iv) (c)—*Declaration—Consequential relief—execution Sale—Setting aside.* See (1921) DIG. COL. 382 JOGENDRA NATH SEN v. TORIAUTNESSA BIBI. 35 C. L. J. 144 : (1922) Cal. 242.

—S. 7 cl. (iv) (c)—*Suit for declaration of status as landlord and ejectment—Court fee.*

Where a plff. sues for a declaration that he is a raiyat and that the debts are his under raiyats and for ejectment of the latter the suit falls within S. 7 cl. (iv) (c) of the Court Fees Act. (*Miller, C. J. and Mullick, J.*) PARMESHWAR SINGH v. SUREBA KUER. 65 I. C. 240

—S. 7 (iv) (c) — *Suit for declaration—Injunction—Consequential relief—Valuation—Jurisdiction—Suits Valuation Act, S. 8.*

Where plaintiff sues (1) for a declaration that he is the owner of certain property (2) that an ejectment decree obtained against him by defts. should be cancelled on the ground of fraud and declared not binding and (3) for a perpetual injunction that defts. should not interfere with his possession the suit is one for a declaration with consequential relief within S. 7 (4) (c) of the Court Fees Act. The courts are bound to accept valuation placed by the plff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property. (*Scott Smith, J.*) NANDAN MAL v. SALIG RAM (1922) Lah. 236 : 66 I. C. 34.

—S. 7 (iv) (c)—*Suit for declaration—Validity of decree against Hindu family—attached—Court-fee payable*

In execution of a decree obtained against some members of a Hindu family, certain properties were sold. Some of the other members of the family brought a suit for a declaration that the sale was null and void.

*Held*, the suit was one for a declaratory decree and consequential relief and under S. 7 (iv) (c)

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advalorem fee was payable, (*Das and Buckmill, JJ.*) SURENDRA NARAIN SINGH v. SHAMBIHARI SINGH. 1 Pat. 197 : (1922) P. 404.

—S. 7 (iv) (c)—*Suit for declaration of right to recover money—Consequential relief—Court Fees.* See (1921) DIG. COL. 383. SHAIKH RAFIQ UD DIN v. HAJI SHAIKH ASGAR.

1 Pat. 1. (1922) P. 392 : 1 Pat. L. T. 793

—S. 7 (iv) (c) and (v) (a) and (b)—*Suit to set aside alienation by father—Suit for declaration add possession—Valuation—Court-fee.*

Where a junior member of a joint Hindu family brings a suit for cancellation of a sale of joint family property by his father and elder brother and for possession of his share, he is liable to pay *advalorem* court-fee on the value of the whole of the property as he had asked, though quite unnecessarily, for cancellation of the sale-deed. Where however, the court below decreed the plff's suit subject to the payment of certain sums to the purchasers, the defendant in his appeal against the decree need pay court-fee only on ten times the government revenue of the property in dispute. 3 Pat. L. J. 448 Dist. (*Piggott, J.*) RUP NARAIN v. BISHWA NATH SINGH.

44 All. 629 : 20 A. L. J. 587 : (1922) All. 358 :

4 U. P. L. R. (A) 192 : 68 I. C. 265.

—S. 7 cl. (iv) (c)—*Suit by minor for declaration that mortgage decree against him was void—Fraud.*

Where a minor sued, on attaining majority, to set aside a final decree for foreclosure passed against him on the ground that the decree, though based on a compromise sanctioned by the Court, was void and therefore unenforceable against him. *Held* that the relief for declaration involved a consequential relief and that the suit should be valued under S. 7 cl. (iv) (c) of the Court Fees Act with an *advalorem* court fee. (*Daniels, J.C.*) SRIPAL SINGH v. JAGDISH NARAYAN.

24 O. C. 361 : 65 I. C. 980.

—S. 7 (iv) (c) and (5)—*Suit for declaration of title and possession—Court fee.*

Where a challenge is directly thrown on the title of the Plaintiff, and the Plaintiff comes to Court in order to meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the Plaintiff asks for possession also in that suit, his suit comes under S. 7 cl. (4), Sub-cl. (c) of the Court Fees Act and not within Sec. 7, cl. (5) of the Act.

A suit for declaration of title as adopted son and for possession is a suit that comes within S. 7, cl. (4), Sub-cl. (c) of the Court Fees Act. (*Das and Foster, JJ.*) UGRAMOHAN CHOWDHRI v. LACHMI PRASAD CHOWDHRI. (1922) Pat. 6.

—S. 7 (iv) (d)—*Suit by Hindu reversioner for declaration of invalidity of alienation by widow and for appointment of receiver—Valuation.* See (1921) DIG. COL. 383 HARBANS SAHU v. MUSSAMMAT LALMONT KOER.

3 Pat. L. T. 21 : (1922) P. 61.

—S. 7 (v) and (i) and Sch. II Art. 17 (3) and (16)—*Suit by reversioner to set aside*

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alienation and for possession and mesne profits—  
Dismissal of suit—Appeal allowed on payment  
of certain amount—Second appeal—Valuation  
See (1921) DIG. COL. 382 PORKODI ACHI *In re*  
45 Mad. 246 (1922) Mad. 211 :  
68 I. C. 444

———S. 7 (v) and (iv) (c)—*Suit by Hindu  
reversioner to recover possession of property gift-  
ed by Hindu widow after her death—Court fee.*

In a suit by the reversioners of a deceased  
Hindu for recovery of possession of properties  
gifted away by the widow after her death, the  
plaintiffs prayed *inter alia* (1) that on considera-  
tion of the above facts the court may be pleased to  
hold that the properties in dispute constitute the  
estate of B (the last male owner), that the plain-  
tiffs as reversionary heirs of the said B are enti-  
tled to get possession of the properties in dispute  
since the death of K. (the widow), that it is illegal  
on the part of the defendant not to give up pos-  
session of the properties and that the defendant's  
possession is quite wrongful and illegal.

(2) That on adjudication of the above points  
a decree may be passed in favour of the plaintiffs  
in respect of the properties in dispute by dispos-  
sessing the defendant or such person as may be  
found in possession at the time of delivery of  
possession.

*Held*, that the suit was not one to obtain a  
declaratory decree where consequential relief was  
prayed for but one for possession under S. 7 (v)  
of the Court Fees Act. 6 P. L. J. 101 ; 5 P. L. J.  
339 ; 34 C. 329. (*Miller, C. J. Mullick, Jwala  
Prasad, Coutts, Das, JJ.*) RAM SUMRAN PRASAD  
v. GOBIND DAS. (1922) Pat. 291 :

4 U P. L. R. (Pat.) 75. 3 Pat. L. T. 704 :  
68 I. C. 700 (F. B.)

———S. 7 (v) (e)—*Pre-emption—Garden with  
house, out-houses and trees—Land assessed to  
revenue—Advalorem fee*

In a suit for pre-emption plff. described the  
property as land assessed to revenue and paid the  
court fees on it at ten times the *Jama*. The  
vendee contested the suit and pleaded that the  
value of the suit had been wrongly assessed. A  
reference to the deed of sale showed that what  
was sold was described as a garden together  
with a house and out-houses as well as trees  
of all kinds

*Held*, that the property sold was a garden and  
that under S. 7 (v) (e) of the Court-Fees Act and  
fee payable should be an *advalorem* one on the  
market value.

146 P. R. 1018 ; P. R. 1914 foll. 40 M. 824 dist.  
(*Shadi Lal and Broadway, JJ.*) BEHARI LAL v.  
NANDLAL.

2 Lah. L. J. 362 : 68 I. C. 345.

———S. 7, (Sub) (vii) cl. (4)—*Suit for account  
—Appeal from preliminary decree—Valuation.*

Where a person appeals from a preliminary  
decree in a suit for account, he is allowed the  
option of placing his own valuation upon the  
memorandum of appeal and he is not bound by  
the valuation put upon the claim in the plaint.

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7 A. L. J. 546 ref. 30 M. L. J. 402 not fol:  
(*Piggott, J.*) KANHAIYA LAL v. SETH RAM SARUP.  
44 A. 542 : 20 A. L. J. 416 : L. R. 3 A. 193 :  
4 U P. L. R. (F. C.) 99 :  
(1922) All. 228 : 66 I. C. 841.

———S. 7 (ix)—Appeal—Decree for redemp-  
tion on payment of a certain sum—Court fee.  
Extension of time for payment. See (1921) DIG  
COL. 384 FATTEN SINGH v. BABU RAM.

67 I. C. 130.

———S. 7 (ix) and Sch. I Art. 1—*Mortgage—  
Redemption suit valuation.*

Plaintiff sued for redemption of three mortgages  
of which the principal amount totalled Rs. 6,400.  
The lower Court gave him a decree for redemp-  
tion on payment of Rs. 62,293-11-9. On appeal he  
valued his appeal for the purposes of court fee at  
Rs. 6,400 and paid court fee accordingly

*Held*, that Article I, Sch. I of the Court Fees  
Act applied to such cases and not clause (ix) of S. 7.  
5 P. R. 1911 ; 58 P. R. 1915 ; 11 I. C. 198 ; 29  
M. 367 and 27 A. 447, foll.

13 A. 94 and 1891 P. J. 218. diss. (*Scott Smith  
and Wilberforce, JJ*) LOKH RAM v. RAMJI DAS.  
3 Lah. L. J. 370.

———S. 7 (ix) and Sch. I. Art. 1—*Provisions if  
applicable to appeals—'Suit', meaning of—Morti-  
gage suits—Court fee payable in appeal.*

The provisions of S. 7 are applicable equally to  
appeals as to original suits and the word 'suit' is  
not there used in contra distinction to 'appeal'.  
Court fees are payable not on suits or on appeals  
but on documents which are filed, exhibited or  
recorded in Courts in accordance with S. 6 of the  
Act. The court-fee payable in appeal need not  
be the same as in the suit, as the nature of the  
litigation may be changed in appeal.

(1) If a suit for redemption or foreclosure has  
been dismissed the court-fee payable by the  
plaintiff-appellant on his memorandum of appeal  
will be computed in accordance with the provi-  
sions of cl. ix or section 7 of the Court-Fees Act,  
that is according to the principal money expres-  
sed to be secured by the instrument of mortgage.  
In such a case clearly the suit has not changed  
its nature in appeal.

(2) If a suit to redeem has been decreed and  
the defendant-appellant merely challenges the  
right to redeem, the court-fee payable on the  
memorandum of appeal will be computed in ac-  
cordance with the provisions of cl. ix of section 7  
of the Court-Fees Act. Here again there is no  
change in the nature of the suit.

(3) If a suit to redeem or foreclose has been  
decreed and the plaintiff or the defendant in  
appeal merely challenges the amount to be paid  
or received without questioning the right to re-  
deem or foreclose the court-fee payable on the  
memorandum of appeal will be on the subject-  
matter in dispute that is on the additional amount  
claimed or the amount in respect of which the  
appellant seeks to avoid liability. In this case the  
suit has clearly changed its nature in appeal, and  
is no longer a suit falling within the provisions of  
cl. (ix) of section 7 of the Act.

(4) Where in a foreclosure suit a decree has  
been passed for a certain sum in default of pay-

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ment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed the court-fee payable on the memorandum of appeal will be calculated *ad valorem* on the subject-matter in dispute according to Article I of Schedule I, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid. In this case the suit has clearly changed its nature in appeal and has become a suit to avoid the payment of a specific sum.

(5) Where a decree has been passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment of a larger sum than that fixed by the Court of first instance the court-fee will be paid on the relief which is liable to pay the higher fee, on the former the fee would be computed in accordance with the provisions of cl ix of section 7 read with Article I of Schedule I and on the latter the court-fees would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant (*Daniels and Lyle, A J. C.*) SANGAT BAKHS SINGH v. RAWAT DIJDEO BAKHS SINGH.

25 O. C. 30 : (1922) Oudh 82 : 67 I. C. 968

—S. 7 (ix)—Mortgage—Suit for redemption—Valuation—Accounts—Liability for.

In a suit for redemption court fee is payable only upon the principal amount secured by the mortgage. The plaintiff is not bound to pay court fee upon the surplus amount claimed as mesne profits. 29 A 471 ; 68 I. C. 226 foll. (*Banerji and Gokul Prasad, JJ.*) CHHIDDU SINGH v. JHANJHAN RAI.

L. R. 3 A. 628.

—S. 7 (ix)—Mortgage suit—Appeal—Valuation—Interest pendente lite.

Where a mortgage suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization or to pay court fee thereon. But if any future interest is determined by the trial court and is entered in the decree, additional court fee on such interest has to be paid. If the appellate court grants him a decree for an amount larger than that claimed in the court below, court fee must be paid on the difference and unless this is done the decree cannot be executed. (*Jwala Prasad, J.*) KALI PRASAD SINGH v. MATHURA PRASAD SINGH.

3 Pat. L. T. 813

—S. 7 (x) (c)—Suit for specific performance—Contract of lease—Court-fee—Calculation—Suits valuation Act, S. 8. See (1921) DIG. COL. 385. SAILENDRA NATH MITRA v. RAM CHARAN PAL.

66 I. C. 268

—S. 11—Applicability to mortgage suits—Amount decreed higher than amount claimed—Additional court fee if leviable before execution

Where in a suit on a mortgage, the mortgagee ultimately got a decree for a much larger amount

## COURT FEES ACT (1870), S. 31.

than he claimed on account of the interest *pendente lite*, and on his trying to execute the same, it was objected that he could not do so before paying the court-fee on the excess amount awarded, held S. 11 of the Court Fees Act refers only to suits for immoveable property, mesne profits and accounts, and as such does not apply to mortgage suits—Hence no additional court-fee is leviable (*Coutts and Ross, JJ.*) RAM BUJHAWAN PRASAD SINGH v. NATHO RAM.

3 Pat. L. T. 146 : (1922) P. 59.

—S. 11—Suit for accounts or mesne profits—Right to value his claim on estimate—Power of Court to decree larger amount. See (1921) DIG. COL. 386. DURGA BHARATHI v. BHAGWATI PRASAD.

64 I. C. 101.

—S. 17—Applicability—Suit for redemption of usufructuary mortgage and surplus collections—Valuation.

A suit was filed by plaintiff to redeem a usufructuary mortgage alleging himself to be bound to the extent of one fourth of the principal amount secured which he put at Rs. 625 and claiming also Rs. 500 as surplus profits realised by the mortgagee. Putting his aggregate claim at Rs. 1125 he paid Rs. 85 as court fee and filed his plaint in the court of the Subjudge of K. alleging the value of the claim to be Rs. 1125 for the purpose of jurisdiction also. The Sub Judge returned the plaint for presentation to the munsif's court on the ground that the value for purposes of court-fee and Jurisdiction was only Rs. 625. Held that no additional court fee was payable on the sum claimed as surplus profits and that the order of the Sub Judge was right. 29 A. 71, 8 N. L. R. 179 Ref. (*Drake Brockman, J. C.*) SETH GOPIKISHAN v. SORABJEE.

68 I. C. 226.

—S. 17—"Subject" meaning of—Cause of action—Not to be interpreted with reference to S. 7. See COURT FEES ACT, SS. 7 AND 17.

(1922) Pat. 79.

—S. 17—Suit on a khata—Computation of Court fees on the balance due—Amount of each separate item—Basis of court-fee. See (1921) DIG. COL. 386. HIRALAL MOTICHAND v. GANPAT LAHANU.

(1922) Bom 376 : 46 Bom. 142 : 64 I. C. 486.

—S. 19 (xvii)—Bail—Application signed by advocate—Stamp.

An application made by the Advocate of a prisoner in duress or under restraint is an application made by the prisoner himself. Consequently an application for bail by the advocate of a prisoner in jail does not require to be stamped, (*Saunders, J. C.*) JAGANATH KAHAR v. EMPEROR.

(1922) U. B. 14 : 65 I. C. 553 : 23 Cr. L. J. 121.

—S. 31—Court-fee—Direction to pay complainant—Revision.

Only where the offence committed by the accused is a non-cognisable one, payment of court-fees to the complainant can be ordered. An improper order under S. 31 of the Court Fees Act can be set right in appeal or revision. (*Stuart, J.*) MINGAN v. EMPEROR.

L. R. 3 A. 187 Cr.

## COURT FEES ACT (1870), Sch. I, Art. 1.

—Sch. I, Art. 1—Appeal—Final decree—Subsequent mesne profits—Court fee (1921) *See* DIG. COL. 387. *PITTA BALARAMANAIDU v. PITTA SANGANNAIDU*. 42 M. L. J. 184.

—Sch. I, Art. 1, and Sch. II, Art. (d) and Art. 11—Cross objections on question of costs—Court Fee. *See* (1921) DIG. COL. 387 *KAMAL KAMINI DEBI v. MAHOMED-EMADUDDIN SARKAR*. 64 I. C. 606

—Sch. I, Art. 1—Mortgage—Redemption suit—Valuation. *See* COURT FEES ACT S. 4 (ix) AND SCH. I ART. 1. 3 Lah. L. J. 370

—Sch. I, Art. 1—Scope of—Foreclosure or redemption suits—Appeal—Calculation of court-fee. *See* COURT FEES ACT S. 7 (ix) AND SCH. I, ART. 1. 25 O. C. 30

—Sch. I Art. 1—Set off—Court fee.

Where the defendant claims right of set off, he has to pay *ad valorem* court-fee on the same. (*Piggott and Walsh, JJ*) *CHAKKHAN LAL v. KANHAIYA LAL*. 20 A. L. J. 1005.

—Sch. II, Art. 2—Application for mesne profits—Appeal against order Court-fee payable.

An application under S. 144, C. P. Code, for mesne profits by way of compensation relates to the execution, discharge or satisfaction of the decree and in an appeal from an order dismissing the application, *advalorem* Court fees need not be paid but only a sum of 8 annas. (*Drake Brockman J. C.*) *GABBA v. KANCHHEDILAL*. 18 N. L. R. 15 : (1922) Nag. 62 : 67 I. C. 225.

—Sch. II Art. 6—Surety bond—Duty payable.

A security bond filed by a claimant in a claim case, being an instrument of obligation gives in pursuance of an order of court is governed by Sch. II Art. 6 of the Court Fees Act. (*Newbould and Panton, JJ*) *SARBO MOSSALMANI v. SAFAR MANDAL*. 68 I. C. 730.

—Sch. II, Art. 17—Court fee—Charge held enforceable against a portion of the property—Appeal that charge enforceable against whole property. *See* (1921) DIG. COL. 388. *SAHEB ALI v. MAHOMED ZAHID*. 65 I. C. 114.

—Sch. II, Art. 17—Appeal—Court-fee—money decree against one debt.—Appeal with regard to the liability of other debts.

Where a plaintiff who obtained a decree for the full amount sued for against one of the debts, appealed with a view to make the other debts also liable, held he was bound to pay *advalorem* Court fee on the amount for which the other debts were sought to be made liable, 13 M. 508 foll. (*Macleod, C. J. and Coyajee J.*) *ANNA NARAYAN PAVGI v. MADHYAMA STHITILAL*.

24 Bom. L. R. 313 : 46 Bom. 840 : (1922) Bom. 172 : 67 I. C. 364.

—Sch. II, Art. 17—Claim suit—Dismissal of claim for default—Court fee payable *See* (1921) DIG. COL. 388. *SATINDRA NATH BANERJI v. SIVA PRASAD BHAKAT*. (1922) Cal. 166 : 64 I. C. 713.

## CRIMINAL LAW AMENDMENT ACT, S. 17.

—Sch. II, Art. 17—Declaratory relief—Claim suit under O. 21, R. 63—Court fee

The plaint in a suit under O. 21, R. 63, C. P. Code, is not chargeable with an *ad valorem* Court fee but with a fixed Court-fee of Rs. 10. (*Walmesley and Greaves, JJ*) *SRIMATI GOL ASMATER KHATUN v. HABIBULLA* 64 I. C. 49.

—Sch. II, Art. 17 (i)—Claim suit—Plaintiff in possession—Sale of property

When a suit is filed as contemplated by O. 21, R. 63 C. P. Code, after the dismissal of a claim petition, the court-fee payable is governed by Sch. II Art. 17 (i). The fact that the property was sold before the suit was filed does not matter if the plaintiff claims to be in possession and as such does not claim to be restored to possession (*Jwala Prasad, J.*) *MT. MANIK v. RAMJAS AGARWALA*. 3 Pat. L. T. 832.

COURT FEES AMENDMENT ACT (Bihar and Orissa)—Act II of 1922—S. 1 Applicability of—Appeal filed during long vacation before Assistant Registrar—Court-fee on memorandum, Vakalat judgment and decree—C. P. Code O. 41, R. 1—Patna High Court Rules Ch. II, R. 14.

A memorandum of appeal was filed before the Assistant Registrar of the High Court of Patna on 18—1—1922 when the old Court Fees Act was in force with the Court-fee prescribed by that Act. The new Bihar and Orissa Court-Fees Act (II of 1922) came into force on 24—8—1922 under which a larger court fee should have been paid by the appellant. The High Court of Patna was closed for the long vacation from 4—8—1922 to 22—10—1922 though the offices were open and the Registrar was on duty. Under Ch. II R. 13 (3) of the Patna High Court Rules the Registrar is the proper person to receive memorandum of appeals. The appeal was filed and numbered only after the re opening of the court and the Taxing Officer required payment of the full court-fee under the Amending Act II of 1922.

Held (1) that there was nothing to prevent the presentation of the appeal during the vacation to a proper officer and such presentation is a valid presentation 9 A. 366 Ref.

(2) that under the Rules of the Patna High Court coupled with O. 41, R. 1 C. P. C, the Registrar was the proper person to receive appeals presented during the vacation, and in his absence, the judge,

(3) that the presentation during the vacation was not a valid presentation ;

(4) that the appeal memorandum and the vakalat should be stamped under the new Court-Fees Act ; and

(5) that the copies of judgment and decree having been obtained before the Amending Act came into force, need only bear the court-fee required by the old Court-Fees Act as it stood before the amendment (*Jwala Prasad, J*) *ANAND RAM PRAMHANS v. KRAMGULAM SAHU*.

3 Pat. L. T. 820 : (1922) Pat. 365.

CRIMINAL LAW AMENDMENT ACT (XIV of 1908) S. 17 (2)—Proceedings under—Prima facie case—Police report.

Proceedings were instituted under S. 17 (2) of the Criminal Law Amendment Act on a police re.



## CRIMINAL PROCEDURE CODE (1898), S 4

port to the following effect:—"A (accused) has been assisting the volunteers (congress) by giving them shelter in a house belonging to him in Tip-pur town." Held that the police report did not disclose a *prima facie* case in respect of an offence under S 17 (2) of Act XIV of 1908 and that the proceedings should be quashed (*Walmsley and Suhrawardy, JJ.*) *PARMANANDA AGARWALA v. EMPEROR* 36 C. L. J. 179

## CRIMINAL PROCEDURE CODE (V of 1898) — Sureties—Residence of—Order directing limits—Legality.

A Magistrate has no authority to lay down any limits within which the sureties must reside (*Lindsay, J.*) *RAGHUNANDAN PRASAD v. EMPEROR*. 20 A. L. J. 520 : L. R. 3 A, 116 (Cr.) (1922) All. 489 : 67 I. C. 352 : 23 Cr. L. J. 400

—Jurisdiction—Additional—Sessions Judge Appeal made over to him by sessions judge—Transfer—Case afterwards withdrawn and tried by Sessions Judge. See (1921) DIG. COL. 391. *BIRJU MARWARI v. EMPEROR* 44 A. 157 : 65 I. C. 491 : 23 Cr. L. J. 107 (1922) A. 387

—Ss. 4 (h) and 200 — Complaint—Written statement—Examination of complainant under S. 220—If can be treated as part of complaint. See (1921) DIG. COL. 390. *PEDDA ANJINI-GADU In re.* (1922) Mad. 353 : 64 I. C. 282.

—Ss. 15 and 350—Trial by Bench of Magistrates—Absence of one member of Bench during trial—Effect of. See (1921) DIG. COL. 391 *ABDUL GHANI v. EMPEROR*. 1 P. L. R. 1922 : (1922) Lah. 137.

—S. 35 (3)—Appeal—Sessions Judge—Conviction by first class Magistrate of several offences and non-appealable but—concurrent sentence for each. See (1921) DIG. COL. 393 *ABDUL JABBAR v. EMPEROR*. 66 I. C. 65 : 23 Cr. L. J. 227.

—S. 45—Scope of—No duty to supply information already known to the police.

The provisions of S. 45 Cr. P. Code are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby to facilitate steps being taken in the investigation of the same. Where the police are already informed of a fact, there is no obligation to repeat the information, 4 C. 623; 20 C. 316, 7 M. 436 Ref. (*Wazir Hasan. A. J. C.*) *RAMPAL v. EMPEROR*. 4 U. P. L. R. (Oudh) 17 : 65 I. C. 626 : 23 Cr. L. J. 162.

—S. 45—Suspicious death—Duty of Mukaddam and kotwar to report—Default—Penalty.

Under S. 45 Cr. P. Code every mukaddam and kotwar is bound to communicate with the nearest Station House officer or the nearest Magistrate of the occurrence in or near the village of any death under suspicious circumstances. A death cannot be said to be unnatural within S. 45, Cr. P. C. so as to require to be reported immediately unless it occurred fairly soon after the cause. The length of the period between the cause and the

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effect which obviates the necessity for an immediate report must be largely a matter of opinion where a mukaddam is guilty of a mere error of judgment and nothing more is not reporting a nominal penalty would be sufficient. (*Hallijax, A. J. C.*) *DOMARSING v. EMPEROR*. (1922) Nag. 87 : 66 I. C. 1001 : 23 Cr. L. J. 345.

—S. 54 (1)—Complaint before magistrate—Arrest by constable—No warrant—Offence.

If a magistrate after taking the statement of the complainant of an offence under S 406, I. P. C. issues a warrant for the arrest of the accused, there is a "reasonable complaint" of the accused being concerned in a cognizable offence, consequently a constable who arrests the accused without a warrant is justified under S. 54 (1) of the Cr. P. Code. The complaint referred to in the section need not have been made to the constable himself, and it is sufficient that it was made to a person entitled to entertain it. (*Lindsay, J.*) *ALAY MOHAMMAD v. EMPEROR*. (1922) All. 457 : 64 I. C. 278 : 22 Cr. L. J. 758.

—S. 59—Right of private person to arrest

S. 59, Cr. P. Code, gives powers to a private person to arrest any person who, in his view, commits a non-bailable and cognisable offence. One who attempts to arrest a person who has not committed a cognisable offence e.g. a thief running away after theft is not entitled to the protection. (*Abdul Raouf and Abdul Qadir, JJ.*) *ALAWAL v. EMPEROR*. 4 U. P. L. R. (Lah) 21 : 19 P. L. R. 1922 : (1922) Lah. 73 : 64 I. C. 371 : 23 Cr. L. J. 3.

—S. 77—Warrant for search and arrest—Form of—Warrant not addressed to any particular person.

A warrant for search and arrest not addressed to a particular person authorising him to make the arrest is irregular and the search of a room or premises not belonging to or occupied by the person mentioned therein would not be justified. (*Kanhaya Lal, J. C.*) *EMPEROR v. SHANKAR DAYAL*. 25 O. C. 111 : (1922) Oudh 224

—S. 87—Proceedings under when to be resorted to.

Action under S. 87 Cr. P. Code can be taken only when a court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. But a man who files a petition against the order issuing the warrant and takes steps to procure an order of a superior court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself. (*Abdul Qadir, J.*) *QAMAR DIN v. EMPEROR*. 67 I. C. 726 : 23 Cr. L. J. 454.

—Ss. 96 and 97 — Search by police—Mode of—Obstruction to—Offence.

The law contemplates two stages in a search by the police. The first stage consists of a demand by the police authorities to enter and to receive reasonable facilities which it is the duty of persons whose houses are to be searched, to afford. Where no facilities were afforded to the police for making a search at all, and the police

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were driven off as the result of an affray it is a gross and deliberate defiance of the law, (*Piggott and Walsh, JJ*) HARDEO v. EMPEROR.

L. R. 3 A. 117 (Cr.)

———S. 103—Applicability—Search under the Gambling Act. See GAMBLING ACT, S. 5.

68 I. C. 845.

———S. 103—Search—Independent witness.

One of the essentials for a valid search is the presence of independent witnesses to the search. (*Abdul Qadir, J.*) SHER ALI EMPEROR.

68 I. C. 833 : 23 Cr. L. J. 609.

———S. 106 (3)—No finding as to breach of the peace—Appellate Court—If can pass order under.

In the absence of a finding that any breach of the peace occurred, an appellate court has no power to direct the accused to enter into a bond under S. 106 of the Cr. P. Code. (*Kumaraswamy Sastry, J.*) THIRUMAL REDDY v. EMPEROR.

30 M. L. T. 348 (H. C.)

———S. 106 (3)—Order requiring security—Power of appellate court to demand.

On an appeal from an order of a second class magistrate an appellate court cannot pass an order requiring security. 5 P. R. 1018 foll. (*Harrison, J.*) KARAM SINGH v. EMPEROR.

67 I. C. 729 :

23 Cr. L. J. 457.

———S. 107—Breach of the peace apprehended within District—Accused resident abroad—Order, if legal.

Where a District Magistrate is satisfied that a breach of the peace is apprehended within the local limits of his district, the fact that the accused is living outside such limits in a Native State, does not take away his jurisdiction to pass an order under S. 107 Cr. P. Code. (*Stuart, J.*) SHEOPARAN DUBE v. KING-EMPEROR.

L. R. 3 A. 96 Cr. 20 A. L. J. 523 : (1922) All. 337 :

67 I. C. 348 : 23 Cr. L. J. 396.

———Ss. 107 and 145—Dispute regarding immoveable property—Breach of the peace—Apprehension as to—Procedure.

A dispute about Land which would justify proceedings under S. 145 Cr. P. Code does not bar proceedings under S. 107 of that Code. But if the complainant is out of possession of the land in dispute and there is no danger of a breach of the peace unless he attempts to resume possession, he should be referred to his remedies under S. 145 Cr. P. Code, or in the Civil Court and the facts that his attempting to resume possession may cause a breach of the peace and that his dispossession was *prime facie* illegal are not sufficient grounds for binding over the opposite party to keep the peace 5 N. L. R. 94 Ref. (*Prideaux A. J. C.*) DHUMA v. EMPEROR.

68 I. C. 407 :

23 Cr. L. J. 567.

———S. 107—Dispute regarding property—Aid of section when to be invoked. See Cr. P. Code Ss. 144, 107 AND 145. (1922) P. 228

———S. 107—Ferry—New ghat opened—Dispute about possession—Jurisdiction

A new ghat was opened for the ferry to ply by that change of course of the river. By the award of

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the arbitrators it was agreed to share equally the tolls. The Magistrate in proceeding under S. 107 held that the proceedings belonged to the second party only, who were originally entitled to them on the ground that only some of the landlords of the second party were parties to arbitration proceedings—*Held*, so far as there was any dispute between the parties, it related to the right of the second party to take passengers to and from Raotara, and so far as the Magistrate's order had the effect of declaring that the second party had this right, it was without jurisdiction. Raotara being in Madhipura sub-division the proper tribunal for the decision of any question as to the taking of passengers by ferry from and to Raotara is the Court of the Sub-Divisional Magistrate of Madhipura. (*Ross, J.*) RAJA KALANAND SINGH v. HIRDE MISSER. (1922) P. 219.

———S. 107—Information—Verbal communication—Inquiry—Proceedings against individuals for acts of their servants. See (1921) DIG. COL. 395 GRANT v. EMPEROR.

64 I. C. 137 :

22 Cr. L. J. 745

———Ss. 107 and 112—Notice of proceedings—Substance of information—Omission to set forth—Irregularity

The omission to set forth in an order under S. 112, Cr. P. Code, the substance of the information received by the Magistrate, does not vitiate the proceedings if as a matter of fact the accused had clear notice of the case made against them and ample time and opportunity to let in evidence. (*Miller, C. J. and Adams, J.*) JAI SINGH v. EMPEROR

64 I. C. 666 : 23 Cr. L. J. 42.

———S. 107—Order demanding security to keep the peace—Charge of murder—Acquittal—Effect of.

Where an apprehension of a breach of the peace arose out of facts which were undisputed and in connection with those facts a charge of murder was laid unsuccessfully against certain persons and the proceedings against the petitioners were also started under S. 107 Cr. P. C. *Held* that the proceedings were regular and the order demanding security was proper 41 M. 246 Dist. (*Kanhariya Lal, J. C.*) EMPEROR v. GOBARDHAN SINGH.

9 O. L. J. 285 :

4 U. P. L. R. (O. C.) 73 : (1922) Oudh 273

———S. 107—Proceedings under—Expression of willingness by accused to furnish security.

The mere statement of a person that he is willing to give security is not sufficient ground for taking security from him for keeping the peace. 24 P. R. 1915 ; 27 P. R. 1917 Cr. foll. (*Chevis J.*) KARAM v. EMPEROR.

65 I. C. 639 ; 23 Cr. L. J. 175.

———S. 107—Proceedings under—Order for compensation if can be passed. See Cr. PRO. CODE Ss. 250 and 107. 20 A. L. J. 624.

———S. 107—Scope of.

The mere fact, that a dispute exists between two rival Zamindars, would not justify proceedings being taken against all their officers and servants unless there are materials to show that they are likely to commit any breach of the peace. "Information of the kind mentioned in S. 107

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must be of a clear and definite kind directly affecting the person against whom process is issued, and it should disclose tangible facts and details: so that it may afford notice to such person, of what he is to come prepared to meet." It may be that some of the persons mentioned in the Police report are likely to commit a breach of the peace, while others are not likely to do so but all of them must not be lumped up together because they are all interested in the dispute. In one sense all the members of a Zamindar's family are interested in a dispute relating to a property comprised in the Zemindary but that, by itself, would be no ground for taking proceedings against them all, 6 All. 26 followed *Chatterjee and Cuming, JJ.* AINUDDIN *v* EMPEROR.

(1922) Cal 97.

—Ss. 107 and 145—Scope of—Dispute about land—Appropriate procedure.

When a magistrate has reason to think that an individual is likely to commit a breach of the peace, he has jurisdiction, even though the case for the apprehended breach of the peace may relate to a dispute about land, to put into operation S. 107 Cr. P. Code. Where there is a dispute about land and where there is some *bonafide* claim on the part of both the parties, the appropriate and proper section is S. 145 Cr. P. Code 46 L C 296 dist. (*Bucknill, J.*) ABDUS SAYEED KHAN *v* EMPEROR.

65 I. C. 555. 23 Cr L. J. 123

—Ss. 107 and 125—Security for keeping the peace—Powers of the District Magistrate on appeal—Evidence to sustain an order for security

Abetment by instigation or conspiracy of the offence of voluntarily causing hurt is a wrongful act and nothing is more likely to occasion a breach of the peace than instigating the infliction of a public thrashing on a citizen. Consequently proceedings under S. 107 can be taken against the persons guilty of that charge. Under S. 125 of the Cr. P. Code all that a District Magistrate is empowered to do with a bond for keeping the peace is to cancel it or leave it alone. He cannot alter or modify. Under Ss 406 and 423 of the Code he can alter a bond for good behaviour but only such a bond. 11 N. L. R. 98 foll. 4 P. R. 1912 diss. 64 P. R. 1887 diss. (*Halliday, A. J. C.*) H. F. BAINES *v* EMPEROR.

(1922) Nag 180.

67 I. C. 346. 23 Cr L. J. 394

—Ss. 108 and 397—Applicability of—Sentence of imprisonment—Withdrawal of security.

On 23-5-1921 the applicant was ordered to furnish security for a period of one year under S. 108 Cr. P. C. In default of finding security it was directed that he should undergo rigorous imprisonment for the same period. The accused furnished the security required so that the alternative sentence of rigorous imprisonment did not come into operation. On 31-7-1921 the applicant was convicted of a substantive offence under S. 506 I. P. C. and sentenced to three months' simple imprisonment. He however remained on bail until 23-11-1921 when the bail bond was cancelled. In the meanwhile on 16-10-21 the applicant had withdrawn his security under S. 108 Cr. P. Code and had been committed to prison under

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that section. *Held* that the substantive sentence of three month's imprisonment should commence on the date when the bail bond was cancelled namely 23-11-1921. 30 A. 334 dist. (*Daniels, A. J. C.*) GANESH SHANKER *v* EMPEROR.

25 O. C. 249.

—S. 109—Ostensible means of subsistence—Dependence on father—Arrest—Suspicious circumstances—Misleading details given.

Where a person having no means of his own is maintained by his father, who earns an honest living, he is not "a person who has no ostensible means of subsistence" within S. 109. If on arrest under suspicious circumstances a person gives a wrong name and address, he fails to give a satisfactory account of himself. Proceedings against such a person under S. 109, Criminal Procedure Code, are therefore justified. 17 A L J. 43 32 dist. (*Sulaiman, J.*) ABDUL RASHID *v* EMPEROR

64 I. C. 141 : 22 Cr. L. J. 749.

—Ss 110 and 155—Charges made not proved—Order when justifiable. See (1921) DIG. COL. 398 BHAGWAT PRASAD *v* EMPEROR.

65 I C 551 : 9 O. L. J. 57 : (1922) Oudh 26 : 23 Cr. L. J. 119.

—S. 110—General repute—Evidence of—Witness having no personal knowledge—order or security. See (1921) DIG. COL. 397. KALLU *v* EMPEROR.

L. R. 3 A. 6 (Cr.)

—Ss 110 and 117 cl. (4)—Joint trial of several accused—Evidence of bad repute—Prejudice.

Ordinarily under S. 110 of the Cr. P. Code every person has to be tried separately for the offences enumerated therein. A joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in S. 110 cl. (a) to (f) which are under enquiry. Unless this circumstance is established, a joint trial is illegal and the conviction would be set aside. In a case under S. 110 of the Cr. P. Code in which the evidence of bad character of the accused persons and of the individual nefarious acts committed by them form integral part of the offence, it is impossible to conceive that the evidence led against one will not prejudice the case of the other accused persons assembled together in the same dock (*Jwala Prasad and Ross, JJ.*) JAI SAO *v* EMPEROR.

3 Pat. L. T. 538 : 65 I. C. 484 : 23 Cr. L. J. 100.

—S. 110—Jurisdiction—Facts necessary to give—Permanent residence.

Permanent residence within the locality is no essential to give jurisdiction to a Magistrate to take proceedings under S. 110 against an individual. It is enough if the person practices his career as thief, house-breaker, etc., within the jurisdiction. (*Stuart, J.*) BHOLA *v* EMPEROR.

20 A. L. J. 49 : L. R. 3 A. 72 (C) : (1922) All. 86 : 65 I. C. 438 : 23 Cr L. J. 86.

—S. 110—Order rejecting Surety—Sufficiency of grounds for. See (1921) DIG. COL. 398 EMPEROR *v* PANCHU,

67 I. C. 585 : 23 Cr. L. J. 425.

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—Ss. 110, 118 and 406—Order by Additional District Magistrate—If appealable to the Dt. Magistrate. See (1921) DIG. COL. 398  
 MAHENDRA BHUMJI v. EMPEROR. 48 Cal 874; 66 I. C. 69 : 23 Cr. L. J. 229

—S. 110—Order of Dt. Magistrate—Threats—Order to leave the town. See (1921) DIG. COL. 398. RAMPRASAD v. EMPEROR  
 65 I. C. 554 : 23 Cr. L. J. 122.

—S. 110—Order for security for good behaviour—Power of appellate court to enhance security. See (1921) DIG. CCL. 398. RAMESHWAR BAKSH SINGH v. EMPEROR. 90 L. J. 28 : 64 I. C. 286 : 22 Cr. L. J. 766.

—Ss. 110 and 118—Proceedings under—Accused belonging to different villages—Joint trial.

Where there is an association of several persons belonging to different villages at several places for committing offences their joint trial in a proceeding under S. 110, Cr. P. C., is not bad. (Teunon and Suhrawardy, JJ.) RAHIM BUX PRAMANIK v. EMPEROR. 64 I. C. 842 : 23 Cr. L. J. 58.

—Ss. 110 and 439—Proceedings under—Several accused—Legality of—Evidence of friends and relations—Value of—Evidence—Duty of High Court to consider.

In proceedings under S. 110 Cr. P. Code against a particular individual, evidence should be confined to his case alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable. Where witnesses voluntarily come forward as friends or associates of the accused and give evidence it ought not to be brushed aside unless the witnesses are discredited as regards their good faith and honesty. Evidence of general repute by persons having no personal knowledge of the accused is insufficient. It is open to a District Magistrate to lay down rules for the guidance of his subordinates so as not to allow an unnecessary large number of witnesses to be examined. In revision the High Court would weigh the evidence and see whether the case has been considered from the point of view of the accused and if the evidence for the defence is equally good as that of the prosecution, the High Court would quash the conviction. Mere repetitions unaccompanied by direct evidence personally affecting each accused or accompanied by direct evidence which is worthless and incredible, is insufficient in a case under S. 110 Cr. P. C. (Walsh, J.) ANGNOO SINGH v. EMPEROR. L. R. 3 A. 149 (Cr.) : 20 A. L. J. 881.

—S. 110—Scope of—Powers under when to be exercised.

The powers under S. 110 of the Criminal Procedure Code are to be exercised very sparingly and only in those cases where the evidence is very clear and precise. The Legislature does not thereby provide a means of punishment. (Abdul Raouf J.) JAGAT SINGH v. EMPEROR. 2 Lah. L. J. 237 : 23 Cr. L. J. 507 : 68 I. C. 43.

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—S. 110—Rejection of sureties—Grounds for—Police report. See (1921) DIG. COL. 197  
 EMPEROR v. LACHMAN. 65 I. C. 575 : 23 Cr. L. J. 142.

—Ss. 110 and 125—Rejection of sureties—Police report—Illegality.

When sureties are offered it is the duty of the court to accept them unless the court itself is satisfied that they are not proper persons. A magistrate is wrong in rejecting the sureties on the report of the police. (Ryves, J.) GOPIKHADE v. EMPEROR. L. R. 3 A. 140 Cr. : 20 A. L. J. 760 : 68 I. C. 35 : 23 Cr. L. J. 499

—Ss. 110 and 118—Security proceeding—Statements made to police officers—Corroboration—Co accused. See (1921) DIG. COL. 400. ASHUTOSH DAS v. EMPEROR. 66 I. C. 513 : 23 Cr. L. J. 289.

—Ss. 110, 119 and 437—Security for good behaviour—Discharge of person against whom proceedings taken—Further inquiry.

Where after proceedings against the accused under S. 110 Cr. P. Code terminated in his discharge under S. 119, the District Magistrate acting on a note put up by the Superintendent of Police but without taking fresh evidence or issuing notice to the accused to show cause, directed further proceedings to be taken in the case :

Held, the order was illegal and could be set aside. It was further held that it was open to the Magistrate to issue notice to the accused to show cause why the order under S. 119 should not be set aside (Stuart, J.) JASWANT v. EMPEROR. 19 A. L. J. 985 : L. R. 3 (A) 5 (Cr.) : 64 I. C. 846 : 23 Cr. L. J. 62

—Ss. 110 and 125—Sureties—Hearsay evidence of repute—Admissibility.

In the case of persons standing sureties for a person charged under S. 110 Cr. P. Code hearsay evidence as to general repute is not admissible. (Wazir Hasan, A. C. J.) SHEOPAL v. KING EMPEROR. 90 L. J. 353 : (1922) Oudh 227 : 68 I. C. 959 : 23 Cr. L. J. 639.

—Ss. 117 (4) and 107—Proceedings under S. 107—Joint complaint—Joint trial.

Though the joint trial of two contending parties should not be allowed in a proceeding under S. 107 Cr. P. Code yet if they are not contending parties but ranged on the same side, the trial is not illegal (Stuart, J.) RANGA PRASAD v. EMPEROR. L. R. 3 A. 181 (Cr.).

—Ss. 123 and 379—Failure to furnish security—Imprisonment—Nature of sentence—Subsequent sentence for an offence—How to take effect.

An order detaining a person who has failed to furnish security under Chapter VIII Cr. P. Code is not a sentence of imprisonment and therefore S. 379 does not authorise a magistrate to direct that a subsequent sentence for an offence should take effect on the expiry of the previous detention (Kennedy, J. C. and Madgaonkar, J.) CROWN v. SUKHAL SINGH. 15 S. L. R. 205 : 66 I. C. 191 : 23 Cr. L. J. 255.

## CRIM. PROCEDURE CODE (1898), S 123

—S 123—*Omission to furnish security—Procedure—Power of Dt. Magistrate—Appeals.*

Where security for a period of more than one year has been ordered and not furnished, the case must be referred to the Sessions Judge who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security. It is not necessary that the case should have gone in appeal to the Dt. Magistrate. Though S. 406 Cr. P. Code is so worded that an appeal may be preferred under this section to the Dt. Magistrate in every case by any person ordered to give security for good behaviour under S. 118 by a Subordinate Magistrate, yet ordinarily, this section is meant for cases in which a reference to the Sessions Judge is not necessary (i. e.) where a man has been either ordered to furnish security for one year or having been ordered to furnish security for more than one year has furnished it and wants to appeal. In such cases he would go to the District Magistrate in appeal and there would then be no reference to the Sessions Judge who could deal with such cases only as a court of revision. (*Abdul Qadir, J.*) QAMAR DIN v. EMPEROR, 67 I. C. 726 : 23 Cr. L. J. 454.

—S. 125—*Cancellation of bond—Powers of District magistrate*

The only ground on which a District Magistrate can cancel a bond for keeping the peace and to be of good behaviour is that something has supervened since the date of the first court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity for keeping the accused person under bond. S. 125 cannot be used by the District Magistrate as if he were a court of appeal going into the evidence. If he thinks the order is not maintainable on the evidence on record, his duty is not to pass an order under S. 125, but to refer the case to the High Court on its revisional side. (*Lindsay, J.*) NIZAMUDDIN KHAN v. MUHAMMAD ZIN-UL-NABI KHAN, 20 A. L. J. 521 : L. R. 3 A. 112 Cr. 4 U. P. L. R. (A) 142 : (1922) All. 191 : 44 A. 614 : 67 I. C. 350 : 23 Cr. L. J. 398.

—Ss. 125 and 107—*Order for security—Powers of Dt. Magistrate—Order quashing proceedings—Revision.*

The jurisdiction of a Dt. Magistrate under S. 125 of the Cr. P. Code is to cancel the bond ordered to be executed by a sub-divisional Magistrate under S. 107. The Dist Magistrate is not an appellate or revisional authority and he has no power to vacate the order of the sub-divisional Magistrate as ultra vires or to quash the proceedings. If he purports to do so the High Court has power to set aside the order. 37 Cal. 72 ; 32 Cal. 948 ; 34 Cal. 1 ref. (*Adami, J.*) DURGA SINGH v. AMAR DAYAL SINGH, 3 Pat. L. T. 103 : (1922) P. 334 : 66 I. C. 425 : 23 Cr. L. J. 281.

—S. 125 and 107—*Scope of—Powers under.* Though no appeal lies from an order under S. 107, the District Magistrate can order the discharge of the appellants from the necessity of giving security for their future behaviour, setting

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aside the order of the lower court, in his executive capacity, as well as cancel the bond for keeping peace or for good behaviour. (*Adami, J.*) MONMOHAN DASS v. BABU LALL, (1922) P. 420.

—Ss. 133 and 137—*Complaint—Notice—Enquiry—Order absolute.*

Where a person against whom a notice is issued under S. 133 Cr. P. Code appears and objects to the order, the inquiry must proceed as in a summons case. (*Stuart, J.*) JASSI v. EMPEROR, L. R. 3 A. 129 Cr. : 20 A. L. J. 692 : (1922) All. 335.

—Ss. 133 and 137—*Conditional order by Magistrate—Report and enquiry by another magistrate—Order made final by magistrate making conditional order.*

Under Ss. 133 and 137 Cr. P. Code the materials on which a conditional order can be made absolute by the Magistrate who makes that order are described as "evidence taken as in a summons case." That imports the necessity of the Magistrate taking the evidence before himself and he cannot, even with the consent of the parties, refer the matter for inquiry and report to another magistrate. Where an order is made absolute on materials which are not provided for by the section and in a manner contrary to the express provision of the section, no consent of the parties can possibly cure the illegality. (*Shah, A. C. J. and Crump, J.*) KARIYAPPA NINGAPPA *In re.*, 24 Bom. L. R. 807 : (1922) Bom. 384 : 68 I. C. 619 : 23 Cr. L. J. 587.

—S. 133—*Highway—Obstruction—Claim of right—Power of Magistrate to pass order—Procedure.*

If in proceedings under S. 133 Cr. P. Code arising out of an alleged obstruction of a highway, the opposite party sets up a bona fide claim of right, the jurisdiction of the Magistrate is not ousted thereby.

It is competent to the Magistrate, if he finds that there is a real and a substantial claim on the part of the opposite party to allow him a reasonable time to assert the claim by a civil suit. If the party does not go to the court within such period or fails therein, the Magistrate can continue the proceedings under S. 133 Cr. P. Code, 8 C. W. N. 143 appr. (*Sanderson, C. J., Teunon Richardson, Newbould and Ghose, JJ.*) RAM SAGAR MANDAL v. ALEX NASKAR, 49 Cal. 682 : 26 C. W. N. 442 : 35 C. L. J. 247 : (1922) Cal. 682 : 67 I. C. 177 : 23 Cr. L. J. 353. [F. B.]

—S. 133—*Proceedings under—Throwing of rubbish on common land.*

The mere throwing of rubbish on vacant land lying between two houses is not sufficient to justify proceedings under S. 133, Criminal Procedure Code, (*Lindsay, J.C.*) EMPEROR v. SUKHDEI, 24 O. C. 327 : 64 I. C. 841 : 23 Cr. L. J. 57.

—Ss. 133 and 137—*Public nuisance—Enquiry by Magistrate—Conditional order—Evidence to be taken.*

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No man can be permitted to deal with his property in such a way as to cause public nuisance to others, 34 All 345, 6 O. L. J. 616 referred. Where there is a complaint of a public nuisance a Magistrate is bound to enquire into it and he cannot make a conditional order absolute without taking evidence 24 Cal 395; 11 Bom. 375; 31 All. 453 Ref. (*Kanhaya Lal, J. C.*) *SANT SAHAI v LACHMAN SINGH*. 9 O. L. J. 64 : (1922) Oudh 29 : 66 I. C. 186.

— Ss. 134, 135 and 244 — Order without recording evidence—Illegality. See (1921) Dig. COL. 404. *EMPEROR v. KANHAYA LAL*. 64 I. C. 285.

— S. 137—Conditional order by Magistrate—When can be made absolute. See CR. PRO. CODE Ss. 133 and 137. 24 Bom. L. R. 807.

— S. 137 (1)—Complaint—Enquiry—Procedure—Duty to consider evidence and record findings.

Where a person to whom notice is issued under S. 133 Cr. P. Code appears and shows cause, the Court itself should go into the evidence and record its findings. It is illegal to make the order absolute on the report of the Tahsildar. (*Stuart, J.*) *ISMAIL v. BANDA* 20 A. L. J. 657 : (1922) A. 265.

— Ss. 138 and 139—Jury — Refusal to give verdict—Power to summon another jury

Where the majority of the jurors appointed by a Magistrate under S. 138 (1) of the Cr. P. Code perversely refuse to return a verdict for fear of displeasing either party, the Magistrate can discharge them and appoint a fresh jury and decide the matter before him under S. 139 Cr. P. Code. (*Lindsay, J.*) *GIRWAR LAL v. BANSIDHAR* 44 A. 575 : 20 A. L. J. 472 : L. R. 3 A. 84 (Cr) (1922) All. 297 (1) : 66 I. C. 420 : 23 Cr. L. J. 276.

— S. 144—Absence of sufficient materials—Validity of order.

Where the Magistrate had no materials before him upon which he could make an order against petitioners, an order under S. 144, Cr. P. Code is without jurisdiction. (*Ross, J.*) *PANCHI RAM v. SHEIKH MUHAMMAD ABDULLAH*. (1922) P. 239.

— S. 144—Breach of the peace—Power to stop prayers in a mosque—Jurisdiction of Magistrate.

Where owing to disputes between the congregation of worshippers and the *pesh imam* or leader of prayers in a mosque appointed by the mutwalli a magistrate passed an order under S. 144, Cr. P. Code forbidding people from either party to read prayers in the mosque Held that the order was illegal and misconceived. Unless the mutwalli was displaced from his position as such, no one had any right to interfere with the management of the mosque. The mutwalli had the right to appoint a servant of the mosque, and if the congregation was not satisfied with the appointment made by him the only course open to them would be to have the mutwalli removed in a proper suit or to make him adopt the proper

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and legal method of managing the waqf property. (*Walmsley and Suhrawardy, JJ.*) *HAJI MD. ISMAIL v. MUNSHI BARKAT ALI*. 26 C. W. N. 904.

— S. 144—Declaration—Suit for—Order under S. 144 Criminal Procedure Code, against the plaintiff—Whether plaintiff can sue for a declaration that he is entitled to use his property in any manner he pleases—Order under S. 144 furnishes cause of action for suit against defendants—Specific Relief Act, S. 42

Where the plaintiffs and the defendants are owners of adjacent properties and the defendants complained to the Police and obtained an order from a Magistrate under S. 144 of the Criminal Procedure Code preventing the plaintiffs from making use of their property by erecting certain buildings on the same, without notice to them or without an adjudication of the private rights of parties, it is open to the plaintiff to sue the defendants for a declaration that they are entitled to use their property as desired by them and for an injunction restraining the defendants from interfering with them in so doing; and the order under S. 144 of the Criminal Procedure Code is no bar to such suit.

The order under S. 144 would itself furnish the Cause of Action for the suit for declaration and injunction. (*Ayling, Offg. C. J. and Odgers, J.*) *P. BABA SAH v. K. G. MAHOMED HUSAIN SAHIB*. (1921) M. W. N. 867 : 42 M. L. J. 179 : 15 L. W. 68 : (1922) Mad. 123 : 68 I. C. 180.

— S. 144—Ex parte orders — Legality—Adjournment.

It is not proper for a magistrate to pass an *ex parte* order under S. 144 Cr. P. Code and when its propriety or legality is challenged to postpone the hearing from time to time. Such matters ought to be disposed of quickly to avoid unnecessarily encroaching on the civil rights and liberties of the subject. (*Walmsley and Suhrawardy, JJ.*) *BENOWARI LAL RAM v. PRONAB KRISHNA*. 26 C. W. N. 663 : 35 C. L. J. 396.

— Ss. 144 and 145 — Order of District Magistrate directing Substitution of proceedings under S. 145 to one under S. 144—Illegal. See (1921) Dig. COL. 405. *TILOKI RAI v. EMPEROR*. 68 I. C. 35 : 23 Cr. L. J. 498.

— S. 144—Order restraining holding of hat—Legality of.

A general order prohibiting a person absolutely from holding a hat within an extensive area is illegal; for in theory a person is ordinarily entitled to exercise all rights of ownership on his property and holding a hat on one's own property is not in itself a wrongful act. The proper procedure if disturbance is anticipated would be to act under S. 107. (*Walmsley and Suhrawardy, JJ.*) *BENOWARI LAL RAM v. PRONAB KRISHNA*. 26 C. W. N. 663 : 35 C. L. J. 396.

— S. 144—Order under—Effect on title or possession.

An order under S. 144, Cr. P. C., has not the effect of disturbing either title or possession, though it may prevent and does prevent the exercise of the rights which a person in possession

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would otherwise be entitled to exercise during the continuance of the said order, (*Tennon, J.*)  
*NASIRAN BIBI v. SALIM AKANDA.* 64 I. C. 572

## —S. 144—Orders under—Temporary in junction of Civil Court—Effect of.

Successive extensions of an order under S. 144 Cr. P. Code are invalid but they can be supported as fresh orders. Such successive orders may amount to an abuse of the process of court especially when the civil court has passed an order of temporary injunction against one party. It is the duty of the criminal courts to respect the opinions of civil courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their right and not prohibit the latter's lawful enjoyment of rights. 27 M. L. J. 628; 22 M. L. J. 251; 20 C. W. N. 758 Ref. (*Ramesam, J.*) *MURARI NAICKEN v. AIYASAMI NAICKEN* 16 I. W. 452: (1922) M. W. N. 612.

## —Ss. 144, 145 and 146—Preliminary order—Attachment—Restoration of property to one of the parties—Effect.

A Magistrate passed a preliminary order under S. 145 (1) and subsequently attached the properties under S. 145 sub-S. (4). Eventually he refused to take evidence and dismissed the petition as unnecessary in view of a prior order under S. 144 Cr. P. Code. At the same time he directed delivery of possession of the properties to one of the parties. Held that the order must be set aside as illegal and without jurisdiction. (*Venkatasubba, Rao, J.*) *PALANI GOUNDAN v. KULANDAI VELU GOUNDAN.* 43 M. L. J. 716: (1922) Mad. 437. (1922) M. W. N. 484.

## —Ss. 144 and 145—Proceedings under—Initiation of proceedings under S. 144 Cr. P. Code—Conversion into proceedings under S. 145

Where proceedings are initiated under S. 144 Cr. P. Code with regard to land the possession of which is honestly disputed, the Magistrate would be acting properly in converting the proceedings into those under S. 145 and making an order under the latter section, (*Jwala Prasad, J.*) *NAND KISHORE SAO v. BIKAN SINGH.* 3 Pat. L. T. 570: (1922) P. 557: 65 I. C. 856: 23 Cr. L. J. 200.

## —Ss. 144, 107 and 145—Scope of.

It is well to indicate the relative value of the preventive Ss. 107, 144 and 145 of the Code in a dispute relating to property, where the first party claim to be in exclusive possession and the second party claim to be in joint possession. If the property is found to be in joint possession of both the parties, then no order under S. 145 can be passed and the danger to a breach of the peace by the contending parties with a view to exclude the other from the possession of the property in dispute can only be averted or avoided by binding both the parties or by binding both of them under S. 107, for none of them has a right to exclude the other from joint possession. If on the other hand, one of them is found to be in exclusive possession of the property then the other side can be restrained under S. 144 from interfering with the

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exclusive possession of the other party, and if possible by binding him down. Unless the exclusive possession of one of the parties is undisputed or is admitted or is concluded by some decision of a competent Court, an enquiry into the claims of the parties as to exclusive or joint possession must be held. It is only after an enquiry a decision is arrived at as to the possession of the contending parties, separate or joint. An order under S. 144 or 107 against one of the parties will not be justifiable. Such an order will prejudice the other party and will exclude him from the possession of the property whether exclusive or joint. No court by its proceeding or order can allow such an advantage to one of the parties. Therefore in a dispute of this kind the danger to a breach of the peace can be averted by issuing a temporary order upon both the parties under S. 144 if the case is of urgency and by holding an enquiry into the possession of the parties before confirming the order. The danger to a breach of the peace can also be averted by at once instituting a proceeding under S. 145 by attaching the property in dispute pending the enquiry. (*Jwala Prasad, J.*) *RATAN CHAND SAHU v. MOHANLAL SAHU.* (1922) P. 228.

## —Ss. 144 and 145—Difference between.

Under S. 144 Cr. P. Code, no order can be passed where a question as to the factum of the delivery of possession is raised between the parties.

Ordinarily a dispute as to land should be inquired into in a proceeding under S. 145; but where a civil court has put one of the parties in possession, there is in law no dispute and hence no scope for taking proceedings under the section. (*Jwala Prasad, J.*) *KAMLA PRASAD SINGH v. GOBIND SAHAY.* 3 Pat. L. T. 826: (1922) P. 13.

## —Ss. 144 and 145—Scope of—Dispute as to possession—Bona fide dispute—Jurisdiction of magistrate.

*Per Mullick, J.* S. 144 of the Cr. P. Code is of general application and contains nothing which ousts the Magistrate's Jurisdiction in cases of bona fide dispute as to possession of land. But where S. 107 or S. 145 Cr. P. Code will meet the requirements of the case, S. 144 is not an appropriate remedy, and if it is found that the danger was not so imminent that it could not be otherwise averted, an order under S. 144 will generally be held to have been made without jurisdiction. Where it is clear upon the materials before the Magistrate that one party is in possession and that another whose claim to possession is a mere pretence is threatening to interfere with that possession, the Magistrate is entitled to resort to the summary procedure of S. 144 Cr. P. Code, some times it may even be necessary to take action against the party who is in actual possession, but in every case it must be shown that the conditions required by the section exist. What the Courts deprecate is the habitual and unjustifiable use of S. 144 Cr. P. Code as a substitute for Ss. 107 and 145 Cr. P. Code.

*Per Jwala Prasad, J.:* S. 144 Cr. P. Code is a larger and more general section than S. 145. An

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order under that section can be made under various circumstances including a danger of a breach of the peace S 145 is of limited scope and applies only when there is a danger of a breach of the peace. The former is discretionary, the latter is mandatory. The latter provides for a thorough inquiry into the dispute as to possession of the parties which tends to a breach of the peace. Therefore when the special condition of S. 145 is fulfilled.

S. 144 yields to S. 145 in the same sense that when he finds that there is a real dispute tending to a breach of the peace the Magistrate is bound to institute a proceeding under S. 145 and enquire into the possession of the parties irrespective of any order that he might have originally passed under S. 144 Cr. P. Code. (*Miller, C. J. Mullik and Jwala Prasad, JJ.*) SHEBALAK SINGH v. KAMARUDDIN MANDAL. 3 Pat. L. T. 573 (1922) Pat. 241 : 4 U. P. L. R. (Pat.) 57 : (1922) P. 435 : 68 I.C. 149 : 23 Cr. L. J. 549 (F.B.)

—S. 144 (3)— *General order prohibiting persons attending market—Legality of—Disobedience of order—Procedure to follow.*

A general order under S 144 Cr. P. Code restraining the holding of a *hat* or market is not permissible—But an order prohibiting the holding of a new market on the same days as the old market is perfectly legal.

The disobedience of a valid order under S. 144 Cr. P. Code is punishable under S 188 I. P. C., prosecution for which might be started either by the sanction given under S. 195 Cr. P. Code or by an order passed under S. 476 Cr. P. Code. (*Jwala Prasad J.*) PARMESHWAR RAI v. EMPEROR. 3 Pat. L. T. 268 : (1922) Pat. 204 : 4 U. P. L. R. (Pat.) 34 : (1922) P. 84 : 67 I. C. 205 : 23 Cr. L. J. 381.

—Ss. 144 (4) and 145—District Magistrate—Revisional jurisdiction—Power to direct initiation of proceedings under S. 145 See (1921) DIG COL 406 CHHEDI LAL MARWAFI v. MAHABIR PRASAD SIKUL. 64 I. C. 507 : 23 Cr. L. J. 27

—S. 144 (4) and (5)—Order under Jurisdiction—Validity of—Indefiniteness as to time—Time expired order—Revision—Powers of Appellate Magistrate.

The High Court, must, in revision, against an order under S. 144 of the Cr. P. Code examine whether it was passed with or without jurisdiction in spite of the fact that the two months for which the order is to be in force under cl. (5) of S. 144 had previously expired.

An order under S. 144 of the Cr. P. Code which is indefinite as to time is to that extent one made without jurisdiction.

Under cl. (4) of S. 144 a Magistrate has jurisdiction only to rescind or alter an order made under the section by himself or by any Magistrate subordinate to him. A Magistrate has no jurisdiction on appeal from an order under S. 144 of the Cr. P. Code to prohibit the counter petitioners before him from doing an act which they were permitted to do by the order appealed against:

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(*Odgers J.*) MUTHUKUMARASWAMI NADAR v. MAHAMMAD ROWTHER. 42 M. L. J. 852 : 30 M. L. T. 148 (H. C.) : 15 L. W. 423 : (1922) M. W. N. 177 : (1922) Mad. 76 : 67 I. C. 500 : 23 Cr. L. J. 404.

—S. 144 (4)—Power of court to rescind or modify order—Reasons for.

The powers given by S. 144 (4) Cr. P. Code need not be confined to cases where there has been a change of circumstances since the original order was made. If the Magistrate has power to rescind an order previously made by himself or his predecessor or his subordinate under the section because the circumstances no longer require it to remain in force, he would equally have power to rescind it if he is satisfied that it never ought to have been made. (*Miller, C. J. Mullik and Jwala Prasad, JJ.*) SHEBALAK SINGH v. KAMARUDDIN MANDAL. 3 Pat. L. T. 573 : (1922) Pat. 241 : 4 U. P. L. R. (Pat.) 57 : (1922) P. 435 : 68 I. C. 149 : 23 Cr. L. J. 549 (F. B.)

—S. 145—Applicability of—Claim to weigh grain in market.

The claim to weigh grain in a market and realize the weightment dues is not covered by S. 145, Cr. P. Code. (*Rafiq, J.*) MAQBAL AHMAD v. EMPEROR. L. R. 3 A. 128 (Cr.) : 20 A. L. J. 694 : (1922) A. 430 : 68 I. C. 836 : 23 Cr. L. J. 612

—S. 145—Applicability of—Discontinuous possession—Market stalls—Possession once a week—Proceedings under S. 145 Cr. P. Code.

The element of continuity of possession is an ingredient which is necessary at any rate in cases where interruption is not due to seasonal variations, in proceedings under S. 145 Cr. P. Code. S. 145 does not apply to a case where the petitioners claim possession of a market stall only one day in the week and the respondents are alleged to be in possession throughout the week. (*Walmsley and Suhrawardy, JJ.*) NAYAN MANJURI DAST v. FAZLEY HUG SARDAR. 49 Cal. 871.

—S. 145—Applicability of—Mining rights—Dispute as to.

S. 145, Cr. P. Code, applies to disputes with regard to sub-soil rights and a dispute as regards the possession of minerals underneath falls under the section 32, C. L. J. 54 dist. (*Walmsley and Suhrawardy JJ.*) BIMALA PRASAD MOOKERJEE v. TATA IRON & STEEL CO. LTD. 35 C. L. J. 456 : (1922) Cal. 83.

—S. 145—Applicability of—Joint possession—Bona fide claim to—Dispossession within two months.

For the purpose of a decision under S. 145 of the Cr. P. Code the dispossession within two months must be a forcible and wrongful dispossession, and possession delivered under a decree would not be a dispossession of that character. Where there is a good and valid claim to joint possession the Magistrate has no jurisdiction to take proceedings under S. 145 and pass an order declaring one of the parties to be in possession.



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(*Adami, J*) RAMPACITAR SINGH v. KASIM ALI KHAN  
(1922) P. 423 : 67 I. C. 203 :  
23 Cr. L. J. 379

—S. 145—*Applicability of—Mines and Minerals—Right to work*

A dispute as regards mines and minerals and the right to work mines falls within the scope of S. 145 Cr. P. Code. 4 P. L. J. 154; 2 Pat. L. J. 637 Foll. (*Jwala Prasad, J*) MAHADEO DUTT v. J. N. SARKAR, (1922) Pat 122 (1922) P. 340

—S. 145—*Breach of the peace—Enquiry—Evidence—Police report.*

Under S. 145, Cr. P. Code, a Magistrate has no jurisdiction to make an enquiry as to possession, still less any final order, unless and until he is satisfied of the likelihood of a breach of the peace and is absolutely essential that the fact and grounds of his being so satisfied should appear in his first order directing the issue of a notice, and the grounds stated must be such as to satisfy a Court of revision before which the case may be brought by any of the parties concerned. 12 C. P. L. R. 2 Cr., foll. The Police report and the personal talk to parties and personal inspection of the land in dispute are not grounds justifying an order under S. 145, Cr. P. C. (*Kotval, A. J. C*) ASARAM v. CHOTULAL. 64 I. C. 288 : 22 Cr. L. J. 768

—Ss. 145 and 435—*Breach of the peace—Likelihood of—No finding as to—Revision*

Even though there is no express finding as to the likelihood of a breach of the peace in the order made by a Magistrate under S. 145 of the Cr. P. Code, yet where the notice shows that the Magistrate was satisfied that there was a serious dispute between the parties and in consequence he issued the notice and in the judgment it appeared that there was a quarrel between the parties with reference to the possession of several plots of lands, it could not be said that the proceedings were not proceedings contemplated by S. 145 of the Cr. P. Code. Consequently, the High Court should not interfere in revision. (*Ryves, J.*) BABUA SINGH v. ANGNU KEWAT. L. R. 3. A. 65 (Cr) : 66 I. C. 527 : 23 Cr. L. J. 303.

—S. 145.—Civil court—Delivery to auction purchaser—Heirs of judgment debtor in possession even after delivery—Possession adverse to auction-purchaser—Possession to be upheld under S. 145, See (1921) DIG. COL. 407 SHAHABAY MANDAL v. BHAIJAHARI. 49 Cal. 177 : (1922) Cal. 364.

—S. 145—*Delivery of possession by Civil Court—Scope of proceedings under*

When possession is delivered through a Civil Court to one of the parties, it is not competent to a Criminal Court to re-open the question of possession and investigate it under S. 145. It is the duty of a Magistrate to maintain the possession given by the Civil Courts either by an order under S. 145 or by acting under the preventive sections of the Cr. P. Code (*Jwala Prasad and Sonit, JJ.*) RAM KRISHNA SINGH v. KING EMPEROR. 3 Pat. L. T. 335 : (1922) P. 197 : 66 I. C. 817 : 23 Cr. L. J. 321

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—Ss. 145 and 439—*Dispute between Co sharers—Exclusive claim of possession—Duty of Magistrate—Revision.*

S. 145 Cr. P. Code applies to a case where the dispute is between co sharers each claiming to be in possession of the disputed land to the exclusion of the others. S. 145 (1) (b) does not render that section inapplicable to a case in which the parties are jointly entitled to the land in question. Where in a such case a magistrate holding that S. 145 Cr. P. Code did not apply, refused to inquire into that possession. Held, his action was materially irregular and justified interference in revision by the High Court 17 C. W. N. 944; 20 C. W. N. 518; 29 I. C. 66 foll. 23 P. R. 1902 Ref. (*Broadway, J.*) MUSSAMMAT MALAN v. MAKHAN SINGH. 2 Lah. 372 : (1922) Lah. 348 : 66 I. C. 65 : 23 Cr. L. J. 225.

—S. 145—*Dispute about immovable property—Collections made by lambardar—Dispute as to shares of rent*

Disputes as between co sharers as regards the share of rents due to them is not within the purview of S. 145 Cr. P. Code if the rents are collected by the lambardar and then distributed among the co sharers 28 A. 266, 30 C. 110 Ref. (*Damels, J. C. and Wazir Hasan, A. J. C.*) EMPEROR v. RAM BHAJAN. 25 O. C. 137 : (1922) Oudh 199 : 69 I. C. 90 : 23 Cr. L. J. 650.

—S. 145—Dispute relating to property—Proceedings under section. When to be taken. See CR. P. CODE, Ss. 144, 107 AND 145. (1922) P. 228.

—S. 145—*Dispute between landlords—Tenants in actual possession—Action under S. 145 Cr. P. Code, if justifiable.*

Where the fact is that the land in dispute is cultivated by tenants whom each side claims to be his and the question resolves itself into one as to the title of the disputed land, there is no room for action under S. 145 Cr. P. Code. The dispute can only be settled by a Civil Court. (*Chevis, J.*) ATMA RAM v. ALLAH WASAYA. 65 I. C. 630 : 23 Cr. L. J. 166.

—Ss. 145 and 147—*Easement—Dispute as to—Procedure.*

S. 147, Cr. P. Code, and not S. 145, applies to a dispute about an easement in respect of which action has to be taken. (*Kotval, A. J. C.*) ASARAM v. CHOTULAL. 64 I. C. 288 : 22 Cr. L. J. 768.

—S. 145—*Enquiry under—Evidence—agreement to dispense with oral evidence—Recent decree of Civil Court—Effect on Criminal Court.*

As the Magistrate is required in disputes under S. 145 Cr. P. Code to come to a conclusion on the fact or actual possession at the date of order or 2 months prior to it, an agreement between the parties to get the case decided on documents or without adducing evidence of possession is outside the scope of the section. Where however there is a decree of a civil court in execution of which possession has been recently delivered the Criminal Court is bound thereby. The Criminal Court must uphold a recent delivery of possession by the Civil Court. (*Adami, J.*) MAHARAJA PRATAP UDAI NATH SAHI DEO v. BHAIJAIN SUNDERBAS KOER. 3 Pat. L. T. 628.

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—Ss. 145 and 439—Enquiry—Finding as to possession—Finding based on evidence in another case.

Where a magistrate decides a case under S. 145 Cr. P. Code on his own knowledge derived from certain mutation proceedings without recording any evidence in the case and relying entirely on the evidence in the mutation case, his order is open to interference in revision, 34 C. 840; 11 A. L. J. 586 Ref. (*Kanhaiya Lal, J. C.*) *MIRZA RAZA HUSAIN v MEHDI HASAN*

25 O. C. 143 : (1922) Oudh 256 :  
69 I. C. 268 : 23 Cr. L. J. 684.

—S. 145—Essentials necessary.

The essential requisite to give a magistrate jurisdiction under S. 145 Cr. P. C. is that he must be satisfied of the existence of a dispute. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure and not jurisdiction.

The Magistrate need not give a finding in his final order as to the likelihood of a breach of the peace after making an order under S. 145 (1). The only matter he has to determine is the question of the possession of the disputed property.

Revisional powers of the High Court in proceedings under Ch. XII considered. (*Martineau, J.*) *JHANDA RAM v TOPAN RAM.*

4 U. P. L. R. (Lah.) 82 : 67 I. C. 584 :  
23 Cr. L. J. 424

—S. 145—Enquiry under—Power of Magistrate to depute a pleader as Commissioner to make local inquiry and report—Reliance on wrong piece of evidence—Revision.

A Magistrate dealing with a case under S. 145, Cr. P. Code, has jurisdiction to direct a pleader Commissioner to hold a local inquiry and can receive in evidence a report drawn up by the Commissioner after completing the inquiry  
12 I. C. 88 Ref.

If a Magistrate relies wrongly on a piece of evidence, there is no error or want of jurisdiction, warranting an interference by the High Court.

A party who asserted all along that the lands could be identified, cannot turn round and assert the contrary in the High Court after judgment was given against him by the court below. (*Adami and Ross, JJ.*) *CHULAI MAHTO v SURENDRA NATH CHATTERJEA.*

1 Pat. 75 :  
(1922) P. 224 : 3 Pat. L. T. 17 : 65 I. C. 616 :  
23 Cr. L. J. 152.

—S. 145—Evidence—Supplemented by observations—Results of local inspection not recorded—Effect.

Where it is urged that the Magistrate twice made local inspections and that without making any record of the result of his observations, he used his observations at the time of his local inspections in the course of his judgment in substitution of and in order of supplement the evidence which has been recorded by him *held*. If the Magistrate has used his observations made at the time of local inspection both in substitution of and to supplement the evidence recorded by him, he had in fact, turned himself into a witness in the case and further, if he has failed to record the result of his local inspections which would have given both parties a chance of challenging the

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correctness of his observations, the decision is vitiated (*Coults, J.*) *RAMSUNDRA v. MAHARAJAH BAHDUR KESHO PRASAD SINGH.*

(1922) P. 294.

—S. 145—Evidence of possession—Evidence of title—Corroboration.

In proceedings under S. 145, Criminal Procedure Code, it is open to the Magistrate to rely on the evidence as to title, to corroborate the evidence, as to possession 7 Cal 461, ref. (*Kumara-swami Sastri, J.*) *ADAIKKAN v. NALLAKARUPPAN.*

15 L. W. 62 : (1922) M. W. N. 12 :  
(1922) Mad 188 : 65 I. C. 853 :  
23 Cr. L. J. 197.

—Ss. 145, 366 and 367—Final order—Duty of Magistrate to record reasons for final order. See (1921) DIG. COL. 408 *BHUBAN CHANDRA HAZRA v. NIBARAN CHANDRA SANTRA*  
49 Cal. 187 : (1922) Cal. 382

—S. 145—Final order based on no evidence—If valid—Finding as to possession—Local enquiry—No evidence taken—Revision. See (1921) DIG. COL. 408 *GOGAN HOWLADHAR v. KARIMADDI CHAWKIDHAR.*

65 I. C. 855 :  
23 Cr. L. J. 199.

—S. 145—Order under—Review by Deputy Commissioner *ex parte*—Legality of.

A complaint was lodged as to the possession of certain property and the Sub-Divisional Magistrate made an enquiry, heard evidence and made an order purporting to be under S. 145. He found that the proceedings under S. 145 were no longer necessary as there had been no breach of the peace during four months previous to the proceedings. He found actual possession in favour of the first party and ordered the crops to be delivered to them. On second party applying for review to Deputy Commissioner, he set aside the order of the Sub-Divisional Magistrate without giving notice to the other party and ordered the crops to be delivered to second party. *Held*, although the procedure followed by the Sub-Divisional Magistrate was irregular and was not according to the procedure as laid down by S. 145 Cr. P. C. he must be considered to have contemplated the proceedings to be under S. 146. Under the circumstances it was not open to the Deputy Commissioner to review the sub-Divisional Magistrate's decision. In any case he could not do so *ex parte* and the order should be set aside.

*Further held* that he order of sub-Divisional Magistrate not being passed on proper procedure should also be set aside. (*Bucknill, J.*) *JAGU PAL v. MAKUNDA KOER*  
(1922) P. 449.

—S. 145—persons against whom proceedings taken—if "accused" within the meaning of S. 360 See CR. P. CODE, S. 360.

3 Pat. L. T. 291.

—Ss. 145 and 537—Possession case—Judgment—Contents of.

A magistrate after holding an enquiry under S. 145 Cr. P. code instead of pronouncing a judgment with reasons for his conclusion merely passed an order in these terms "counter petitioner is declared to be put in possession of the lands

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described here under fill up schedule form accordingly." A printed form was filled up declaring counter petitioner to be in possession,

*Held*, that the order of the magistrate was without jurisdiction and that he ought to have written a judgment giving a finding as to the possession of the property on the date of the preliminary order 18 M. 41; 49 C 187 Ref. (*Venkatasubba Rao, J.*) PERIA SUBBA GOUNDAN *v* SINNA SUBBAYYA GOUNDAN. 16 L. W. 701 : 31 M. L. T. 382 (H. C.) 69 I. C. 158. 23 Cr. L. J. 670.

—S. 145—Possession—Effect of order of court,

Where a party whose possession is disturbed by an order of court fails to take the step under S. 37 of the Bihar and Orissa Public Demands Recovery Act or rule 103 of O. 21 C. P. C his remedy is to file a suit in a civil court. But subject to the result of the suit the order is final and conclusive and is binding upon the criminal Court and in fact any court which has to adjudicate upon the possession of the parties, (*Jwala Prasad, J.*) KAMALA PRASAD SINGH *v*, GOBIND SAHAY AND OTHERS.

(1922) P. 13 : 3 Pat. L. T. 825.

—S. 145—Possession disputed—Decree of Civil Court and proceedings under S. 145 giving possession—Magistrate's duty

Where in spite of the decree of a Civil Court declaring title and giving possession to the first party and also in spite of an order in appeal of the High Court to that effect under S. 145, Criminal Procedure Code, the Magistrate on the ground that second party was not a party to the previous proceedings and that the dispute was not the same declared them to be entitled to claim possession and gave it—*Held* when under cl. 3 proceedings under clause 1 of S. 145 are published by affixing at a conspicuous place or near the subject matter in dispute and this notice is given to persons interested in the subject matter in dispute to come forward and be made parties to the proceedings, the proceedings are binding upon the whole world. As far as the Magistrate is concerned the question of possession is thus set at rest once for all and thereafter he should maintain the order by taking action under Ss. 107 and 144 as the case may be against persons interfering with the possession of the party declared by the Magistrate to be in possession. The possession was effectively delivered by the civil court to the 1st party and the only course open to persons other than the judgment-debtors was to apply under S. 100 of the Code and thereafter to institute regular suit. The subject matter in dispute being the same in the new as well as in the previous proceedings that in itself is sufficient ground to set aside the order of the Magistrate. (*Jwala Prasad, J.*) RAGHUNANDAN PANDEY *v* KISHEN MOHAN SINGH. (1922) P. 210.

—S. 145—Possession—Nature of—Omission to read over evidence to witnesses—Failure to implead tenant—Effect,

*De facto* possession, with which alone proceedings under S. 145 Cr. P. Code are concerned means effective occupation or control.

The omission to read over to witnesses in such proceedings their depositions does not mean that

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such depositions are not evidence in the case; it may be they cannot be convicted of perjury in a subsequent trial

The omission to implead a tenant of a portion of the land in dispute is not fatal to the proceedings (Ross, J.) RAMNARAIN SINGH *v* DHONRAJ GOPE 3 Pat. L. T. 291 : (1922) P. 371 : 68 I. C. 557 : 23 Cr. L. J. 125.

—Ss 145 and 146—Possession proceedings—Finding as to possession—Absence of—High Court—Interference in revision

Where the magistrate in proceedings under S. 145 Cr. P. Code did not even attempt to deal with the question of possession and gave no finding thereon but declared the possession to be with the party whom he considered to be lawfully entitled, his order is an obvious infringement of S. 145 Cr. P. Code and the High Court could set it aside in revision 29 M. 561 ; 17 Bom. L. R. 382 ; 18 C. W. N. 700, 36 M. 275 Ref. (*Venkatasubba Rao, J.*) SINNNAN SHUKULATHI ROWTHEN *v*, GULAM MOIDEEN ROWTHER,

16 L. W. 338 : (1922) M. W. N. 689.

—S. 145—Proceedings under—Duty of Magistrate to finish enquiry.

Once a Magistrate initiates proceedings under S. 145 Cr. P. Code and passes a preliminary order under the section it is his duty to complete the enquiry after taking the evidence offered by the parties ? I. W. 1208 Ref. (*Ramesam J.*) VIRAPPA CHETTIAR *v* KATHAYEE AMMAL

16 L. W. 592.

—Ss. 145 and 439—Proceedings under Revisional power of High Court—Jurisdiction—Material irregularity—Evidence of possession not considered—Effect of—Government of India Act, S. 107,

Where there is initial want of jurisdiction proceedings, though they may purport to be under S. 145 Cr. P. Code are not really proceedings under it and the High Court can interfere under S. 439 Cr. P. Code but if the proceedings were properly started all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Government of India Act, 36 M. 275, 286, 41 A 302 ; 37 M. L. J. 589, 27 M. L. J. 169 ; 17 C. W. N. 205, 40 C. 982 ; 32 C. 249 ; 2 L. W. 107, 3. L. W. 164 ; 12 L. W. 939 ; 33 M. L. J. 73 Ref.

Pattas and kist receipts are evidence not merely of legal right but of possession also. Where the Magistrate comes to a perverse conclusion on the question of possession after getting rid of the oral and documentary evidence in the case the High Court can interfere in revision. (*Ramesam J.*) THYLAYEE AMMAL *v* SRIRANGAROYA GOUNDAN. 43 M. L. J. 624 : 31 M. L. T. 202 (H. C.) 16 L. W. 497 : (1922) M. W. N. 629.

—S. 145—Proceedings not drawn up—Order of attachment and settlement. See (1921) DIG. COL. 412. JAMUNA PRASAD SINGH *v* MOHAN KOERI. 64 I. C. 848 : 23 Cr. L. J. 64.

—Ss 145 and 148—Proceedings under—Improper initiation of—Suit for damages—Costs.

## CRIM. PROCEDURE CODE (1898), s. 145.

Where proceedings are initiated under S. 145 of the Cr. P. Code by a party who was eventually unsuccessful it is not open to the successful party to sue for damages. The damages in such a case are remote and are sufficiently compensated by any order for costs that might be made in the proceedings. (*Mears, C. J. and Banerji, J.*) *RAM DAS v. MAHOMED FAQIR.*

20 A. L. J. 205 : 4 U. P. L. R. (A) 20  
(1922) All. 143 (2) : 65 I. C. 513.

## —S. 145—Renewal of proceedings—if allowed

Proceedings under S. 145 Cr. P. Code cannot be renewed after the dispute has been settled and an order has been made that the case be struck off under such circumstance, a new proceeding which is based merely on the materials on which the prior proceeding was struck off would not be justified. (*Shadi Lal, C. J.*) *GHULAM MUHAMMAD v. THE CROWN.*

3 Lah. 401.

—S. 145—Scope of—contrasted with that of S. 144. See CR PRO CODE Ss. 144 AND 145.

(1922) Pat 241.

—Ss. 145 and 107—Scope of—Dispute about land—Breach of the peace—Apprehension of—Jurisdiction of Magistrate to take action under S. 107, Cr. P.C. See CR, P. CODE Ss. 107 AND 145

65 I. C. 555.

—S. 145 (1)—Breach of the peace—Likelihood of—Police report more than three months old. See (1921) DIG. COL. 413 *CHHEDI LAL MARWARI v. MAHABIR PRASAD SUKUL*

64 I. C. 507 : 23 Cr. L. J. 27.

—Ss. 145 (1) and (4)—Preliminary order—Cancellation of—Dropping of proceedings—Revision.

A magistrate has jurisdiction to cancel an order passed under S. 145 (1) Cr. P. Code, and to stay proceedings if he becomes satisfied, whatever the source of information may be, that the state of things does not exist which alone would give jurisdiction to proceed with the enquiry. The High Court could not interfere in such cases as the magistrate has not acted without jurisdiction 30 C. 112 foll. (*Scott Smith, J.*) *SANTOKH SINGH v. RAM SINGH.*

2 Lah. 364 :  
66 I. C. 516 : 23 Cr. L. J. 292.

—S. 145 (3)—No service of notice—Failure to draw up proceedings—No evidence recorded—Whether affects the jurisdiction of the Magistrate—Irregularity.

In a proceeding purporting to be under S. 145 Cr. P. C. notice was not served upon the parties or their pleaders, nor was it served upon the locality, as is required by S. 145, no written statement was filed by parties nor any evidence oral or documentary, was adduced. Held, that the non-compliance of the aforesaid requirements constituted a grave irregularity and when it has caused a failure of justice or a prejudice to any party, the order under S. 145 is vitiated and the jurisdiction of the Magistrate is affected and the High Court has jurisdiction to set aside the order. 4 P. L. W. 183 followed (*Jwala Prasad, J.*) *BASAWAN PANDEY v. TILAK GOPE.* (1922) P. 77.

## CRIM. PROCEDURE CODE (1898), s. 146.

—S. 145 (4)—Attachment of—Subject of dispute—House and moveables

Under S. 145 Cr. P. Code a Magistrate has no jurisdiction to attach anything but land and its rents and profits. Consequently an order for the attachment of a house and moveables is *ultra vires*. (*Stuart, J.*) *GAJRAJ SINGH v. EMPEROR.*

L. R. 3 A. 189 (Cr.) : 20 A. L. J. 906.

—S. 145 (4)—Inquiry—Evidence of title—Jurisdiction. See (1921) DIG. COL. 414. *ROMESH CHANDRA SIKKAR v. MOHIN CHANDRA GUHA DEB BARUA.*

35 C. L. J. 156.

—S. 145 (4)—Possession case—Land attached—Dropping of proceedings—Declaring party to be in possession without evidence.

Where a magistrate attached the lands which had been the subject of dispute under S. 145 (4) he cannot declare one of the parties to be in possession merely because the other party did not choose to adduce any evidence. Once a magistrate drops the proceedings under S. 145 he ought not to re-open them and even if he has jurisdiction to go on with the case without a fresh proceeding, he ought to put the parties on the same footing. (*Walmsley and Subhawardy, JJ.*) *SAMAD ALI v. ABDUL MAJID.*

65 I. C. 351 : 23 Cr. L. J. 195.

—S. 145 (4)—Possession on date of preliminary order not found—Possession found on a date prior thereto—Presumption of continuance of possession—Order confirming possession. See (1921) DIG. COL. 415 *MAHOMED HUSSAIN SAHIB v. PACHAIAPPA CHETTY*

42 M. L. J. 147 :  
(1922) Mad. 356 : 65 I. C. 444 : 23 Cr. L. J. 92.

—S. 145 (4)—Refusal to issue summons—If vitiates proceedings.

It is not obligatory on a magistrate to assist the parties to a proceeding under S. 145 Cr. P. Code to produce their witness and they cannot claim as a matter of right that process should be issued by the court. 32 Cal. 1096; 38 Cal. 24 foll.

The refusal to issue such summons does not mean a denial of a fair trial (*Ross, J.*) *ARJUN MAHTON v. JAGGERNATH SINGH.*

3 Pat. L. T. 433 : (1922) P. 226 : 66 I. C. 419 :  
23 Cr. L. J. 275.

—Ss. 146 and 145—Attachment of property—Duty of magistrate to hold an inquiry.

It is the duty of a Magistrate before attaching property under S. 146 Cr. P. Code, to make some inquiry in order to ascertain, if possible, who was in possession. Where no inquiry is at all made the order of attachment cannot stand. (*Ross, J.*) *PARSURAM RAI v. SHIVAJATAN UPADHAYA.*

3 Pat. L. T. 434 : (1922) P. 544 :  
66 I. C. 421 : 23 Cr. L. J. 277.

—S. 146—Dispute about immovable property—Attachment—Effect of—Release of property in favour of a particular party—Order *ultra vires*.

Where a Deputy Magistrate passed an order attaching certain property in proceedings under S. 145, Cr. P. Code, it is not open to him or to the District Magistrate to review that order or to hand over possession of the property to one of

## CRIM. PROCEDURE CODE (1898), S. 146.

the contesting parties on failure of the other to institute a suit for possession. The proper remedy of the aggrieved party was to have applied to the High Court in revision. (*Adamu, J.*)  
 RAMKUMAR LAL v. THAKUR OJHA.

4 U P. L. R. (Pat.) 52 : (1922) Pat 224.  
 3 Pat. L. T. 648 : (1922) P. 554 :  
 68 I. C. 402 : 23 Cr. L. J. 562

—S. 146 (1)—*Witnesses present not examined—Effect*

An order passed under S. 146 (1) Cr. P. Code, without examining any witnesses although a number of them were present in court is invalid. (*Walmsley and Suhrawardy, JJ.*) SITA NATH BHAGAT v. RAMKISHORE MONDAL

35 C. L. J. 291 : (1922) Cal. 280.  
 69 I. C. 272 : 23 Cr. L. J. 688

—S. 147—Easement—Dispute as to—Procedure to follow. See CR. P. CODE SS. 145 AND 147.  
 64 I. C. 288.

—S. 147—Local inspection by magistrate—Decision based on this as well as other evidence—Legality of—Declaration as to limited right of way if may be granted—Finding of possession in proceeding under S. 147—Propriety of. See (1921) DIG. COL. 417 MAHOMED MUSA v. SHYAM SUNDAR KOERI.  
 64 I. C. 131 : 22 Cr. L. J. 739.

—S. 147—Magistrate's power.

Where the contention on behalf of the petitioners is that the order in favour of the opposite party in respect of a right to fish in water lying over the occupancy holdings of the petitioners is without jurisdiction inasmuch as an order can only be made under S. 147 if it appears to the Magistrate that the right to the use of land or water exists, but the Magistrate himself made a finding of fact to that effect himself, relying on the written statement, wherein there is an allegation that the right is the sole right of one of the parties, who have been exercising and enjoying it ever since the grant of the mokarari right to them by the Bettiah Raj :—*Held*, although this is not an explicit pleading of an acquisition of the right by adverse possession it is sufficient to let in the evidence on which that finding has been arrived at. (*Ross, J.*) BANDH RAI v. NORMAN.

(1922) P. 214.

—S. 148—Costs—Assessment of—Scale of costs.

Where a magistrate in proceedings under S. 145 Cr. P. Code awarded a sum of Rs. 100 as costs without any inquiry into the amount of the pleader's fees and witnesses' expenses, the order will be set aside. The magistrate could not arbitrarily decide what the costs should be. 1 Pat. L. T. 369 ; 14 C. W. N. 73 Ref. (*Adamu, J.*) HIRA MAHTON v. RAJKUMAR MAHTON.

3 Pat. L. T. 484 : (1922) P. 564 : 68 I. C. 44 :  
 23 Cr. L. J. 508.

—S. 148—Local inspection—Scope and object.

The object of local inspection is to understand and appreciate the topography of the land in dispute in order to aid the Magistrate in appreciating the evidence offered in court ; but the local inspection cannot take the place of legal evidence

## CRIM. PROCEDURE CODE (1898), S. 164.

much less the result thereof can be used as a basis for the decision. 61 I. C. 712 followed. (*Jwala Prasad J.*) MT. RAM RUTON KUAR v. TARAKH NATH BHATTACHARJI. (1922) P. 249

—S. 148—Order for costs—Order made without notice to parties—Jurisdiction.

An order for costs passed some time after the termination of an enquiry under S. 145, Cr. P. Code without notice to the petitioner is without jurisdiction, 29 Mad. 373 Ref. (*Ayling, J.*) PALANIANDI SHERVAL v. SAMMANDI AMMAL.

16 L. W. 613

—S. 148—Local enquiry—Power of magistrate to depose pleader Commissioner to make a local enquiry—Admissibility of report in evidence.

S. 148, which says that a local inquiry can be made by a subordinate magistrate only, deals with delegation of judicial functions, and does not apply to the case of making a survey of the disputed land or preparing a map.

Under S. 148, the report of the magistrate is evidence without his being called to prove it unlike as in other cases where the commissioner has to be examined to prove the report. (*Adamu and Ross, JJ.*) CHULAI MAHTO v. SURENDRANATH CHATTERJEE.

1 Pat. 75 : (1922) P. 224. 3 Pat. L. T. 17 :  
 65 I. C. 616 : 23 Cr. L. J. 152

—S. 148 (3) and 386—Order for costs—Execution of—Distress warrant—Discretion of magistrate.

The wording of S. 148 (3) Cr. P. Code does not give the magistrate a discretion to refuse to recover the costs. It merely points out the way in which those costs are to be recovered and the reference is merely to S. 386 Cr. P. Code. The use of the words "may in his discretion" in S. 386 cannot be used for the purpose of interpreting the words "may be recovered" in S. 148. The discretion in S. 386 Cr. P. Code only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine the offender shall be imprisoned. (*Adamu, J.*) HARENDRA KRISHNA BAGCHI v. BALKUMAR KUMAR.

3 Pat. L. T. 762.

—S. 150—Irregularity—Misstating of evidence—Effect.

Where the Magistrate's order was attacked on the ground that the proceedings were incorrect with respect to the names of the parties and the subject matter and the receipts relied upon by the Magistrate related only to a few of the claimants and could not therefore be evidence as regards possession of the large body of the members who claimed specific and separate lands in dispute and who had no community of interest and lastly on the ground that there was a misstatement of evidence. *Held* : on the facts proved, the Magistrate's order must be vacated. (*Jwala Prasad J.*) MT. RAM RUTON RUAR v. TARAKH NATH BHATTACHARJI. (1922) P. 249.

—Ss. 164 and 533—Confession—Record by magistrate—Narrative form—Irregularity—Cure of defect.

Where a magistrate who recorded a confession was called and he swore that he had all the police

## CRIM. PROCEDURE CODE (1898), S. 164.

removed from the court room and also had the handcuffs removed from the accused before recording the confession and the Magistrate also asked the accused whether he was tutored by anybody and after being satisfied that the accused was not tutored by anybody recorded his confession. Held that any irregularity in the record of the confession was cured under S 533 of the Cr. P. Code and that the record of the confession in English and in a narrative form did not render it inadmissible. (*Stuart and Ryves, JJ*) DEO DATT v. EMPEROR, 20 A. L. J. 915, L. R. 3 A. 191 (Cr.).

—Ss. 164, 288, 366 and 533 — Confession of accused to magistrate not holding enquiry on trial but merely watching the progress of investigation by police—No written record—Oral evidence of magistrate. See (1921) DIG. COL. 419. TANGEDUPALLE PEDDA OBIGADU *In re* 45 Mad. 230 42 M. L. J. 37 : 30 M. L. T. 107 (H. C.) (1922) Mad. 40 : 69 I. C. 284 : 23 Cr. L. J. 680.

—Ss. 164, 286, 342 — Confession — Sessions Court—Procedure

Where at the very beginning of a sessions trial the judge before proceeding to take evidence, takes up the statements recorded under S. 164, Cr. P. C. and examines and almost cross-examines the accused on such confession, he contravenes the provisions of S. 286. Although under S. 342 the Court has been given power to examine the accused at any stage of the trial, the provision must not be regarded as in any way superseding the clear directions in S. 286.

The proper time for taking into consideration such confession is after the court is in possession of the entire prosecution evidence. When the confession is recanted and a plea of not guilty is entered the court has to enquire very carefully into the conduct of the police investigation.

As regards the confessions recorded under S. 164 the court has to ascertain if they were made and were true. Explanations might be asked for and it would be an error to confront the accused at once with the confession and demand simply if they had been made. (*Piggott and Walsh, JJ.*) MR. SUKHIA v. KING EMPEROR.

L. R. 3 A. 101 (Cr.).

—S. 164—Confession not properly recorded —Effect—Admissibility

A confession not properly recorded in accordance with the provisions of S. 164 Cr. P. Code is not admissible. 39 I. C. 991 ; 40 I. C. 721 Rel (*Wazir Hasan A. J. C.*) GAJODAR v. EMPEROR 90 L. J. 500.

—Ss. 164 and 364—Confessional statement—Informality of procedure—Recording of evidence on incomplete chalan—Pointing out dead body—Evidentiary value of.

The confession of an accused should not be rejected on the ground of mere informalities of procedure.

If an incomplete chalan is sent up and the evidence available is recorded by a magistrate, statement made is not one under S. 164 but under S. 364.

## CRIM. PROCEDURE CODE (1898), S. 174.

The mere pointing out of the dead body would not by itself be sufficient evidence for sustaining a conviction for murder, but the fact that the accused has not explained how he came by his knowledge of the place where the body lay is a material circumstance to be taken into consideration (*Chevis, A. C. J. and Le Rossignol, J.*) FEMI KHAN v. EMPEROR. 4 Lah. L. J. 225 : (1922) Lah. 189 : 68 I. C. 841 : 23 Cr. L. J. 617.

—S. 164 — Statement by accused in custody other than confession not recorded by Magistrate—Oral evidence of such Magistrate if admissible. See (1921) DIG. COL. 420, LEGAL REMEMBRANCE v. LALIT MOHAN SINGH ROY. 49 Cal. 167 : (1922) Cal. 342.

—Ss. 164 cl. (3) and 533 — Confession —Record by Magistrate—No enquiry as to whether it was voluntary—Illegality.

Where a Magistrate recorded a confession made to him in the course of a police investigation without questioning the person making it as to whether it was made voluntarily the defect is one of substance and is not cured by S. 533, of the Cr. P. Code. The confession is therefore inadmissible in evidence. 9 M. 224, 17 C. 862 2 C. W. N. 702 foll. 52 P. R. 1887 dist. (*Shadi Lal, C. J. and Martineau, J.*) FARID v. EMPEROR. 2 Lah. 325 : 65 I. C. 613 : 23 Cr. L. J. 149 : 4 U. P. L. R. (L.) 33 : (1922) Lah. 237.

—Ss. 164 (3) and 342—Police diaries, user of—Legality of—Irregularity — Revision. See (1921) DIG. COL. 420. UMAR DIN v. EMPEROR. 67 I. C. 340 : 23 Cr. L. J. 388.

—Ss. 169 and 514 — Surety for appearance of accused on a particular date—Subsequent non-appearance—Liability of surety.

The liability of a surety is strictly conditioned by the terms of his bond and if he binds himself to produce the accused on a particular date and does so his liability is discharged. He cannot be made liable for the non-appearance of the accused on any subsequent date. (*Saunders, J. C.*) NGA PO TIN v. EMPEROR. (1922) U. B. 8 : 65 I. C. 420 : 23 Cr. L. J. 68.

—S. 172 (2)—Police diaries—User of, as evidence—Criminal case.

S. 172 (2), Cr. P. Code, authorises a criminal court to send for the police diaries of a case under inquiry or trial in such court, and to use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Where the Sessions Court uses the diaries as evidence, it is an improper use of them and the conviction cannot stand. (*Scott Smith and Abdul Qadir, JJ.*) SUNDAR SINGH v. EMPEROR. 66 I. C. 187 : 23 Cr. L. J. 251.

—Ss. 174 and 175 — Enquiry — Volunteering information—False statement — Perjury.

Where in an enquiry under S. 174 of the Cr. P. Code a person voluntarily comes forward without

## CRIM. PROCEDURE CODE (1898), S. 179.

being summoned and gives information, he is not bound to answer truly questions put to him under S. 175. If he makes false statements, they cannot form the basis of a charge of perjury. (*Campbell J.*) MAHOMED HAYAT v. EMPEROR.

(1922) Lah. 133 : 65 I. C. 434 : 23 Cr. L. J. 82.

## —S. 179—Cheating—Offence where triable.

In cases of cheating, there must be an intention to cause wrongful loss or wrongful gain but it is not essential that loss should be caused. It is the court within whose jurisdiction the cheating was committed and not where loss ensued that should determine the forum of trial. Case of criminal misappropriation distinguished. (*Campbell, J.*) RAGHIB SARAN v. KURAKSHETAR MOTOR SERVICE COY. 67 I. C. 623 : 23 Cr. L. J. 447.

## —S. 179—Jurisdiction—Criminal breach of trust—"Consequence" which has ensued—Meaning of.

The complainant sent cotton from Ahmednagar to Bombay to the accused for sale as his commission agent. The accused sold the cotton at Bombay and failed to remit the sale proceeds to Ahmednagar. On a complaint having been preferred against the accused for the offence of criminal breach of trust, punishable under S. 409 of the Indian Penal Code, in the Magistrate's Court at Ahmednagar, an objection was raised that the Ahmednagar Court had no jurisdiction to hear the case.

*Held*, overruling the objection, that the Ahmednagar Court had jurisdiction to try the case under S. 179 of the Criminal Procedure Code, because the complainant was entitled to get the proceeds of the cotton in Ahmednagar, and as the proceeds were not so sent, loss was incurred at Ahmednagar.

The word "consequence" in S. 179 of the Criminal Procedure Code bears its ordinary grammatical meaning; its meaning is not restricted to a consequence which is a necessary ingredient of the offence. 19 All. 111, 35 All. 29 foll.; 44 Cal. 912 : 38 Mad 639, not foll. (*Macleod, C. J., and Kanga, J.*) EMPEROR v. RAMRATTAN CHUNILAL. 46 Bom. 641 :

24 Bom. L. R. 46 : (1922) Bom. 39 : 65 I. C. 637 : 23 Cr. L. J. 173

## —S. 179—Local jurisdiction—False verification—Verification signed at one place but presented in another—Complaint.

A petition under S. 21 of the Income Tax Act 1918 was verified at a place in the Tanjore District but presented in Ramnad District. On a complaint of an offence under S. 177, I. P. C. read with S. 40 Income Tax Act being filed in Ramnad. *Held* that the alleged offence was completed in the Tanjore District and that the Ramnad Magistrate had no jurisdiction to entertain the complaint. (*Oldfield and Ramesam, JJ.*) MOHIDEEN PAKKIRI MARAKKAYAR. *In re*.

43 M. L. J. 475 : 31 M. L. T. 282 : (H.C.) 16 L. W. 335. : (1922) M. W. N. 690 : 68 I. C. 843 : 23 Cr. L. J. 619.

## CRIM. PROCEDURE CODE (1898), S. 190.

## —S. 180—Jurisdiction—Non-British subject—Receipt of stolen property

A non-British subject retaining stolen property in a native state is not amenable to British Courts. 9 A. 523 ; 16 P. R. 1880 Cr. 22 P. R. 1888. Cr. foll. (*Wilberforce, JJ.*) MUHAMMAD HUSSAIN v. EMPEROR. 2 Lah. L. J. 348 : 23 Cr. L. J. 560 : 68 I. C. 160.

## —S. 181 Sub S. (2)—Criminal breach of trust—Moneys received at one place—Accountability in another—Jurisdiction.

Where a firm carrying on business in Calcutta employed A as agent at Singapore, and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which he was to render accounts in Calcutta : *Held*—that the Court in Calcutta had jurisdiction to take cognizance of the complaint. 26 C. 746 foll. 44 Cal. 912 dist. (*Teunon and Ghose, JJ.*) ABDUL LATIF YUSUFF v. ABU MAHOMED KASSIM. 26 C. W. N. 175 : (1922) Cal. 46.

## —S. 182—Jurisdiction—Place of trial—Continuing offence

It is incorrect to regard S. 182 Cr. P. C. as applicable only to cases where some place of trial cannot be laid down with absolute certainty. For example, the section applies to cases where the offence is a continuing one, so that if A steals a buffalo in district W and takes it through district X into district Y he may be tried for theft in any of the three districts though it is beyond doubt that district W would be a proper place of trial (*Drake Brockman, J. C.*) SHAMJI v. EMPEROR.

5 N. L. J. 16 : (1922) Nag. 40 : 65 I. C. 994 : 23 Cr. L. J. 210.

## —Ss. 190 and 351—Addition of new accused after initiation of proceedings,

Though a Magistrate has taken cognizance of an offence under S. 190 Cr. P. Code he can proceed under S. 351 against any other persons who may appear from the evidence to be concerned in that offence. S. 351, Cr. P. Code, is independent of S. 190 and is not limited by the latter section. But the magistrate initiating proceedings in regard to additional accused must be held to have acted under the same clause of S. 190 as that under which the original proceedings were initiated 1 C. W. N. 105 not foll. 26 C. 785 ; 3 C. W. N. 367 ; 41 C. 1013 approved. (*Robinson, C. J. Maung Kin and Macgregor, JJ.*) NGA CHAN THA v. EMPEROR. 1 Bur. L. J. 183.

## —S. 190—Cognizance of offence—Materials for—Charge sheet.

There is no provision of law which requires that the magistrate before taking cognizance should know exactly what each of the witnesses named in the charge sheet will prove. The charge sheet alleges that a certain offence will be established by the evidence of certain witnesses and, this is sufficient to enable the magistrate

## CRIM. PROCEDURE CODE (1898), S. 190.

to take cognisance. (*Coutts and Ross, JJ*) GRANT v. EMPEROR. (1922) P 294 : 65 I. C. 421 : 23 Cr. L. J. 69.

## —S. 190 (a)—Complaint—Order by District Judge to subordinate Magistrate to try accused.

On a petition being presented to a District Judge making certain allegations as to the commission of the offence of robbery he ordered the persons complained against to be taken in custody to a magistrate "on charges of robbery and abetment of robbery." Held that the order of the District Judge was *ultra vires* and there was nothing in the Cr. P. Code to justify his action. The order of the District Judge could not be construed as a complaint under S. 190 (a) Cr. P. Code, as it was not a mere allegation made to a magistrate with a view to his taking action but left no option to the magistrate except to proceed with the trial. (*Kincaid, J. C. and Raymond, A. J. C.*) POHUMAL v. EMPEROR 15 S. L. R. 119 : (1922) S. 9 : 65 I. C. 481 : 23 Cr. L. J. 97

—Ss. 190 (1) (a) and (b) 202 and 476—Police report—No action by complainant—Complainant asked to prove his case by Magistrate—Prosecution under S. 211, I. P. C.—Judicial proceedings See (1921) DIG. COL. 422. TILOKI MAHTON v. EMPEROR. 64 I. C. 47 : 22 Cr. L. J. 735.

## —S. 192—Transfer of case—Power to re-transfer.

A Magistrate who transfers a case for trial under S. 192 of the Cr. P. Code has no power to transfer it again. (*Stuart, J.*) GANGA SAHAI v. JASWANT. 65 I. C. 441 : 23 Cr. L. J. 89

## —Ss. 192 and 145 — Transfer of proceedings under.

It is open to a Sub-Divisional Magistrate to transfer proceedings instituted by him under S. 145 of the Cr. P. Code to another Magistrate. The words "any case" in S. 192 of the Cr. P. Code cover an enquiry under S. 145 (*Ryves, J.*) MAHENDRA SINGH v. MR. RAJPATTI. 20 A. L. J. 215 : (1922) All. 99 : 65 I. C. 861 : 23 Cr. L. J. 205.

## —S. 195—Application for sanction—Death of applicant—Legal representative—Right to continue application.

Where an applicant for sanction dies during the pendency of the application, his legal representatives cannot continue the application. They may file a fresh petition if necessary. (*Oldfield and Devadoss, JJ.*) GHULAM MOHIDEEN QURAISHI SAHIB v. AHAMADULLA BEGAM SAHIBA 16 L. W. 881.

## —S. 195—Dishonestly making false claim—Penal Code, S. 209.—Sanction to prosecute—Plaintiff prevented from placing his case before the court—Grant of sanction.

Sanction to prosecute for bringing a false and fraudulent suit should not be granted when the plaintiff has been thwarted in his attempt to establish the correctness of his claim by the unwarranted activities of the Police acting as the agent of the defendant. (*Shadi Lal, C. J.*) KHAIIRATI RAM v. EMPEROR. 3 Lah. L. J. 537.

## CRIM. PROCEDURE CODE (1898), S. 195.

## —S. 195—Grant of sanction—Discretion of court—Duty of trying Magistrate.

The fact that a court sanctions a prosecution is no intimation to the Magistrate that the court thinks that there is a case to go to a jury or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. This view is not inconsistent with the duty of the court to refuse sanction, if it is clearly of opinion, on the evidence before it, that no reasonable jury should convict.

*Per Oldfield, J.* : A court granting sanction must put on record sufficient materials to demonstrate that its exercise of discretion has been judicial.

*Per Coutts Trotter, J.* : A court granting sanction does no more than say that on the materials before it, it is not apparent that a prosecution would be against public interests or a mere indulgence of private spite. Where the court is of opinion that the public interest would not be served by such a prosecution it is not debarred from refusing sanction even if there is a *prima facie* case. (*Schwabe, C. J. Oldfield and Coutts Trotter, JJ*) MUNISAMI MUDALIAR v. RAJARATNAM PILLAI. 16 L. W. 505 (F. B.)

## —Ss. 195 and 439—Order granting or revoking sanction—Revision.

It is open to the High Court to consider in revision the propriety of an order granting or revoking sanction to prosecute. 39 M. 750, 5 Pat. L. J. 23, 42 A. 649, 24 O. C. 165 Ref. (*Kanhaya Lal, J. C.*) BRIJ KUMAR v. MANNALAL MISRA. 25 O. C. 158 : (1922) Oudh 18.

## —S. 195—Revenue Court—Deputy Tahsildar holding enquiry into patta transfer—Production of document—Sanction—Penal Code, S. 471.

Where the applicants for a transfer of patta produce as genuine a forged will before the Deputy Tahsildar in the course of the enquiry held by him, they can be prosecuted under S. 471, I. P. C. only with the sanction of the Deputy Tahsildar. 12 Bom. L. R. 383 Rel. (*Sir Walter Schwabe, C. J. and Krishnan, J.*) MATTAM CHINNA VIRAYYA *In re*. 16 L. W. 534.

## —S. 195 and 476—Revision.

No revision can lie against the order directing a prosecution for an offence under S. 195, I. P. C. 40 A. 24 ; 15 A. L. J. 817 ; 48 Bom. 300 at P. 310 ; 20 Bom. L. R. 928, foll. (*Daniels J. C.*) QAZI EJAZ ALI KHAN v. EMPEROR (1922) Oudh 220.

## —S. 195—Sanction—Penal Code, S. 193—Offence in relation to proceedings—False evidence—Alleged abetment by pleader.

Where the petitioner, the pleader of certain accused persons charged with dacoity, was prosecuted for an offence under S. 193 I. P. C. in that he suborned three of the prosecution witnesses in the dacoity case and the prosecution was launched without the sanction of the criminal court and before the trial of the dacoity case was over, Held, that the want of sanction was fatal to the prosecution of the petitioner and that the starting of the prosecution against the petitioner even before the dacoity case was heard was inadvisable.



## CRIM. PROCEDURE CODE (1898), S. 195

*Per Crump J.* The words "in relation to" in S. 195 (b) Cr. P. Code are very general and are wide enough to cover a proceeding in contemplation before a criminal court, though it may not have begun when the offence was committed (*Shah A. C. J. and Crump, J.*) VASUJEO RAM-CHANDRA JOSHI *In re* 24 Bom L R 1153

—S. 195—Sanction to prosecute—If lapses on death.

A sanction for prosecution given by a court under section 195 Cr. P. C 1898 is not a personal privilege granted to a petitioner but a decision that the case is one suitable for magisterial investigation and therefore a sanction for prosecution does not lapse on the death of the persons who obtained it. Any man can avail of such sanction on the death of the person who obtained it and can prosecute the person against whom it was obtained. (*Abdul Quadir, J.*) GOPAL SINGH v. CROWN. (1922) Lah 221.

—S. 195—Sanction to prosecute—Offences under Ss. 193, 204, 471 I. P. C.—Decree of Civil Court not set aside—Form of sanction—Examination on commission

The existence of a decree unreversed on appeal is no bar to a prosecution on charges under Ss. 204, 193 and 47, I. P. C. Where the order granting the sanction embodies by reference the application made and in the several paragraphs of the said application all the essential particulars are to be found, there is a substantial compliance with the requirements of the law as to the form of the sanction. For the purposes of an enquiry made by a civil court under the provisions of S. 195, Cr. P. Code, the examination of certain witnesses living at a considerable distance on commission, is permissible and sufficient (*Teunon and Suhrawardy, JJ.*) DULLOO SINGH v. THE DEPUTY INSPECTOR GENERAL OF POLICE C. I. D., BENGAL. 49 Cal. 551 : (1922) Cal. 412 : 65 I. C. 570 : 23 Cr. L. J. 138

—Ss. 195 and 197—Sanction to prosecute—Notice to accused—Necessity for.

Before granting sanction to prosecute under S. 195 Cr. P. Code, the court is not bound to issue notice to the accused, (*Walsh, J.*) ANGNOO SINGH v. EMPEROR.

20 A. L. J. 831 : L. R. 3 A. 149. (Cr

—S. 195—Sanction proceedings—Costs—Civil Court if may order. See (1921) DIG COL. 425, BHOLA NATH KHANRA v. PURNA CHANDRA BANERJEE. 67 I. C. 730 : 23 Cr. L. J. 458.

—Ss 195 and 476—Sanction to prosecute—Nature of proceedings—Powers of appellate court.

Proceedings under S. 195, Cr. P. Code are judicial proceedings, and it is competent to an appellate court hearing an appeal therefrom to take proceedings under S. 476 Cr. P. Code. 10 A. L. J. 174 foll. (*Gokul Prasad, J.*) BIKRAMA PRASAD TEWARI v. EMPEROR.

L. R. 3 A. 145 (Cr.) : (1922) A. 292.

—S. 195—Scope of—Duty of court.

An application for sanction under S. 195 is in most cases a reminder to the court of a very important duty it has omitted to perform under

## CRIM. PROCEDURE CODE (1898), S. 195.

S. 476. Though the section does not speak of an enquiry, such enquiry as may be necessary must be made before a final order is passed. The court ought not to rest satisfied with the evidence in the original trial or such as is procured by the applicant. The court must be astute to discover any evidence which may bear either way and use its best endeavour to see the person does not escape if he is guilty or is not unduly harassed if he is innocent. (*Halifax A. J. C.*) TULSIRMA v. TILOKCHAND. 23 Cr. L. J. 605 : 68 I. C. 829.

—S. 195 (1)—Perjury—Sanction for—Different views of evidence by final court and appellate court

Sanction for prosecution for perjury in respect of a piece of evidence should not generally be granted where the trial court and the appellate court have taken different views as to its credibility. (*Das, J.*) HIRALAL MAHTON v. LILA MAHTON. 3 Pat. L. T. 60 : 64 I. C. 276 : 22 Cr. L. J. 756

—S. 195 (1)—Sanction—Necessity—Complainant a public servant.

Sanction under S. 195 Cr. P. Code is not required when the complainant is a public servant. (*Miller C. J. and Ross, J.*) GOVERNMENT ADVOCATE OF BIHAR AND ORISSA v. GANGA PRASAD. 1 Pat. 423 : 3 Pat. L. T. 559 : (1922) P. 532.

—S. 195 (1) (4) (5). (6) and (7)—Sanction—Refusal by magistrate of second class—Refusal of sanction by magistrate specially authorised to hear appeals—Omission to specify particulars.

A Magistrate specially authorised to hear appeals under S. 407 (7) Cr. P. Code, is not a court to which an appeal ordinarily lies for purposes of S. 195 (7). 30 C. 394, 3 N. L. R. 50 foll.

A sanction under S. 195, Criminal Procedure Code, refused by a Magistrate of a second class cannot be granted under sub-section (6) by a Magistrate specially empowered to hear appeals under S. 407 (2) of the Code.

30 C. 394 : 3 N. L. R. 50 Foll

Where a Magistrate failed to specify the false statements on account of which he had granted sanction, or the court before which and the occasion on which the offence was committed, the order of sanction was bad. (*Wilberforce, J.*) MUSSAMMAT JIWANI v. EMPEROR.

2 Lah. L. J. 660 : 23 Cr. L. J. 572 : 68 I. C. 412.

—S. 195 (1) (a)—Superintendent of police—If subordinate to District Magistrate.

A District Superintendent of police is subordinate to the District Magistrate within S. 195 (1) (a) Cr. P. Code. Where a District Magistrate granted sanction to prosecute the accused for contempt of the lawful authority of a police officer the order is not of a court of justice and cannot be set aside in revision. (*Mears, C. J. and Pigott J.*) CHHOTY LAL v. CHHEDI LAL. L. R. 3 A. 176 (Cr.)

—S. 195 (1) (a) and (7)—Order under S. 145 Cr. P. Code—Disobedience to—Sanction to prosecute—Order passed by First Class Magistrate—Subsequently transferred—Power of District Magistrate.

## CRIM. PROCEDURE CODE (1898), S. 195.

Under S. 195 (1) (a), Cr. P. Code, if the public servant making the order is a court, in respect of that order, the court to which that court would be subordinate is the Court to which appeals would ordinarily lie. 42 M. 64 foll.

A magistrate of the first class passed an order under S. 145, Cr. P. Code, and was subsequently transferred and the order was disobeyed thereafter. The judicial charge of the Magistrate went to the City Magistrate. Held that sanction to prosecute for the disobedience could be given by the Sessions Court and not by the District Magistrate. (*Shah, A. C. J. and Crump, J.*) BADIUDDIN SARFUDDIN, *In re* 24 Bom. L. R. 810 : 68 I. C. 416 : 23 Cr. L. J. 576.

## S. 195 (1) (b)—False charge—Sanction for prosecution—Private grudge

The fact that the parties are on bad terms is not a reason for refusing sanction for the prosecution, as otherwise no sanction would be granted in any case. Where the Magistrate found after a consideration of the evidence that the charge of criminal breach of trust was false, there is no reason why the petitioner should not be allowed to prosecute his accuser for having brought a false charge. (*Martineau, J.*) HARI CHAND v. AYA RAM. 4 Lah. L. J. 321 : (1922) Lah. 402.

S. 195 (1) (B)—Sanction—Grant of, after lapse of time—Grounds for granting sanction for filing false written statement. See (1921) DIG. COL. 426 TRAILOKYA NATH BANERJI v. RADHARANJAM. 67 I. C. 204 : 23 Cr. L. J. 380.

## S. 195, (1) (b) — Perjury—Sanction to prosecute—Statements to be recorded

Sanction to prosecute should not be given unless the Court giving sanction has satisfied itself that there are very favourable chances of obtaining a conviction. In a case where sanction is given to prosecute for giving false evidence, the actual statements which are alleged to be false should be mentioned in the sanction. (*Macleod, C. J., and Shah, J.*) DANAPPA NARSAPPA *In re*. 24 Bom. L. R. 45 : (1922) Bom. 38 : 65 I. C. 640 : 23 Cr. L. J. 176.

## S. 195 (1) (b) and (6)—Sanction to prosecute—Applicant not a party—Appeal,

A person who is not a party to a suit cannot make an application for sanction in respect of an offence alleged to have been committed by the defendants under S. 193, I. P. C. And a person who was not a party to the previous proceedings in his private capacity has no right to appeal. 3 C. W. N. 3 : 37 Cal. 13 : 18 Mad. 484 Ref. (*Harrison, J.*) PRABH DIAL v. GURDIT SINGH. 4 Lah. L. J. 89 : (1922) Lah. 194 : 68 I. C. 46 : 23 Cr. L. J. 510.

## S. 195 (1) (c) and 7—Sanction to prosecute—Meaning of the words 'or of some other court to which such court is subordinate.'

Where the case has been tried in any Court other than that of a District and Sessions Judge or an Additional District and Sessions Judge to which the trial court is subordinate, the words "or of some other Court to which such Court is subordinate", in S. 195 (1) (c) read with sub 7 of the same section do not include the High Court

## CRIM. PROCEDURE CODE (1898), S. 195.

and in virtue of merely having heard the appeal the High Court is not empowered to grant sanction to prosecute.

34 I. C. 654 : 35 All. 90 : 31 I. C. 340 Ref. to. 41 Mad. 787 : 2 Lah. 57 foll. (*Martineau and Harrison, JJ.*) M. FAZAL ILAHI v. MOHAN LAL. (1922) Lah. 346.

## S. 195 (1) (c)—Sanction—Witness—Prosecution for producing document alleged to be a forgery.

It is open to a person to prosecute a witness under Ss. 469 and 471, I. P. C., without obtaining sanction under S. 195 (1) (c), Cr. P. Code, or even though a sanction so obtained has been revoked under S. 195 (6) (*Kennedy, J. C., and Madgaonkar, A. J. C.*) BASSARMAL AWATMAL v. EMPEROR. 15 S. L. R. 149 : 64 I. C. 511 : 23 Cr. L. J. 31.

## S. 195 (6)—Appellate Court—Power to take evidence.

The Court exercising its powers as an Appellate Court under S. 195 (6), Cr. P. Code has got ample powers to examine any number of witnesses or to take any evidence it thinks fit in order to satisfy itself whether it should or should not sanction, or direct the prosecution of any person. 21 C. W. N. 269 followed; 53 Ind. Cas. 826 (1919) dist. (*Sultan Ahmed, J.*) RAMDHARI AHIR v. EMPEROR. (1922) Pat. 29 : (1922) P. 52.

## S. 195 (6) and (7)—High Court—Original Side—Order of single judge for prosecution—Appeal—Costs.

An order of a single Judge of the High Court on the Original Side granting sanction to prosecute is open to appeal to a Bench of the High Court *Quare* : Whether the Court has power to order costs to be paid in a proceeding under S. 195 Cr. P. Code. (*Sir Walter Schwabe, C. J. Oldfield and Coutts Trotter, JJ.*) MUNISWAMI MUDALIAR v. RAJARATNAM PILLAI. 16 L. W. 505 (F. B.)

## S. 195 (6)—Order granting sanction—Appeal—Sanction when to be granted.

When there is inveterate enmity between the parties it is certainly not desirable nor in the interests of justice, that a power like a sanction should be placed in the hands of one of them. S. 195 (6) does not provide for interference by a third court but allows only one appeal. 22 I. C. 322 : 20 I. C. 213 : 30 I. C. 448 Rel. (*Lyle A. J. C.*) NAZIR HASAN v. MAHOMED YAMIM.

9 O. L. J. 282 : (1922) Oudh 225 : 68 I. C. 414 : 23 Cr. L. J. 574.

## S. 195 Sub-S (6)—Refusal of sanction by Asst. Collector—Dismissal of appeal by Commissioner—Second appeal to the Board of Revenue—Revision.

Where on an appeal against an order of the Asst. Collector declining to sanction the prosecution of a person under S. 467 I. P. C., the Commissioner without hearing the parties dismisses the appeal on the ground that he had no power to interfere, though the Commissioner's decision was wrong, it is not competent to the Board of Revenue to interfere with the order of the Commissioner as no appeal or revision lies to the Board against the order. (*Burn, J. M.*) RAJ RANI KUNWAR v. SHEO NARAIN LAL.

L. R. 3 A. 78 (Rev.)

## CRIM. PROCEDURE CODE (1898), S. 195.

—S. 195 (6)—Sanction—Refusal by first court and appellate court—Revision—Power of High Court—C. P. Code S. 115—Government of India Act.

Where the first court and the appellate court have both refused sanction, there is no provision for any further appeal or application to the High Court. Even if the High Court has power under S. 115, C. P. Code or S. 107 of the Government of India Act to interfere, it will not do so, where the courts below have refused sanction on a consideration of the entire evidence. 11 C. W. N. 195, 5 C. L. J. 222 Ref. 1, C. W. N. 1026 appr. (*Ghose and Cumming, JJ.*) SARAT CHANDRA MANDAL v. RAM-SASHI ROY.

26 C. W. N. 1016 :  
36 C. L. J. 265 : 69 I. C. 153

—S. 195 (6) and (7)—Sanction to prosecute—Grant of sanction by single Judge—Appeal to High Court.

An order of a single Judge of the High Court granting or refusing sanction under S. 195 Cr. P. Code is open to appeal to the High Court. Though generally speaking the Subordinate Court contemplated by S. 195 Cr. P. Code is a court different from the court to which the appeals ordinarily lie, yet for purposes of S. 195 a single Judge of the High Court is subordinate to the appellate Bench (*Shah, A. J. C. and Crump, J.*) ABDUL LATIF USMAN v. HAJI TAR MAHOMED.

24 Bom. L. R. 817 : 68 I. C. 33 23 Cr. L. J. 497.

—S. 195 (6) and (7)—Sanction to prosecute—Grant of, by single Judge of the High Court—Powers of revocation of division bench hearing appeals from the Original Side—Letters Patent cl. 15—Judgment.

A single Judge sitting on the Original Side of the High Court and giving sanction under S. 195 (1) Cr. P. Code for prosecution in respect of an alleged offence committed in relation to proceedings before him is subordinate to the Division Bench of the Appellate Side hearing appeals from the original side of the High Court in the sense of sub. S. (6) as explained by sub. S. (7) of S. 195 Cr. P. Code and the Division Bench has the power of revoking the sanction so granted.

*Per Chief Justice.* A single Judge sitting on the Original Side is subordinate to a Division Bench of the Appellate Side hearing appeals from the Original Side of the High Court within the meaning of S. 195 (6) Cr. P. Code.

*Per Courts Trotter, J. : Quaere* Whether a single Judge sitting on the Original Side of the High Court is subordinate to a Division Bench of the appellate side of that court hearing appeals from the Original Side in any other sense and for any other purpose. (*Schwabe C. J. Oldfield and Courts Trotter, JJ.*) MUNISAMY MUDALIAR v. RAJARATNAM PILLAI.

43 M. L. J. 375 :  
(1922) M. W. N. 594 : 31 M. L. T. 237. (H. C.) :  
16 L. W. 365 : (1922) Mad. 495 (F. B.)

—S. 195 (6) and (7)—Subordination of courts—Munsif—Small cause powers—If subordinate to District Judge.

Where a Munsif or Sub Judge exercises small cause powers only, he is subordinate to the District Judge for the purposes of S. 195, Cr. P. C.

## CRIM. PROCEDURE CODE (1898), S. 196.

4 Pat. L. J. 609 Ref. (*Broadway, J.*) BHAG SINGH v. EMPEROR 4 U. P. L. R. (Lah) 89 : (1922) Lah. 401 : 67 I. C. 832 : 23 Cr. L. J. 480.

—S. 195 (7)—Perjury—Sanction—Contradictory statements in different courts—Sanction to be given by which court.

Where an accused person is alleged to have made contradictory statements in the court of an Honorary Magistrate, second class and in the court of a first class magistrate, sanction for prosecution for perjury can only be given by the court to which both the aforesaid courts are subordinate and not by the sessions court. 30 P. R. 1901 ; 2 Lah. 57 Ref. (*Abdul Qadir, J.*) WARYAM SINGH v. EMPEROR

67 I. C. 817 : 23 Cr. L. J. 465 :  
(1922) Lah. 394 (2) : 3 Lah. L. J. 589.

—Ss. 196 and 197—Member of village panchayat—Complaint of offences under, Ss. 169 and 171 E—Sanction.

Where a member of a village panchayat was alleged to have bribed the 1st accused, for securing the vote of the latter in an election for the presidency of the Court and against whom a complaint under S. 161, Penal Code, was lodged and returned by the Magistrate for want of sanction from Government under S. 3 of Act XXXIX of 1920 :

*Held* (1) that a member of a village panchayat constituted by Madras Act II of 1920 is a Judge : (2) the general S. 161, Penal Code, is not repealed by Act XXXIX of 1920 : (3) that when either of two sections applies a complaint under one of them alone is not bad and (4) that sanction from proper authorities is essential to institute proceedings under S. 161 or 171-E, Penal Code. (*Oldfield and Krishnan, JJ.*) PONNUSWAMI THEVAR *In re.*

42 M. L. J. 139 15 L. W. 199 :  
30 M. L. T. 351 : (H. C.)  
(1922) M. W. N. 122 : 65 I. C. 612 :  
23 Cr. L. J. 148 : (1922) Mad. 62.

—S. 196—Offence under S. 121 or 121-A., I. P. C.—Sanction—Requisites of.

A sanction under S. 196, Cr. P. C., for the prosecution of the accused in the alternative for offences under S. 121 or under S. 121-A. of the Penal Code is not defective on the ground that it does not specify with sufficient clearness the section or the offence in respect of which it is given.

Observations of Jenkins, C. J. in 37 C. 467 as to the requisites of a proper sanction under S. 196 Cr. P. C., relied on. (*Oldfield and Krishnan, JJ.*) KUNHI KADIR. *In re.* 42 M. L. J. 108 : (1922) M. W. N. 71 : 30 M. L. T. 125 (H. C.) : 15 L. W. 311 : 65 I. C. 859 23 Cr. L. J. 203 : (1922) Mad. 126.

—S. 196—Sanction of local Govt.—Signature—Proof of.

Under S. 196, Cr. P. Code, the sanction of the Local Govt. is made essential and this sanction must be conveyed in an order signed by the Chief Secretary to the Government. An order signed by Deputy Secretary on behalf of the Chief Secretary is not legal and the proceedings initiated thereon must be quashed. 35 Cal. 141 Ref.

## CRIM PROCEDURE CODE (1898), S. 197

(*Walmsley and Suhrawardy JJ.*) MD OZIULLAH v. BENI MADHAB CHOWDHURY 26 C. W. N 878 : 36 C. L. J 180 : (1922) Cal. 298

—Ss. 197 and 195—*Practising pleader—Order of Dt. Judge under S. 197—Revision.*

Where a District Judge gives sanction under S. 197, Cr. P. C. to a practising vakil to prosecute a sub-judge for alleged offences under Ss. 500, 504 and 506, I. P. C. in connection with an incident which occurred while the sub judge was hearing a case in his court.

*Held*, that an application for revision to the High Court was not maintainable as the order complained of was an executive and not a judicial order. The distinction between Ss. 197 and 195 of the Code explained (*Martineau, J.*) ALI HUSAIN KHAN v. HARCHARAN DAS 2 Lah. 305 :

4 U. P. L. R. (Lah) 47 : 35 P. L. R. 1922 : (1922) Lah. 146 : 65 I. C. 545 : 23 Cr. L. J. 113.

—S. 197—*Sanction for prosecution—Forest ranger.*

A Forest ranger in the Central Provinces is not a public servant not removable from his office without the sanction of the Government of India or the local Government. Consequently no sanction under S. 197 of the Cr. P. Code is necessary before the court can take cognisance of an offence under S. 347 of the Penal Code. (*Kotval, A. J. C.*) KRIPA SINGH v. EMPEROR.

(1922) Nag. 121 : 67 I. C. 349 : 23 Cr. L. J. 397

—Sec. 197—*Sanction of Local Government—Delegation of authority.*

Where prosecutions under Ss. 384 and 161 I. P. C. were instituted against a Zilladar without the sanction of the Local Government but with the sanction of the Chief Engineer, although the Local Government had delegated the power of appointment, suspension and removal of Zilladars to the Chief Engineer. *Held*: as the accused was appointed at time when the powers of appointment, suspension and removal of Zilladar were vested in the Local Government alone, the cases could not proceed without the necessary sanction under S. 197 Cr. P. C. (*Abdul Raof J.*) THE CROWN v. LALA KHAN CHAND. (1922) Lah. 337.

—S. 198—*Complaint by official superior of person aggrieved.*

A complaint of an offence under S. 500 I. P. C. should be made by the person aggrieved but not by his official superior 26 M. 43 Ref. (*Simpson, A. J. C.*) GAYA BARHAI v. KING EMPEROR.

90 L. J. 342 : 4 U. P. L. R. (O. C.) 81 : 69 I. C. 81 : 23 Cr. L. J. 641.

—Ss. 199 and 345—*Abduction—Complaint by husband—Compounding of offence.*

Though it is competent to a person having the care of a woman on behalf of her husband to prefer a complaint under S. 498 I. P. C. such person cannot compound the offence and an acquittal based on such composition is illegal (*Broadway, J.*) MAHBUB ALI KHAN v. EMPEROR.

4 Lah. L. J. 488

—S. 199—*Complaint—Meaning—Complaint to police not enough*

The complaint referred in S. 199 Cr. P. C. must be to a Magistrate. A complaint to the

## CRIM PROCEDURE CODE (1898), S. 202.

Police is not sufficient under that section. (*Krishnan, J.*) ARMUGA MUDALIAR *In re*.

43 M. L. J. 564 : 31 M. L. T. 254 (H. C.) : 16 L. W. 494 : (1922) M. W. N. 801 : 68 I. C. 624 : 23 Cr. L. J. 592.

—S. 199—*Complaint by husband—Dissolution of marriage before complaint.*

The words in S. 199 Cr. P. Code "the husband of the woman" are simply intended to point to the particular person who has the right to start proceedings and a man does not cease to be "the husband of the woman" within S. 199 Cr. P. Code, merely because the marriage tie has been dissolved. The right to start proceedings is given to him simply because he is the person aggrieved. The dissolution of the marriage does not take away from the complainant the right to lodge a complaint. (*Chevis, J.*) DHANNA SINGH v. EMPEROR 67 I. C. 734 : 23 Cr. L. J. 462

—S. 199—*Minor husband—If can complain.*

Whereas in some cases the Code does not provide for representation of a minor. [see for instance S. 345 (iv)] there is no such provision in S. 199. There is nothing to prevent a husband under the age of 18 from lodging a complaint. Except where the husband is absent the father-in-law cannot lodge a complaint even though the husband be a minor. (*Chevis, J.*) WALIA v. THE CROWN. (1922) Lah. 168 : 68 I. C. 837 : 23 Cr. L. J. 613.

—Ss. 200 and 537—*Complaint—Omission of Magistrate to examine complainant—Irregularity.*

Where a Magistrate takes cognizance of an offence or complaint he is bound to examine the complainant under S. 200 and in an ordinary case, the omission to do so is a serious irregularity justifying interference in revision. 30 C. 923 foll. (*Ramesam, J.*) RAMASWAMI AYYANGAR *In re*.

43 M. L. J. 710 : 16 L. W. 220 : (1922) M. W. N. 681 : (1922) Mad. 443.

—S. 200—*Examination of complainant—Obligatory—Transfer of case for enquiry only—Illegal.*

The provisions of S. 200 Cr. P. Code, make it illegal for a magistrate to whom a complaint is presented to deal with it in any way without examining the complainant.

A transfer of a case to a subordinate magistrate merely for the purpose of an enquiry is not permissible. (*Kennedy J. C. and Kemp A. J. C.*) MULCHAND PAMANDAR v. KESOOMAL RAMCHAND. 15 S. L. R. 200 :

66 I. C. 179 : 23 Cr. L. J. 243.

—Ss. 202, 203 and 204—*Complaint—Preliminary enquiry—Police finding complaint to be false—Direction for trial.*

A Magistrate not being satisfied with a complaint sent it to the police for enquiry and report under S. 202 Cr. P. Code. The police stated that the report was false and that a civil suit between the parties was pending. *Held* that the magistrate was not thereafter justified in directing the submission of a charge sheet merely because he wanted to ascertain the truth of the

## CRIM. PROCEDURE CODE (1898), S 202.

complaint (*Jwala Prasad, J.*) RAMPABITAR SINGH v. KASIM ALI KHAN 67 I. C. 499  
23 Cr. L. J. 403.

—Ss 202, 203 and 204—Counter-complaints—Enquiry and report—Order postponing other case—Legality of.

Two counter complainants preferred complaints before a Sub-Divisional Magistrate who referred them to a Sub. Deputy Collector for enquiry and report. On receipt of the report he issued process in one case and directed the counter case to be put up after the disposal of the former. Held that the action of the Magistrate was not illegal and the High Court could not interfere in revision (*Jwala Prasad, J.*) LALJI SINGH v. NAURANGI LAL, (1922) Pat. 304 : 3 Pat. L. T. 764

—S 202—Local investigation and inquiry by magistrate—Legality of.

Under S. 202 Cr. P. Code the magistrate has the option of only one out of two alternatives, viz, either to inquire into the case himself or direct a previous local investigation. He cannot have recourse to both the alternatives and if he chooses to inquire into the case himself, an order directing local investigation is irregular. (*Lindsay, J.*) DURGA PRASAD v. EMPEROR.

44 All. 550 : 20 A. L. J. 355 : (1922) All. 211 : L. R. 3 A. 76 Cr. : 66 I. C. 423 : 23 Cr. L. J. 279.

—Ss. 202 and 203—Complaint—Refusal to issue process—Illegality.

Where a complainant put in a complaint accusing the opposite party of mischief and theft the Magistrate directed notice to be served on the opposite party to show cause why process should not issue against him. The opposite party put in a petition and engaged a pleader to show cause and the Magistrate after hearing the pleader refused to issue any process against the opposite party. Held that the procedure adopted by the Magistrate was irregular and improper and in direct contravention of Ss 202 and 203 Cr. P. Code. 21 C. W. N. 127 foll. (*Sanderson, C. J.* and *Chotzner, J.*) CHANDI CHARAN MITRA v. MANINDRA CHANDRA ROY. 36 C. L. J. 414

—Ss. 203 and 204 (3)—Dismissal of case—Further enquiry—Order for notice.

In the case of a dismissal under S. 203 or S. 204 (3), Cr. P. Code, notice to the other side is not desirable. The other side having had no notice and the proceedings not having reached the stage of summoning them as accused persons, such cases are distinguishable from cases in which the accused have been tried and discarded.

Until the accused has been brought before the Court either by summons or by warrant he should not be allowed to come before the Court at all 15 Cal. 608 foll.

A party who is not being tried for an offence is not an accused person, 32 Cal. 1088, foll. Where a further enquiry is directed by a Sessions Judge, the Deputy Magistrate has no jurisdiction to issue summons before making a judicial enquiry. (*Roe and Coultis, J.*) SHEONARAIN SINGH v. RAMPERTAB RAI. (1922) Pat. 31 : (1922) P. 54.

## CRIM. PROCEDURE CODE (1898), S 215.

—Ss 203 and 209 — Magistrate—Commitment—Discretion—Weight due to evidence—Discharge of accused.

It is quite within the discretion of a magistrate holding a preliminary inquiry to weigh the evidence and discredit the same if necessary. He is not bound to commit the accused to the Sessions merely because there is some evidence, if he thinks that those portions of the evidence essential to make out the charge were not reliable.

28 I. C. 741; 1922 M. W. N. 13 Ref. (*Schwabe, C. J.* and *Krishnan, J.*) NARAMBAN In re. 15 L. W. 552 : (1922) M. W. N. 326 : (1922) Mad. 195.

—Ss. 205 and 353 — Accused — Gosha lady—Power to dispense with personal attendance.

A Sessions Judge has under the Code of Criminal Procedure, power to dispense with the personal attendance of the accused and permit her to appear by pleader during the Sessions trial. In view of the habits and customs of the country and the social stigma that attaches to Gosha ladies breaking purda, it will be in the interests of justice that they should not be compelled to appear in public at least until they are convicted. (*Kumaraswami Sastri, J.*) SRI SRI KANDAMANI DEVI. In re 45 Mad. 359 :

42 M. L. J. 337 : (1922) M. W. N. 165 : 15 L. W. 550 : 30 M. L. T. 346 (H. C.) : (1922) Mad. 79 : 66 I. C. 330 : 23 Cr. L. J. 266,

—S. 209 — Discharge—Sessions case—Jurisdiction to weigh evidence.

What the Magistrate has under S. 209, Cr. P. C., to see is whether the evidence is such as to render the case a fit one for the jury to decide between conflicting probabilities or, whether it clearly points out to there being no *prima facie* case for the accused to meet. In arriving at a decision the committing Magistrate has discretion and power to weigh the evidence.

To hold that, where there is some evidence, however untrustworthy in the Magistrate's opinion, he is bound to commit a person for trial will be to make the preliminary enquiry a mere matter of form. (*Kumaraswami Sastri, J.*) PONNIAH THIRUMALAI VANDAYA THEVAR In re

42 M. L. J. 49 : (1922) M. W. N. 13 : 16 L. W. 460 : (1922) Mad. 43 : 65 I. C. 993 : 23 Cr. L. J. 209.

—S. 209—Sessions case — Inquiry by Magistrate—Powers of discharge.

In a case triable by a Sessions Judge, where the magistrate making the inquiry comes to the conclusion that the prosecution evidence is not worthy of credit, he has power to discharge the accused. (*Martineau, J.*) AHMAD v. EMPEROR.

68 I. C. 825 : 23 Cr. L. J. 601.

—S. 213 (2)—Case triable by court of session—Power of Magistrate to discharge Sufficient grounds, See (1921) DIG. COL. 431 MAHOMED ABDUL HADI v. BALDEO SAHAI 44 A. 57 : (1922) All. 168.

—Ss 215 and 423—Commitment—Quashing of.

## CRIM. PROCEDURE CODE (1898), S. 227.

Where a Sessions Judge commits under S. 423 Cr. P. C. the question of quashing it does not arise, but the order can be dealt with in the exercise of the revisional powers. (*Macgregor, J.*) *EMPEROR v. NGA THET SHE.*

1 Bur. L. J. 250.

—Ss. 227, 241, 255, 257, 342—*Alteration or addition of charges—Procedure.*

Ss. 255 to 257 of the Code have no application to a case when a charge is altered or added to. S. 432 has consequently no application when the accused were already called on to enter on their defence prior to the alteration or the addition of the charge. The procedure for the trial in regard to the alteration or addition of charge is laid down in sections 227 to 231 of the Code: scope of sections considered.

The addition or the alteration of a charge does not open up the trial from the beginning and the court may immediately proceed with the trial if it is of opinion that there will be no prejudice to the accused. (*Jwala Prasad and Adams, JJ.*) *SHAMLAL KALWAR v. EMPEROR.*

1 Pat. 54 : (1922) P. 393 : 3 P. L. T. 91  
65 I. C. 610 : 23 Cr. L. J. 146

—Ss. 233. and 235—*Distinct offences—Separate charge—Several offences comprised in one charge.*

A charge relating to more than one distinct offence is bad in law. But the whole trial is not vitiated because a particular charge was in contravention of S. 233 Cr. P. Code. Where the alleged offences were a series of acts arising out of one and the same transaction and there was nothing to prevent all these matters being put before the court if they had been contained in separate charges instead of their being included in one charge: the court maintained the sentence and conviction under S. 147 I. P. C. and set aside the convictions under S. 149 read with Ss. 323 and 325 I. P. C. (*Sanderson, C. J. and Panton, J.*) *RADHA NATH KARMAKAR v. EMPEROR.*

36 C. L. J. 149.

—Ss. 233, 272, 285 and 537—*Five accused—Separate charges—Separate trials—Necessity.*

The simultaneous hearing of two cases by one set of assessors is more than a mere irregularity. The mere fact that there are separate and complete records with separate judgments in each case is not sufficient compliance with law in a case where the trials are to be distinct. Where there are five accused of several offences regarding the same property, their trial should not be conducted piecemeal but the judge might adjourn one case under S. 344, Cr. P. Code while taking up the other. 6 C. 96; 20 C. 537; 25 M. 61, Rel. (*Duckworth, J.*) *EUSOOF v. EMPEROR.*

11 L. B. R. 73 : 64 I. C. 833 : 23 Cr. L. J. 49.

—Ss. 233 and 434—*Misjoinder of charges—Several acts of defalcation—False entries.*

Each false entry which amounts to an act of falsification constitutes a separate offence although a number of false entries might be proved to cover one defalcation. Where there are two acts of defalcation covered by two false entries and the only thing to connect them together was the

## CRIM. PROCEDURE CODE (1898), S. 234.

fact that the goods were received on the same day from the same depositor, a joint trial in respect of them is illegal. 26 C. 560; 41 C. 772 Ref. (*Spencer and Ramdas, JJ.*) *CHAKRAKODI SHAMA SASTRI v. EMPEROR.*

(1922) M. W. N. 476 : (1922) Mad. 435 :

—S. 233—*Perjury—Joint trial of several accused—Legality.*

The joint trial of several accused persons for perjury is illegal. The accused are in such a case prejudiced as each is deprived of the advantage of calling the others to give evidence (*Abdul Raouf, J.*) *LACHHMAN SINGH v. EMPEROR.*

67 I. C. 615 : 23 Cr. L. J. 439

—Ss. 233 and 537—*Separate offences—Distinct charges—Omission to frame—Effect of irregularity.*

S. 233, Cr. P. Code, no doubt requires that for every distinct offence of which any person is accused there should be a separate charge. But under Ss. 225 and 537, Cr. P. Code the omission to comply with S. 233 Cr. P. Code is immaterial unless the accused was in fact misled by the error and it has occasioned a failure of justice. 41 C. 66; 19 C. W. N. 972 foll. (*Fawcett, J. C. and Kincaid, A. J. C.*) *EMPEROR v. MEHRALI BACHAT.*

66 I. C. 672 : 23 Cr. L. J. 320.

—S. 234—*Cumulative charges under Ss. 411 and 414 I. P. C.—Proceeding changed at the end of trial and striking out rest—Procedure—Legality.*

The joinder of charges under Ss. 411 and 414 of the Penal Code is bad and vitiates the whole trial. If the charges had been framed in the alternative, it might have been good under S. 236 Cr. P. C. The error cannot be remedied by the Judge saying in his judgment that he would proceed only on the charges legally joined. Any striking out of the charges should have been done before concluding the trial and the accused should have been given an opportunity of making such defence as he thought fit on the charges as amended. (*Newbould and Ghose, JJ.*) *GHETTO KALWAR v. EMPEROR.*

49 Cal. 555: (1922) Cal. 401.

—Ss. 234 and 235—*Joinder of charges—Offences under Ss. 408 and 477 A.I.P. Code.*

Ss. 234 and 235 Cr. P. Code do not warrant the joinder of three charges under S. 408 I. P. C. and one under S. 477 A. I. P. C. against the accused in one trial. 32 A. 219 foll. (*Gokul Prasad, J.*) *SHUJA UDDIN AHMAD v. EMPEROR.*

44 A. 540 : 20 A. L. J. 320 : L. B. 3 A. 81 Cr :  
(1922) All. 214 : 66 I. C. 322 :  
23 Cr. L. J. 258.

—Ss. 234 and 239—*Joint trial—Theft and dishonest possession of the stolen article knowing it to be such—If one transaction.*

Theft of two bicycles and the dishonest possession of them by different persons, knowing them to be stolen, form one transaction, even though the receipt is not simultaneous with the theft, 6 Bom. L. R. 517 followed. The joint trial of all the persons is not bad in law. (*Stuart, J.*) *ANWAR v. EMPEROR.*

44 A. 276: 20 A. L. J. 96:  
L. B. 3. All. 10 (Cr.): (1922) A. 208 :  
67 I. C. 510 : 23 Cr. L. J. 414.

## CRIM. PROCEDURE CODE (1898), S. 234.

—Ss. 234 and 239—*Misjoinder of charges—Passing counterfeit coins—Joint trial.*

Where two persons were jointly tried and convicted of passing counterfeit coins on three different occasions to three different persons on the same day the trial was not bad for misjoinder of charges. (*Wallace, J.*) KOVAGANTI alias NALLAGONDA APPIAH *in re.* 16 L. W. 831

69 I. C. 447 : 23 Cr. L. J. 719.

—Ss. 235 and 239—*Dacoity—Several offences by some gang—Joint trial.*

Where a gang of dacoits assembled on a highway for robbing passers by and in the course of the dacoity several offences were committed by them. Held that all these offences were committed in the course of the same transaction. It was not material whether all the members of the gang took an active part in each dacoity (*Stuart and Ryres, J.J.*) RAM PRASAD v. EMPEROR

20 A. L. J. 926.

—Ss. 235 and 236—*Joint trial—Different offences in respect of different persons—Penal Code, Ss. 109 and 477*

It was alleged that the accused induced ten different persons to affix their thumb impressions on blank paper representing that they had to do it under a Government order in connection with the census. Subsequently the accused used the thumb impressions for the purposes of extorting money from the persons who affixed them. Held, that the joint trial of the accused on a consolidated complaint of these 10 persons was illegal and bad. (*Kanhaiya Lal, J.C.*) GIRJA DAYAL v. EMPEROR. 25 O. C. 151 : (1922) Oudh 250.

—S. 235—*Joint trial—Offences under Ss. 366 and 147, I. P. C.—Illegality.*

Where a number of accused are being charged and tried under Ss. 147, and 366 I. P. C., a joinder of a charge against one of the accused under S. 376, I. P. C., is illegal. (*Abdul Qadir, J.*) KHIZAR v. EMPEROR, 4 Lah. L. J. 322 : (1922) Lah. 410.

—S. 235—*Joinder of charges—Theft and cheating—Procedure—Evidence of theft, if admissible to prove cheating.*

The accused was charged at one trial with offences under Ss. 420 and 380 I. P. C. alleged to have been committed under the following circumstances. The complainant was taken to a shop by the accused and was induced by him to try a bar of silver which on subsequent examination, proved to be base metal covered with a thin coating of silver. On the same night the accused in whose house the complainant was staying stole the silver bar. Held that though the two offences under Ss. 380 and 420, I. P. C. were not committed in the course of the same transaction within S. 235, Cr. P. Code, still the evidence which went to establish the charge under S. 380 I. P. C. was admissible as showing dishonest intention in respect of the offence under S. 420 I. P. C.; and that as there had been no prejudice to the accused the joint trial was not bad, (*Ryres, J.*) BECHAI v. EMPEROR. 20 A. L. J. 324 : 16 L. W. 831 : 69 I. C. 159 : 23 Cr. L. J. 671

## CRIM. PROCEDURE CODE (1898), S. 239.

—S. 235—*Offences under Ss. 500 and 501 I. P. C.—Joint trial of two persons.*

On a complaint, two accused were put on their trial on charges under Ss. 500 and 501 I. P. C. and convicted under S. 505, Held the joint trial was illegal (*Ghose and Cuming, J.J.*) ASHUTOSH DAS GUPTA v. PURNA CHANDRA GHOSH. 36 C. L. J. 287.

—Ss. 235 (1) and 537—*Misjoinder of charges—Theft—Assault—Offences committed on different occasions—Joint trial—Irregularity—Trial if illegal. See (1921) DIG. COL. 433.* GANDA SINGH v. EMPEROR. 3 P. L. R. 1922 : (1922) Lah. 433.

—S. 238—*Accused charged with one offence—Conviction on another—Legality of.*

Though a magistrate has power under S. 238 Cr. P. Code to convict the accused of a different charge from what he was originally accused of, this must be done only in cases where the accused was not in any way prejudiced by the conviction on the new charge. The accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and, unless he has this knowledge he must be seriously prejudiced in his defence, 44 C. 358 : 11 C. 106 Rel. (*Jwala Prasad, J.*) BALKESHWAR SINGH v. EMPEROR.

3 Pat. L. T. 322 : 65 I. C. 546 : 23 Cr. L. J. 114 : (1922) P. 5.

—Ss. 238 and 535—*Charge under S. 147 I. P. C.—Conviction of abetment of assault—Conviction under S. 353, I. P. C.—Legality.*

A person charged with an offence under S. 147, I. P. C. cannot be convicted of the abetment of an assault, which was the alleged common object of the assembly 33 M. 264. But a conviction under S. 352, I. P. C., (*i. e.*) of assault is maintainable on a charge under S. 147 I. P. C. 9 I. C. 455, 19 M. L. J. 487 41 I. C. 828 Ref. (*Odgers, J.*) MUTHUKANAKU PILLAI v. EMPEROR.

15 L. W. 583 : (1922) M. W. N. 182 : (1922) Mad. 110 : 65 I. C. 862 : 23 Cr. L. J. 206.

—S. 239—*Joint trial—Discretion of court—Conspiracy—Acts of cheating.*

In a trial for conspiracy, acts of cheating done in pursuance thereof can be tried, as they form part of the same transaction. Even in the absence of a charge, as the acts of cheating could be proved to support the conspiracy, there is no irregularity or improper exercise of discretion in not trying the charges separately. The legality of a joint trial depends on the accusation and not on the result of the trial. (*Newbould and Suhrawardy, J.J.*) ABDUL SALIM v. EMPEROR.

49 Cal. 573 : (1922) Cal. 107 : 26 C. W. N. 680 : 35 C. L. J. 279 : 69 I. C. 145 : 23 Cr. L. J. 657.

—Ss. 239 and 537—*Joint trial—Misjoinder of charges—Theft—Riot—Murder—Illegality.*

The foundation for the procedure sanctioned by S. 239 Cr. P. Code is the association of two or more persons concurring from start to finish to attain the same end. A series of acts separated by intervals of time are not excluded from the

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purview of S. 239 Cr. P. Code, provided that those jointly tried have been directed to one and the same objective 30 B 49 Ref. Indeed it often happens that two or more offences which are admittedly committed in the same transaction are separated by intervals of time, and it is nowhere laid down that unless the offences are committed at one and the same time, they cannot be included in one indictment. *Held* that a joint trial of 4 accused for riot, theft and murder was illegal as some of them did not participate in the riot. (*Shadilal C. J. and Abdul Quadir, J.*) MAHOMED SHAH v. EMPEROR

23 Cr. L. J. 268 66 I. C. 332.

—S. 239—Joint trial—Receiving stolen property—Same transaction—Legality.

Where two persons were tried under S. 411 I. P. C. and beyond the fact the properties were both stolen from the same person, there was nothing to connect them together, the joint trial is illegal. (*Rafique, J.*) MOOSAN v. KING EMPEROR. (1922) All. 459 (1) : 20 A. L. J. 563. L. R. 3 A. 98 Cr.

—S. 239—Joint trial—Theft and dishonest possession of article knowing it to be stolen—If one transaction. See Cr. P. Code, Ss. 234 AND 239, L. R. 3 A. 10 (Cr.)

—Ss. 239 and 537—Joint trial of two accused persons—One charged under S. 302 and the other under S. 202, I. P. C.—Joint trial illegal. See (1921) DIG. COL. 434. RATAN SINGH v. EMPEROR. 64 I. C. 376 23 Cr. L. J. 8

—S. 239—Misjoinder—Inconsistent allegations against the accused—Joint trial bad.

Where the allegations against the two accused are mutually exclusive, that is to say, where the case is that either the one or the other of the accused committed the offence, they cannot be tried together. (*Tharrawaddy, S. M.*) KYAW DWE v. EMPEROR. 1 Bur. L. J. 69

—S. 239—Offence under S. 332 I. P. C.—Isolated assaults—No common intention—Joint trial.

Where a number of persons in a crowd were charged under S. 332 I. P. C. for causing hurt to some policemen and it was found that the accused were not actuated by any common object, *Held* that the joint trial of all the persons was illegal in the absence of any common intention S. 34 I. P. C. does not apply. (*Ryes, J.*) FATEH CHAND v. EMPEROR 20 A. L. J. 706 : L. R. 3 A. 130 Cr. : (1922) All. 428 : 68 I. C. 820 : 23 Cr. L. J. 596.

—Ss. 239 and 531—Offence under S. 411 I. P. C.—Joint trial of three accused—No stolen property in joint possession—Joint trial illegal. See (1921) DIG. COL. 435 JIWAN v. EMPEROR. 67 I. C. 505 : 23 Cr. L. J. 409.

—S. 239—Same transaction—Joint trial for offences—Dacoity—Receipt of stolen property

Where in the course of the same transaction the offence of dacoity and two other offences of receiving property known to have been stolen in the commission of a dacoity are alleged to

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have been committed. *Held*, that a joint trial was permissible under S. 239 Cr. P. Code 6 Bom. L. R. 517 Rel. (*Stuart, J.*) DURGA PRASAD v. EMPEROR L. R. 3 A. 198 Cr. 20 A. L. J. 981

—S. 239—Same transaction—Keeping a gaming house—Using it—Joint trial.

The trial of the owner or keeper of a common gaming house under S. 3 of Act III of 1867 together with the trial of persons found gaming or present for the purpose of gaming in such house under S. 4 in one trial is not illegal. It is always necessary to justify a joint trial and to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception, and this trial can only be justified if the provisions of S. 239 Cr. P. Code have application. (*Stuart, J.*) GANESHI LAL v. EMPEROR. 20 A. L. J. 967 : L. R. 3 A. 191.

—S. 239—Same transaction—Test of—General of defamatory statements—Single trial.

It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may easily be indicated; they are proximity of time, units or proximity of place, continuity of action and community of purpose or design. This is a good working test of what should or should not be regarded as the same transaction. Where certain petitioners ordered to show cause why they should not be prosecuted under S. 188 I. P. C. for disobeying an order under S. 144 made several defamatory statements against the complainant couched in different but containing in substance the same allegations, *Held* that the petitioners could be jointly tried under S. 239 Cr. P. Code. 42 Cal. 597 foll. (*Walmesley and Suwawardy, JJ.*) BANGA CHANDRA DE v. ANNODA CHARAN CHOWDHURY. 35 C. L. J. 527 : (1922) Cal. 76.

—S. 248—Complaint against several—Withdrawal against some—Effect of.

If a complaint is made against several persons and is withdrawn against some of the accused with the permission of the Magistrate, it does not amount to a withdrawal of the complaint against the other accused. 19 A. L. J. 874 foll. 41 M. 37 ref. 531 I. C. 824 : 7 C. W. N. 175 diss. (*Kanhaiya Lal, A. J. C.*) ROHITI SINGH v. MUKHDUM KALWAR. 9 O. L. J. 54 : (1922) Oudh 145 : 66 I. C. 335 : 23 Cr. L. J. 271.

—S. 250—Award of compensation by Magistrate—Case triable by Sessions.

Where a case is ordinarily triable by a Court of Sessions but is actually tried by a Magistrate, it is not competent to him to award compensation under S. 250 of the Cr. P. Code. (*Pratt, J.*) MA E. DOK v. MAUNG PO THAN. 1 Bur. L. J. 38 : 65 I. C. 513 : 23 Cr. L. J. 289.

—S. 250—Compensation—Offence not triable by magistrate.

A magistrate can award compensation under S. 250 (1) only in cases which are triable by him. Hence where the offence is triable only by a



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higher criminal court a magistrate's order awarding compensation is illegal (*Lindsay, J.*) SARUP SONAR *v.* RAM SUNDAR THAKURAIN.

20 A. L. J. 433 : (1922) All. 188 :  
66 I. C. 671 : 23 Cr. L. J. 319.

—S. 250 - Compensation - Order for—Facts constituting offence triable by Sessions Court—Magistrate proceeding to try the case as coming under different offence triable by him—Legality of procedure *See* (1921) DIG. COL. 436 MAHAGANAM VENKATARAYAN *v.* KODI VENKATRAYAR.

45 Mad. 29 : (1922) Mad. 223 :  
66 I. C. 72 : 23 Cr. L. J. 232.

—S. 250 - Compensation - Order for—Vexatious complaint—No evidence adduced—Case thrown out.

Where a person lodged a complaint against others accusing them of cutting and carrying away his crops and obtained a warrant for their arrest, and put them to the inconvenience of attending the Court and compelled them to execute bonds for their attendance and then, having attained his object of harassing them, informed the Court that the case might be filed as he did not wish to produce evidence, he can be properly ordered to pay compensation under S. 250 of the Criminal Procedure Code. (*Martineau, J.*) CHANDAN SINGH *v.* EMPEROR.

18 P. L. R. (1922) 64 I. C. 369 :  
23 Cr. L. J. 1

—S. 250—Order for compensation—F frivolous complaint—Oppportunity to show cause.

Before an order for payment of compensation under S. 250 Cr. P. Code is made on the ground of the complaint being frivolous or vexatious, the complainant must be given an opportunity of showing cause why such order should not be passed (*Shah, A. J. C. and Crump, J.*) MAHADEV RAM KRISHNA KARKARE *In re.*

24 Bom. L. R. 605 : (1922) Bom. 409 :  
68 I. C. 414 : 23 Cr. L. J. 575.

—Ss. 250 and 107—Order for compensation—Initiation of proceedings under S. 107

S. 250 Cr. P. Code is only applicable in a case instituted by complaint or on information given to a Police officer or to a Magistrate whereupon a person is accused before a magistrate of an "offence". S. 250 does not apply to an enquiry under S. 107 Cr. P. Code instituted at the instance of private persons. 7 A. 743, 15 A. 365 foll. *Rynes, J.* MANNU KHAN *v.* CHANDI PRASAD.

(1922) All. 321 : 4 U. P. L. R. (A) 161 :  
67 I. C. 826 : 23 Cr. L. J. 474 :  
L. R. 3 A. 147 (Cr) : 20 A. L. J. 624.

—Ss. 250 (a) and 367 and 424—Order for compensation—Appellate judgment—Contents of.

The direction in proviso (a) to S. 250 Cr. P. Code is mandatory and the magistrate is bound to consider the objections raised by the complainant and to record a judgment with reasons. A mere statement that the cause shown is not reasonable is insufficient. 25 I. C. 994 foll. A District magistrate bearing an appeal under S. 250 (3) Cr. P. Code is bound to record a judgment in accordance with Ss. 367 and 424 Cr.

## CRIM. PROCEDURE CODE (1898), S. 257.

P. Code. (*Jwala Prasad, J.*) DEONARAIN MAHTO *v.* CHHATOO RAUT.

3 Pat. L. T. 203 :  
(1922) P. 157 : 66 I. C. 325 : 23 Cr. L. J. 261.

—S. 252—Hearing a complaint—Meaning of—Examination on oath.

Hearing a complainant within the meaning of S. 252, Cr. P. Code, does not involve his examination on oath and the trial in a warrant case is not irregular merely because it did not begin with an examination of the complainant by the Court. (*Oldfield and Krishnan, JJ.*) KUNHI KADIR *In re*

42 M. L. J. 108 : (1922) M. W. N. 71 :  
30 M. L. T. 125 : 15 L. W. 311 :

65 I. C. 859 : 23 Cr. L. J. 203 : (1922) Mad. 126.

—Ss. 253 and 494 (a)—Scope of—Discharge—Fresh prosecution.

An accused person cannot be summarily tried in several courts on the same facts, although the complainants in the several cases may be different. Though an order of discharge under S. 494 (a) or S. 253 Cr. P. Code in a warrant case does not necessarily prevent the magistrate from taking cognizance of a complaint on the same facts, an order of discharge cannot be set aside and prosecution started afresh unless there are new materials before the magistrate which were not before him formerly, and upon those materials there is a probability of the conviction of the accused persons. (*Jwala Prasad, J.*) BISU RAM *v.* EMPEROR.

(1922) P. 372 :  
23 Cr. L. J. 236 : 66 I. C. 76.

—Ss. 255, 256, 257—Alteration or addition of charges—Applicability. *See* Cr. P. Code, S. 227 etc.

3 Pat. L. T. 91.

—Ss. 256, 342 and 537—Warrant case—Recalling prosecution witnesses for cross-examination—Omission to examine, accused—Effect of.

Where the prosecution witnesses have been recalled for further cross examination in a warrant case under S. 256 Cr. P. Code, the omission of the Court to examine the accused thereafter is a serious irregularity or illegality vitiating the trial.

If the accused is entitled to an opportunity of stating his case to the court, the failure to allow him to do so vitiates the trial, 41 C. 743, 63 I. C. 825 *Ret.* (*Oldfield and Ramesam, JJ.*) MARUDA MUTHU VANNIAN *In re.*

43 M. L. J. 402 :  
16 L. W. 420 : (1922) M. W. N. 601.

[This view has been recently overruled by a full Bench.]

—Ss. 257 and 537—Magistrate—Refusal to summon witnesses for defence—Grounds for refusal—Witnesses not served or not in attendance—Resummoning of witnesses—Refusal—Illegality. *See* (1921) DIG. COL. 439, MAHOMED DIN *v.* EMPEROR.

6 P. L. R. 1922 : (1922) Lah. 71.

—S. 257—Prosecution witnesses called by accused as defence witness—Right of cross-examination.

Prosecution witnesses recalled by the accused as witnesses for the defence do not change their character as prosecution witnesses and may be cross-examined by the accused. 1 C. W. N. 12;

## CRIM. PROCEDURE CODE (1898), S. 257.

28 C 594 foll. (*Odgers, J*) VENKU REDDY v  
EMPEROR (1922) M W. N. 120  
16 L. W. 196 : (1922) Mad. 32  
65 I. C. 768 : 23 Cr. L. J. 192

—S 257—Witnesses for defence—Duty of court to enforce their attendance See (1921) DIG. COL. 439. BISSAY v. EMPEROR.

65 I. C. 556 : 23 Cr. L. J. 124.

—S. 257—Witnesses for defence—Summons issue of—Witnesses, absence of—Court whether justified in dispensing with witnesses See (1921) DIG. COL. 432. SOHARA v. EMPEROR.  
5 P. L. R. 1922 : (1922) Lah. 143.

—Ss. 259, 494 and 495—Absence of complainant—Withdrawing from prosecution. See (1921) DIG. COL. 440. EMPEROR v. YANKAYA.  
64 I. C. 273

—S. 260—Criminal trial—Summary inquiry in the middle of a trial—Irregularity—Offences under Ss 186 and 206 I. P. C.

The accused were summoned under Ss. 186 and 206 I. P. C. The magistrate began to try the case under chapter XXI Cr. P. Code recording the evidence in the manner prescribed by Chapter XXV. After examining in chief seven witnesses for the prosecution and the accused the Magistrate came to the conclusion that no offence under S. 206 I. P. C. was made out and changed the procedure to that applicable to summary trials. The accused were eventually convicted under S. 186 I. P. C. *Held*, that the procedure of the magistrate was prejudicial to the accused and that there should be a retrial (*Walmsley and Suhrawardy, J*) GOSTA BEHARY BASU v. BAISTUN DAS DEWRA.  
26 C W. N. 831.

—Ss. 260 and 342—Summary trial—Taking notes of evidence—Power to examine accused in summons cases. See (1921) DIG. COL. 440. EMPEROR v. RUSTOMJI MANCHERJI.

64 I. C. 501 : 23 Cr. L. J. 21.

—S. 260 (2)—Complicated questions of title and possession—Discretion.

In a criminal case, the adjudication of which involved intricate questions of title and possession a magistrate should exercise his discretion under S. 260 (2) and not try the case summarily. (*Jwala Prasad, J.*) PARMESHWAR LAL MITTER v. EMPEROR.  
3 Pat. L. T. 347 : (1922) P. 296 : 67 I. C. 616 : 23 Cr. L. J. 440.

—S. 260 (f)—Summary trial—Magistrate's duty—Value of property less than Rs. 50.

Before the Magistrate can assume jurisdiction to try the accused in a summary form, he has to satisfy himself that the property in respect of which he is trying the accused is less than Rs. 50 in value. (*Ross J.*) BRIJ NANDAN PANDAY v. KING EMPEROR.  
(1922) P. 227.

—Ss. 262 and 263—Summary trial—Complaint disclosing offence punishable under S. 144 I. P. C.—Procedure—Conviction—Legality.

The accused were tried by the summary procedure and convicted under S. 447 I. P. C. though the complaint disclosed the commission of an offence under S. 144 I. P. C. and there was

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nothing in the examination of the complainant reducing the offence to a less serious one. *Held* that the conviction was bad and there should be retrial (*Teunon and Ghose, JJ.*) CHANDRA MOHAN DAS MANDAL v. EMPEROR.

27 C W. N. 148.

—S. 263—Conviction—Reasons for decision.

Though a trial before a Magistrate is summary, the Magistrate must give the reasons, though briefly, for justifying the conviction. (*Sultan Ahmad, J*) DAMODAR DAS v. EMPEROR.

3 Pat. T. L. 499 : 65 I. C. 446 : 23 Cr. L. J. 95.

—S. 263—Judgment—Contents of—Record how to be framed

S. 263 of the Cr. P. Code requires that the magistrate's record shall state the offence complained of and the offence, if any, proved, the plea of the accused and his examination, if any, the finding and in case of a conviction a brief statement of the reasons therefor. The practice of lumping together in one column of the register all the particulars required by S. 263 Cl (g) to (f) Cr. P. Code is unwarranted. (*Cherwis, J*) GHULAM MAHOMED v. EMPEROR

65 I. C. 625 : 23 Cr. L. J. 161.

—Ss. 263 and 264—Plea of accused—If a substitute for examination of accused—Procedure in summary trials. See Cr. P. CODE S. 342.  
3 Pat. L. T. 347.

—S. 271—Murder—Plea of guilty—When to be accepted—Duty of Court—Illiterate accused. See CRIMINAL TRIAL, MURDER.  
L. R. 3. A. 80 (Cr.)

—S. 283—Judgment—Contents of—No reasons for conviction—Revision. See (192) DIG. COL. 440. EMPEROR v. MAIN JAN,  
67 I. C. 587 : 23 Cr. L. J. 427.

—S. 284—Selection of assessors—Objection to. See (1921) DIG. COL. 441 SHIVADHAN SINGH v. EMPEROR  
3 Pat. L. T. 32.

—S. 285—Trial by assessors—Simultaneous hearing of two cases by one set of assessors—Trials invalid. See Cr. P. CODE, Ss. 233, 272  
64 I. C. 833.

—S. 286—Sessions trial—Procedure—If superseded by S. 342, See Cr. P. CODE Ss. 164 286 AND 342.  
L. R. 3 A. 101 Cr.

—Ss. 286 and 342—Sessions trial—Accused pleading not guilty—Procedure—Admission of guilt before magistrate.

Where an accused is on his trial on a capital charge, it is not expedient that the court should convict him even upon a plea of guilty entered before the trial court itself. The court should as a matter of practice, put such a plea on one side and proceed to record and consider the evidence in order to satisfy itself, not merely of the guilt of the accused, but of the precise nature of the offence committed and the appropriate punishment for the same. Where the accused enters a plea of not guilty even though he has admitted his guilt before the Magistrate, it becomes par

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cularly incumbent on the trial court to proceed with the hearing of the evidence, to enquire very carefully into the conduct of the police investigation and the whole circumstances under which the confession of guilt, now retracted, was obtained. The proper time for taking into consideration such a confession comes after the court is in possession of the entire prosecution evidence, and can estimate what the effect of the evidence would be, considered apart from any statement which the accused person or persons, may from time to time have made. 20 A. L. J. 326 foll. (*Piggot and Walsh, JJ.*) *SUKHIA v. EMPEROR*.

20 A. L. J. 669 : (1922) All. 266

—S. 288—Effect of—Deposition of witness before committing magistrate—If testimony. See EVIDENCE ACT, S. 157

43 M. L. J. 222

—Ss. 288 and 428—Power under—User by High Court on appeal—Procedure. See (1921) DIG. COL. 442 *NAGINA v. EMPEROR*.

L. R. 3 A. 36 (Cr).

—S. 288—Statements of witnesses before the investigating Police officer and the committing magistrate—Retraction of statements when examined in the Sessions court—Former statements used as evidence in the case. See 1921 DIG. COL. 442. *EMPEROR v. MARUTI JOTI SHINDE*.

46 Bom 97.

—S. 291—Witness—Court witness on a previous trial—Duty of prosecution to call

It cannot be the duty of a public prosecutor to call or put into the witness box for cross examination a witness, who in the former trial was called by the Court and whom he believes to be false. 16 All. 84 foll. (*Buckland, J.*) *EMPEROR v. REED*.

(1922) Cal. 461 (1) :

69 I. C. 630 23 Cr. L. J. 742.

—Ss. 298 and 299—Charge to jury—Record of—Identification.

In trials by jury though the law requires a judge to record only the heads of his charge, still the record should include such statements and comments on the part of the judge as will enable the appellate court to understand exactly what he said. 23 W. R. 32 Cr. foll. (*Walmsley and Suhra Wardy, JJ.*) *ABDUL GAFUR KHAN v. EMPEROR*.

26 C. W. N. 996 : (1922) Cal. 192 : 35 C. L. J. 437.

—Ss. 298 and 299—Trial by jury—Misdirection—Non direction—Murder—Minor offence—Consideration of evidence.

In a case where, if at all, only an offence under S. 302, I. P. C., has been made out it is no misdirection on the part of the judge if he does not point the attention of the jury to the possibility of a minor offence being proved by the evidence adduced. A judge need not point out to the jury every bit of the evidence and it is enough if he directs their attention to the salient portions of the evidence for the prosecution and the defence. (*Miller, C. J. and Adair, J.*) *EMPEROR v. BHIMLAL CHAMAR*.

(1922) P. 321 : 64 I. C. 671 :

23 Cr. L. J. 47.

—S. 298—Misdirection—Reference to materials not in evidence in the case.

Where a Sessions Judge places before the jury materials which are not on the record or which

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are not evidence except for purposes of corroboration or contradiction, there is a misdirection which necessitates a retrial. (*Coutts and Das, JJ.*) *DASARATH SINGH v. EMPEROR*.

67 I. C. 502 23 Cr. L. J. 406.

—S. 299—Jury, duty of—Nuisance on public road

Where it was contended that the jury acted without jurisdiction in recommending that *Bhusaul* should be allowed to remain on land which they found to be a public road :—*Held*, in allowing the *Bhusaul* to remain they must be understood as having found that it did not constitute any obstruction. A distinction exists between *Bhusaul* and other articles such as tiles, palm trees, etc., which are regarded as nuisance. (*Ross, J.*) *JANKI SINGH v. BIDAPAT SINGH*.

(1922) P. 224. (1.)

—S. 307—Disagreeing with Jury—Duty of sessions judge—Powers of High Court

*Pet Jwala Prasad, J.*—In making a reference under S. 307, the Sessions Judge must ask the Jury the reasons for the verdict, it is specially necessary in a case where there is a difference of opinion among the jurors.

On such a reference the High Court is required to consider the entire evidence in the case, but this does not necessarily mean the opinion of the Jury on the question of fact will be ignored. There must be something more than a mere estimate of the evidence or the facts before the High Court is entitled to upset the verdict of the Jury. Unless there is an astounding reason for it, the verdict of the Jury on a question of fact will not be set aside—The mere fact that another view of the evidence might be taken is not enough.

*Per Coutts, J.*—After the amendment of 1898, the High Court is bound to consider the entire evidence in the case and to give due weight to the opinion of the Sessions Judge and of the Jury and not to rely solely on the verdict of the Jury. The opinion of a jury is its verdict and not the reasons on which the verdict is based.

The Sessions Judge must also give reasons for his opinion in sufficient detail as to enable the High Court to appreciate it and to give due weight to it. (*Jwala Prasad and Coutts, JJ.*) *EMPEROR v. PUNIT CHAIN*.

3 Pat. L. T. 413 : (1922) Pat. 218 :

4 U. P. L. R. (Pat). 53 : (1922) P. 348

67 I. C. 581 23 Cr. L. J. 421.

—S. 307—Reference to High Court by Sessions Court—Duty of Sessions Judge to record reasons for opinion—Jury—Duty of High Court to examine evidence. See (1921) DIG. COL. 443. *EMPEROR v. BHUILOTAN SINGH*.

64 I. C. 379 : 23 Cr. L. J. 11.

—S. 307—Reference to High Court by Sessions Court—Duty of Sessions Judge to record reasons for opinion—Jury—Duty of High Court to examine evidence. See (1921) DIG. COL. 443 *EMPEROR v. TARIBULLAH SHAIKH*.

66 I. C. 180 : 23 Cr. L. J. 244.

—Ss. 307 and 537—Reference—Scope of the enquiry—Objection on the ground of want of sanction.

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The whole case is open to the court when hearing a reference under S. 307 Cr. P. Code and in dealing with a reference, the Court exercises all the powers which it exercises on appeal. Although S. 537, Cr. P. Code does not directly apply to a reference under S. 307, still the want of sanction under S. 395 Cr. P. Code is no ground for setting aside a conviction on a reference. (*Macleod C. J. and Shah, J.*) **EMPEROR v. SHANKAR BALKRISHNA DESHPANDE.**

24 Bom. L.R. 484 (1922) Bom. 368

—S. 307—*Trial by jury—Inadmissible confession—Evidence given—Omission of Judge to direct jury.*

In a case tried by jury the Sessions Judge allowed a police witness to give in evidence a confession made by the accused to him. The judge made a note in the record that the confession was inadmissible but omitted to mention it in his charge to the jury. *Held*, that the conviction was bad inasmuch as the mind of the jury might have been influenced by the inadmissible confession having been deposed to and recorded in their presence and the omission of the judge to mention it in the summing up constituted a misdirection. (*Jwala Prasad and Ross, JJ.*) **SUMESWAR JHA v. EMPEROR**

3 Pat. L. T. 101 65 I. C. 443

23 Cr. L. J. 91 : 4 U. P. L. R. (Pat.) 31.

—Ss. 337 and 512—*Tender of pardon—Inquiry into offence—Absconding of principal offender—Withdrawal of pardon—Trial of approver—Procedure.* See (1921) DIG. COL. 445 **DAGDOO BAPU In re.**

46 Bom. 120 :

(1922) Bom. 177

—S. 337—*Tender of pardon—Pardon can be tendered only in the course of an inquiry—Pardon tendered otherwise if can form the basis of an alternative charge* under S. 193, I. P. C. See (1921) DIG. COL. 446 **MOTILAL HIRALAL v. EMPEROR.**

46 Bom. 61 : 64 I. C. 40.

22 Cr. L. J. 728.

—S. 337 (3)—*Approver—Forfeiture of pardon—Prosecution—Who to order and when to commence.* See Cr. P. CODE Ss. 339 AND 337 (3).

68 I. C. 835.

—Ss. 339 and 337 (3)—*Forfeiture of pardon—Trial when to commence.*

The substitution of the word "forfeit" in S. 339 of the Cr. P. Code for the word "withdrawn" makes it unnecessary for a magistrate to withdraw or cancel the pardon before trying the approver.

As S. 337 (3) provides for the approver's detention in custody till the termination of the sessions trial. It is the Sessions Judge who has to decide whether the pardon has been forfeited, and this can only be done after the termination of the trial. (*Raymond, A. J. C.*) **EMPEROR v. HAJI JIAND.**

23 Cr. L. J. 611 : 68 I. C. 835.

—S. 342—*Applicability—Alteration or addition of charges—Accused called upon to enter into defence prior to charge—Effect.* See Cr. P. CODE, S. 227, ETC.

3 Pat. L. T. 91.

## CRIM. PROCEDURE CODE (1898), S. 342.

—S. 342—*Examination of accused after chief examination of prosecution witnesses and before their cross-examination and re-examination—Sufficiency of* See (1921) DIG. COL. 447 **MITARJIT SINGH v. EMPEROR.**

(1922) Pat. 7 6 Pat. L. J. 644 : (1922) P. 158.

—S. 342—*Examination of accused before the examination in chief of the prosecution witnesses.*

Where the legislature says definitely that the Court shall put questions to the accused person generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence it is not an admissible argument that the Court may do so before all the prosecution witnesses have been examined. 4 P. L. J. 450 ref. to. (*Das and Adam, JJ.*) **RAMESWAR SING v. THE KING EMPEROR.**

(1922) P. 299.

—S. 342—*Examination of accused—Essential and obligatory—Procedure—Summary trial Cross-examination of complainant.*

Under S. 342, the examination of the accused is essential and obligatory, and the omission to examine vitiates the whole trial. As regards summons cases, S. 263 requires the court to prepare a record of the summary trial and though the magistrate need not record the evidence of witnesses or frame a formal charge, there is no provision in the Code which does away with the necessity for the examination of the accused or recording such examination in summary trials. The plea of the accused under S. 263 (g) cannot possibly take the place of the examination of the accused, for the former occurs at the initial stage of the case and the latter after the prosecution evidence is closed.

The accused has no right to postpone the cross examination of any prosecution witnesses as in warrant cases, but if a postponement is made in accordance with the direction of the magistrate, an opportunity must be given to cross-examine and without it the complainant's evidence will not be legally admissible. (*Jwala Prasad, J.*) **PARMESHWAR LALL MITTER v. EMPEROR.**

3 Pat. L. T. 347 : (1922) P. 296 :

67 I. C. 616 : 23 Cr. L. J. 440.

—S. 342—*Examination not done—Effect.*

A trial is vitiated if the accused were not examined as required by S. 342 Cr. P. C. (*Ross, J.*) **RAM NANDAN SINGH v. THE KING EMPEROR.**

(1922) P. 212.

—S. 242—*Examination of accused—Provisions of the Code mandatory—Illegality—Irregularity.*

The object of the examination referred to in S. 342 Cr. P. Code is to enable the accused to explain any circumstances appearing in the evidence against him. The provisions of the section are mandatory and the Court is bound to question the accused generally on the case, after the prosecution case is completed and before the accused person is called on for his defence. Non compliance with S. 312 renders the trial illegal. (*Sauderson, C. J. and Chotzner, J.*) **MOZAHUR ALI v. EMPEROR.**

36 C. L. J. 417.

—S. 342—*Examination of accused—Taking of written statement—Illegal.*

## CRIM. PROCEDURE CODE (1898), S. 342

The examination of the accused under S. 342 is mandatory and the taking of a written statement from the accused instead of examining him, is illegal and the defect vitiates the trial. 5 Pat. T. J. 430 Rel. (*Jwala Prasad, J.*) BALKESWAR SINGH v. EMPEROR.

3 Pat. L. T. 322 : 65 I. C. 546.  
23 Cr. L. J. 114 (1922) P. 5

—S. 342—Examination of accused—Time for—If supersedes provisions of S. 286. See Cr. P. CODE, Ss. 164, 286 AND 342.

L R 3 A. 101 (Cr)

—S. 342—Examination of accused—Sufficiency of—Revision

It is not open in revision to the High Court to enquire into the sufficiency of the examination made under S. 342 Cr. P. Code. Where the accused is defended by a legal practitioner an elaborate examination is unnecessary. Where an accused is undefended, the tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner, it would not be desirable to contemplate a tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into what would be far worse, some sort of cross-examination. (*Bucknill, J.*) PANCHU CHOUDHURY v. EMPEROR.

3 Pat. L. T. 649 : 66 I. C. 73 : 23 Cr. L. J. 223

—S. 342—Failure to examine accused after prosecution evidence—Effect of.

Non-compliance with the provisions of S. 342 Cr. P. Code i. e., not examining the accused after the close of the prosecution evidence, but simply filing their written statement does not entitle them to an interference in revision, if they have not been prejudiced in the trial and there has been no miscarriage of justice. (*Coutts and Macpherson, JJ.*) MIR TILAWAN v. EMPEROR.

1 Pat. 31 : (1922) P. 388.

—S. 342—Failure to examine accused after prosecution case—Effect. See CR. P. CODE, Ss. 256, 342 ETC.

43 M. L. J. 402.

—Ss. 342 and 537—Omission to comply with—Trial and conviction—Legality.

Omission to comply with S. 342 Cr. P. Code does not vitiate a trial and conviction in the absence of prejudice to the accused. (*Stuart, J.*) BECHU CHAUBE v. EMPEROR.

20 A. L. J. 874 : L. R. 3 A. 168 (Cr.)

—S. 342—Provisions of, mandatory—Examination of accused—When should be made.

The "examination" in S. 342 Cr. P. C. means examination, cross-examination and re-examination of the witnesses of the prosecution and where the accused was not questioned thereafter by the magistrate, the conviction is bad and must be set aside. 45 B. 672 ; 25 C. W. N. 609 foll. (*Walmesley and Pearson, JJ.*) KASHI PRAMANIK v. DAMU PRAMANIK.

27 C. W. N. 28

## CRIM. PROCEDURE CODE (1898), S. 345.

—S. 342—Question to accused—Object of  
—Cross-examination. See (1921) DIG. COM. 449  
UMAR DIN v. EMPEROR. 87 I. C. 340 :  
23 Cr. L. J. 388.

—Ss. 342 and 264—Summons case—  
Accused—Examination of accused—Omission to  
examine—Irregularity vitiating the trial. See  
(1921) DIG. COL. 449 GULABJAN v. EMPEROR.  
46 Bom. 441 (1922) Bom. 290.  
64 I. C. 669 : 23 Cr. L. J. 45

—Ss. 342 and 537—Summons case—  
Examination of accused—Omission to comply  
with formalities prescribed—Illegality.

The procedure prescribed by S. 342 Cr. P. Code is binding on the courts and the omission to comply with its provisions is not a mere irregularity such as can be cured by S. 537 Cr. P. Code. 1 P. R. 1918 Cr. ; 45 B. 672 foll. (*Chevis, J.*) MAHOMED BAKSH v. EMPEROR.

65 I. C. 618 : 23 Cr. L. J. 154.

—Ss. 342 and 526 (4)—Affidavit by  
accused—If can be accepted to support transfer  
petition

The provision in S. 342 (4) Cr. P. Code that no oath shall be administered to the accused evidently has reference only to the statement made by him in answer to the questions put by the court under S. 342 (1). It does not preclude him from making an affidavit in support of an application for transfer under S. 526. (*Martineau, J.*) GHULAM MUHAMMAD v. EMPEROR.

3 Lah. 46.

4 U. P. L. R. (Lah.) 71 : (1922) Lah. 113 :  
67 I. C. 351 : 23 Cr. L. J. 399.

—S. 344—Costs of adjournment—Direction to pay—Illegality of.

Where a criminal case is adjourned consequent on the failure of the complainant to appear on the date fixed for hearing the court has no power to order the accused to pay the costs of the adjournment. (*Gokul Prasad, J.*) BEEDHA v. EMPEROR.  
20 A. L. J. 280 : (1922) All. 184 : 66 I. C. 179 (2) :  
23 Cr. L. J. 243

—S. 344—Criminal case—Police prosecution—Adjournment granted at the instance of prosecution—Costs of the accused when to be borne by complainant.

If an adjournment takes place for which the complainant is solely to blame then an order can be made that the complainant should pay any costs which may have been incurred by the accused. Where however the prosecution is conducted by the police for whose convenience an adjournment is granted, then the complainant cannot be ordered to bear the costs of the accused. (*Macleod C. J. and Coyajee, J.*) EMPEROR v. LAXMAN NATHA.  
24 Bom. L. R. 380 :  
(1922) Bom. 239 : 66 I. C. 994 : 23 Cr. L. J. 338.

—Ss. 345 and 199—Abduction—Offence under S. 498 I. P. C.—Compounding by caretaker of woman and not by the husband—Composition and acquittal bad. See CR. P. CODE, Ss. 199 AND 345  
4 Lah. L. J. 488

—S. 345—Assault—Compromising, with one—Effect.

## CRIM. PROCEDURE CODE (1898), S. 345.

In a case of assault against several accused, compromising the offence with one, amounts to the whole offence being compounded (Ross, J.) SAROJ KUMAR MUKERJI v. EMPEROR.

67 I. C. 592 : 23 Cr. L. J. 432

—S. 345—*Compounding of offence—Sanction of Magistrate—Discretion—Revision.*

It is the duty of the Magistrate to decide in his case whether he will or will not allow a compromise and the responsibility rests entirely with him. Unless the offence is so serious that punishment is absolutely necessary, the Magistrate would well exercise his discretion in allowing a composition of the offence. Where a Magistrate refused to recognise a composition without sufficient reason, the High Court accepted a revision and enforced the compromise. (Harrison, J.) SEWA SINGH v. EMPEROR.

(1922) Lah 138 : 65 I. C. 437 :

23 Cr. L. J. 85.

—Ss 345 and 439—*Revision—Composition of offence—Legality of*

A Court of revision has no power to sanction the composition of an offence after his conviction of the accused by the court below. 43 Cal. 1143 foll. 29 M. L. J. 621, 3 All. 1137 ref. (Bucknill, J.) AUDHI RAI v. EMPEROR

3 Pat. L. T. 458

65 I. C. 432 : 23 Cr. L. J. 80.

—S. 345—*Who can compound* S. 498 A 1 PC.

However anomalous the position may be the only person who can compound a case under S. 498-A is the husband of the woman. (Harrison, J.) MIR ALAM v. THE CROWN. (1922) Lah 177.

—S. 346—*Case referred by Sub-Magistrate—Jurisdiction of Sub-Divisional Magistrate—Procedure.*

Where a case is submitted by a Sub-Magistrate to a Sub-Divisional Magistrate under S. 346 Cr. P. Code his jurisdiction determines. The Sub-Divisional Magistrate may thereupon try the case himself or commit the accused for trial or if he thinks fit, refer the case to any Magistrate having jurisdiction to try the offence which in the opinion of the Magistrate making the reference has been committed. The Sub-Divisional Magistrate should not send the case back without taking any action thereon. (Oldfield and Ramesam, JJ.) THE SESSIONS JUDGE OF BELLARY v. HAMPANNA.

(1922) M. W. N. 641 : 16 L. W. 581 :

31 M. L. T. 365 (H. C.) :

69 I. C. 438 : 23 Cr. L. J. 710.

—S. 350—*Bench magistrates—Conviction by some who did not hear the whole of the evidence.* See (1921) Dig. Col. 451. GIRDHARI v. EMPEROR.

64 I. C. 132

—S. 350—*Transfer of case—Witnesses re-examined—Former statements if evidence—Trial when commences.*

The policy of the law is that an accused should be able to claim a right not to be convicted of a criminal offence by a Magistrate who has not himself heard the evidence. Even in a summons case or summary trial, if the case is transferred from one Magistrate to another, the accused has a right to demand that the witnesses or any of them shall be resummoned or reheard. Under S. 350 Cr. P. Code a trial cannot be said to commence only when a charge is framed. The

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time expressly fixed by the proviso to that section for the accused to exercise his right is when the Magistrate commences his proceedings and not when a charge is framed 32 M. 220, 15 C. 608; 9 A. 52 Ref. If the accused exercises his right of resummoning the prosecution witnesses and they retract their former statements made before the magistrate who originally tried the case, those former statements cannot be treated as evidence in the case. (Chevis and Abdul Qadir, JJ.) SAHIB DIN v. EMPEROR

3 Lah. 115 : 4 U. P. L. R. (Lah) 50 :

66 I. C. 826 : 23 Cr. L. J. 330 : (1922) Lah 49.

—S. 353—*Accused—Ghosha lady—Power to dispense with personal attendance at trial, See Cr. P. Code, Ss. 205 AND 353.*

42 M. L. J. 337.

—S. 355—*Summary trial—Depositions—Reading of.*

S. 355 Cr. P. Code does not require that the evidence of witnesses should be read over to them in a case triable summarily. (Jwala Prasad, J.) MAHOMED ISHAQ v. EMPEROR

65 I. C. 552 :

23 Cr. L. J. 120.

—S. 355—*Warrant case—Summary trial—Record of evidence.*

Where a magistrate trying a warrant case summarily takes down the substance of the evidence of each witness but does not sign the record, the procedure is illegal and the illegality vitiates the trial. (Jwala Prasad, J.) BALKESHWAR SINGH v. EMPEROR.

3 Pat. L. T. 322 : (1922) P. 5 : 65 I. C. 546 :

23 Cr. L. J. 114

—S. 360—*"Accused"—If includes persons proceeded against under S. 145.*

The term "accused" in S. 360 applies to persons against whom proceedings are taken under Ch. (XII) of the Cr. P. Code (Ross, J.) RAMNARAIN SINGH v. DHONRAI GOPE

3 Pat. L. T. 291 : (1922) P. 371 : 65 I. C. 557 :

23 Cr. L. J. 125.

—Ss 366 and 367—*Judgment—Sessions Judge acquitting the accused recording his own findings and findings of assessors—Amplification at a later date giving reasons—Mere irregularity—Revision—Interference*

Where in a Sessions case the sessions Judge at the end of the trial wrote a document headed judgment setting forth the findings of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty and they were acquitted and at a later date he wrote and prefixed to that judgment a full reasoned judgment dealing with the various points raised, the classes of the witnesses and the reasons he had for believing or disbelieving those witnesses, such a course even though it may possibly be an error in procedure is a mere irregularity and the High Court will not set aside the acquittal in revision. (Sir Walter Schwabe C. J. Oldfield and Coultts Trotter, JJ.) SANKARALINGA MUDALIAR v. NARAYANA MUDALIAR.

43 M. L. J. 369 : 16 L. W. 413 :

(1922) M. W. N. 579 (F. B.)

## CRIM PROCEDURE CODE (1898), S 367.

—Ss. 367, 424 — *Appellate judgment — Essentials of.*

There is nothing in the Code of Criminal Procedure which says that the rules which apply to the courts of original jurisdiction shall apply absolutely to the judgments of appellate Courts, but only that they shall apply so far as may be practicable. The principles that should guide a Criminal Appellate Court are laid down in 20 Cal. 353 (*Stuart, J.*) *LAL SINGH v. KING-EMPEROR*

L. R. 3 A. 9 (Cr)

—S. 367 — *Provisions of mandatory Non compliance*

The delivery of judgment and passing of sentence is an integral part of a Criminal trial. It is not a mere formality and the deliberate breach of express provisions of the law cannot be treated as a mere irregularity to be cured by S 537 Cr. P Code (*Robinson, C. J. and Macgregor, J.*) *RAMBIT v. EMPEROR.*

1 Bur L. J. 122

—S. 367 (5) — *Death sentence — Reasons for mitigating — Lapse of time — Effect*

In cases of murder, the normal sentence is one of death. The Judge should not ask himself if there are reasons for imposing the extreme penalty, but whether there are reasons for abstaining from doing so.

The lapse of period of 9 months after a sentence of transportation for life was passed in a case in which the sentence of death should have been passed was held to be ground against enhancement. (*Robinson, C. J. and Macgregor, J.*) *EMPEROR v SHWE HLA U.*

11 L. B. R 323 : 67 : I C. 613 : 23 Cr. L. J. 437.

—Ss 370 and 260 — *Presidency magistrate — Summary trial and conviction — Judgment — Contents of.*

Under S. 370 (1) Cr P Code a Presidency Magistrate who tries and convicts an accused in a Summary trial is bound to give reasons for the conviction. (*Ramesam, J.*) *VARADARAJULU PILLAI in re.*

16 L. W 836 :  
31 M. L. T. 400 (H. C.) : 68 I. C. 826 :  
23 Cr L. J. 602.

—Ss. 376, 418 and 423 — *Trial by Jury — Sentence of death — Confirmation by High Court — Powers of High Court*

Though a High Court has power to substitute its own finding for the unanimous verdict of the jury in a trial for murder when the sentence comes on for confirmation before the High Court still as a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily. It is necessary that the convict must show *prima facie* that the verdict is unsupported by evidence. The High Court will not permit the same latitude in the criticism of the evidence before the jury that it allows in an ordinary appeal from a trial with assessors.

Per *Kennedy, J. C.* If the verdict of the jury is perverse, or if evidence has been improperly admitted or excluded or if there is a misdirection by the Judge, then the High Court would interfere. (*Kennedy, J. C., Kemp and Madgaonkar, A. J. C.*) *GUL v. EMPEROR.*

15 S. L. R 103 :  
64 I. C. 657 : 23 Cr. L. J. 33.

## CRIM PROCEDURE CODE (1898), S 408

—S. 379 — Imprisonment for failure to furnish security — Not a sentence within the meaning of the section. See Cr. P. Code Ss. 123 and 379. 15 S. L. R. 205.

—S. 386 — Levy of fine — Security deposited by accused's brother as his surety for trial — Realisation of fine from such deposit. See (1921) DIG. COL. 453 *GIRDHARI LAL v. EMPEROR.*

64 I. C. 136.

—S 386 — Order for costs under S 148 — Execution — Distress warrant — Discretion of Magistrate See Cr. P. Code, Ss 148 (3) and 386. 3 Pat L. T. 762.

—S. 393 (b) — *Illegality of sentence — Whipping on person sentenced to five years rigorous imprisonment*

The provision in S. 393 (b) against whipping refers to the execution, and not to the passing of the sentence of whipping. The section makes it illegal to execute the sentence of whipping on persons who have been sentenced to imprisonment for more than five years, and consequently the sentences of whipping passed in this case cannot be carried out. It follows that the sentences themselves are illegal as a sentence cannot be passed of which the execution is prohibited by law 1 M. 56. followed. (*Shadi Lal and Martin, J.*) *AKBER v. CROWN.*

3 Lah. L. J. 395.

—Ss 403 and 494 — *Charge under S. 291, I. P. C. — Withdrawal of prosecution — Subsequent prosecution under Ss 188. and 290, I. P. C.*

Where an accused was charged with an offence under S. 291, I. P. C., and the Public Prosecutor withdrew the charge under S. 494 (b), Cr. P. Code, the withdrawal amounts to an acquittal and it operates as a bar under S. 403 Cr. P. Code to a subsequent prosecution on the same facts under Ss. 188 and 290 I. P. C. as the accused could have been convicted of an offence under S. 290 in the former trial, though not charged with the offence. The words "competent to try" in S. 403 refer to the character and status of the Court which had decided the case. 37 A. 110 ; 24 M. 641 : 17 Bom. L. R. 678 Ref. (*Kemp and Raymond, A. J. C.*) *EMPEROR v. MEGHRAJ DEVIDAS.*

66 I. C. 657 : 23 Cr. L. J. 305.

—S. 403 — *Charge of abduction — Acquittal — Subsequent trial for illegal detention.*

An acquittal on a charge of abduction of a woman does not prevent a subsequent trial for subsequent detention of the woman. (*Broadway, J.*) *MAHBUB ALI KHAN v. EMPEROR.*

4 Lah. L. J. 488.

—S 403 — False personation before Sub-Registrar — Previous acquittal on charge under S. 419, I. P. C. — Subsequent trial under S. 82 or the Registration Act. Former Court not competent for want of sanction to try the latter offence — Previous acquittal no bar to later trial. See (1921) DIG. COL. 454 *MOHAN LAL v. EMPEROR.*

64 I. C. 142.

—S. 408 — Appeal — Order of compensation and repayment of fine — Cattle trespass Act.

## CRIM. PROCEDURE CODE (1893), S. 407

S. 22. See (1921) DIG. COL. 455 BARTHELEMY DUMING RODRIKS v. PAPA DADA.

46 Bom. 58 : (1922) Bom 191

—Ss. 407, 429, 439—*Appeal—Notice of, to be given to District Magistrate—Acquittal without notice—Illegality.*

Where a Sub Divisional magistrate disposes of an appeal against a conviction without giving notice to the District Magistrate and acquits the accused, the omission to give the notice is an illegality and not a mere irregularity. The High Court interfered in revision and set aside the acquittal (*Shah, C. J. and Crump, J.*) EMPEROR v. SHIVLINGAPPA BASAPPA. 24 Bom. L. R. 1150

—Ss. 417 and 439 (5)—*Acquittal—Revision against order—Maintainability.*

In a case where the Government has not appealed against an order of acquittal, which it can do under S. 417, interference by way of revision is prohibited by S. 439 (5). (*Fawcett, J. C. and Kemp, A. J. C.*) EMPEROR v. JANU FAKIR.

15 S. L. R. 171 : (1922) Sindh 22 :

66 I. C. 999 : 23 Cr. L. J. 343

—S. 417—*Appeal against acquittal—Trial by jury—Interference by High Court when justified.*

On an appeal by the Government against an acquittal by an unanimous verdict of the jury accepted by the Sessions Judge, the existence of a misdirection in the charge would not justify the reversal of the verdict of the jury unless this misdirection has in fact occasioned a failure of justice. (*Newbould and Suhrawardy, JJ.*) SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS v. SHYAM SUNDAR BHUMJI.

26 C. W. N. 558. (1922) Cal 106

—S. 417—*Appeal from acquittal—Interference*

The High Court will not interfere with an acquittal unless the lower court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts, as to cause a miscarriage of justice. (*Jwala Prasad and Ross, JJ.*) EMPEROR v. KUNJA DUSADH.

3 Pat. L. T. 396

67 I. C. 506 : 23 Cr. L. J. 410,

—S. 420 and 419—*Jail appeal—Dismissal of—Effect of.*

Where a jail appeal is preferred under S. 420 of the Cr. P. Code and is dismissed, no further appeal can be preferred through Counsel under S. 419 of the Cr. P. Code. 3 O. L. J. 326 diss. (*Daniels, J. C.*) GANGA DIN v. EMPEROR.

9 O. L. J. 1. 65 I. C. 612

23 Cr. L. J. 148

—S. 421—*Form of judgment.*

The powers which are capable of being exercised under S. 421 should be exercised with considerable caution and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the appellate Court to call for the records and look at the evidence. It is also desirable, as has been often pointed out by the High Courts, that in dismissing appeals summarily

## CRIM. PROCEDURE CODE (1898), S. 423.

although it is not necessary for the appellate tribunal which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction. (*Bucknill, J.*) PADARATH KURMI v. EMPEROR (1922) P. 552.

—S. 421—*Jail appeal—Dismissal of—Subsequent appeal preferred through counsel—Maintainability.*

An order of the High Court summarily dismissing the petitions of appeal presented by the accused through the Superintendent of Jail is a perfectly valid and legal order. Consequently when once the right of appeal has been exercised by the accused in the manner aforesaid, the accused cannot again file an appeal through counsel 36 I. C. 133 Rel., 19 B. 732 Rel. (*Mars, C. J. and Piggott, J.*) KHALI v. EMPEROR.

20 A. L. J. 739 : L. R. 3 A. 137 Cr. :

(1922) All. 480 : 4 U. P. L. R. (A.) 163.

65 I. C. 41 : 23 Cr. L. J. 505.

—S. 423—*Committal under, by Sessions Judge. It can be quashed—Powers of Court. See CR. P. CODE. Ss. 215 AND 423.*

1 Bur. L. J. 250.

—Ss. 423 and 439—*Criminal case—Remand for fresh trial—When permissible.*

When the trial before a Magistrate was perfectly regular the mere fact that he had held a preliminary enquiry does not incapacitate him from trying the case. It is not competent for an appellate Court to order a retrial when the trial in the first Court has been regular and the record of that Court is as full as the law requires it to be and there is evidence on record to enable the appellate Court to decide the appeal on its merits. It inadmissible or irrelevant evidence had been admitted it should be left out of consideration. (*Pratt, J.*) MRS MAY BOUDVILLE v. EMPEROR.

1 Bur. L. J. 32.

—S. 423—*Different Sentences on each of the accused—Appeal by each—Forum.*

Where some of the accused in a case are convicted for terms of imprisonment for which appeal lies to the High Court and they appeal to the High Court and others are given lesser sentences, the latter are not bound to appeal to the High Court but should appeal as if they have been convicted in a separate case of their own. 40 M. 591 foll. (*Oldfield and Ramchand, JJ.*) MITTOOR MOIDEEN HAJEE v. EDIKKATTU CHEKKUTTI HAJI.

43 M. L. J. 561.

—Ss. 423 and 238—*Powers of appellate Court—Alteration of conviction.*

It is competent to an appellate Court to alter a conviction under S. 147, I. P. C. to one under S. 323, I. P. C. (*Ryves, J.*) HANUMAN v. EMPEROR. 20 A. L. J. 213 L. R. 3 A. 56 Cr. : (1922) All. 114 : (1922) A. 143.

65 I. C. 854 : 23 Cr. L. J. 198.

—S. 423—*Powers of appellate Court—Further inquiry—Further evidence. See (1921) DIG. COL. 456 MAHOMED ATA v. EMPEROR.*

L. R. 3 A. 1 (Cr.) : 67 I. C. 498 : 23 Cr. L. J. 402.



## CRIM. PROCEDURE CODE (1898), S. 424.

—Ss 424, 367 and 250—Appeal—Order for compensation—District Magistrate hearing appeal under S. 250 (3) Cr. P. Code—Duty to record judgment in accordance with S. 367 Cr. P. Code. See CR. P. CODE Ss. 250 (a) 367 AND 424. 3 Pat L. T. 203

—3s 424 and 367—Appellate Court—Duty of, to deal with evidence—Law and evidence not discussed.

An Appellate Court is not required to write a long and elaborate judgment, but it is clearly its duty, not only to examine the evidence, but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. An Appellate Court, which writes a judgment which a High Court is unable to follow without reference to the judgment of the Trial Court, obviously fails in the discharge of the duty imposed upon it by the law. (*Shadi Lal, C. J.*) DALIP SINGH v. EMPEROR.

2 Lah. 308 : 4 U. P. L. R. (Lah.) 9 :  
64 I. C. 377 : 23 Cr. L. J. 9 :  
24 P. L. R. 1922.

—S. 424—Appellate judgment—Essentials of. See CR. P. CODE, Ss. 367, 424

L. R. 3 A. 9 (Cr)

—S. 424—Judgment of appellate court—Contents of—Appeal against order under S. 110 Cr. P. Code—Revision, See (1921) DIG. COL. 457 SOHRA v. EMPEROR. 67 I. C. 202

—S. 435—High Court—No power to review—Remedy of accused.

The High Court has no power to review its judgment dismissing a criminal appeal even though fresh materials throwing doubt on the conviction are placed before it. The proper procedure is to make a reference to the Local Govt. Under Ch. XXIX Cr. P. CODE. (*Stuart, J.*) KALE v. EMPEROR. L. R. 3 A. 185 (Cr.)

—Ss 435 and 438—Inferior Criminal Court—District Magistrate exercising appellate powers, if inferior to Sessions Judge.

The District Magistrate sitting as a court of criminal appeal is an inferior criminal court to the Sessions Judge and the latter can refer an appellate judgment of the former to the High Court under S. 438 Cr. P. Code. (*Harrison, J.*) KALLU v. CROWN. 3 Lah. 23 : (1922) Lah. 85 : 68 I. C. 609 : 23 Cr. L. J. 577.

—Ss. 435 and 439—Interference by High Court *Suo Motu*—Calling for records—Revision

A Court should be loath to interfere on behalf of a person convicted in a Criminal case if that person is an adult of ordinary intelligence when that person himself in no way contests the propriety of his conviction. Under the very extensive powers conferred by S. 435 Cr. P. Code the High Court can call for and examine the proceedings of inferior courts if the necessity for doing so is brought to its notice in any manner. But before it does so it would have to be satisfied that there are *a priori* grounds for apprehending a miscarriage of justice. (*Stuart, J.*) NARAIN PRASAD NIGAM v. EMPEROR. L. R. 3 A. 178 (Cr) : 20 A. L. J. 909.

## CRIM. PROCEDURE CODE (1898), S. 437

—Ss. 435 and 439—Order of Civil Court under S. 476 Cr. P. C.—If open to revision under. See CR. P. CODE S. 476 24 O. C. 367.

—S. 435 (3)—Failure to give notice in proceedings under S. 145, Cr. P. C.—Effect.

The irregularity or illegality committed by a Magistrate in failing to give notice of the date of hearing, will not justify the High Court in interfering in revision. Proceedings under Ch. XII of the Cr. P. Code are excluded from the Scope of S. 435 (3) (*Martineau, J.*) JHANDA RAM v. TOPAN RAM. 67 I. C. 584 : 4 U. P. L. R. (Lah.) 82 : 23 Cr. L. J. 424.

—S. 435 (3)—Revenue court—Decision as to question of possession—Interference by Revenue Court.

Pending an attachment by a Magistrate in proceedings under S. 146 Cr. P. Code mutation proceedings were taken in the Revenue court. The Revenue court found on summary enquiry that the applicant was entitled to the non-talukdari property and the respondent to the talukdari property and the District magistrate thereupon removed the receiver and gave the talukdari property to the respondent. Held in revision to the High Court, that Ss. 40 and 146 of the U. P. Land Rev. Act gave jurisdiction to the Revenue court to decide who was in possession and that the High Court could interfere with the order in revision. (*Ashworth J. C.*) SURENDRA BIKRAM SINGH v. EMPEROR. 25 O. C. 242.

—S. 437—Discharge—Acquittal—Order for fresh trial.

Where after a full trial the accused persons were discharged, the discharge was for all practical purposes as good as an acquittal, it is not open to the District Magistrate to order a further enquiry into the case. (*Wilberforce, J.*) SUNDER SINGH v. MT. BHAGAN. 4 Lah. L. J. 331

—S. 437—Discharge of accused—Order directing further inquiry—No notice to accused—Validity of order.

Where a Sessions judge without giving notice to the accused, directs a further inquiry in a case where the accused had been discharged, the order is bad and cannot stand. 20 All. 339 followed. (*Stuart, J.*) SAGAR MAL v. EMPEROR.

20 A. L. J. 91 : L. R. 3 A. 13 Cr. : 65 I. C. 421 : 23 Cr. L. J. 70.

—S. 437—Further inquiry

Where the Sessions Judge ordered further inquiry, while the order of discharge was not perverse or foolish and where further inquiry merely amounted to a re-hearing of the same evidence by another Magistrate, held :—that the order was illegal 8 P. R. 1900 Cr. : 2 P. R. 1901 Cr. 8 P. R. 1901 Cr. and 1 Lah. 216 Foll. (*Broodway, J.*) DOST MAHOMED v. ASA RAM. (1922) Lah. 409.

—S. 437—Further enquiry—Order for when to be made—Powers of Dt. Magistrate.

In proceedings stated under S. 110, Cr. P. Code, the Trial Magistrate heard a large number of witnesses on both sides and in a well-considered judgment came to the conclusion that it was not proved that orders under the petitioner should

## CRIM. PROCEDURE CODE (1898), S. 437.

issue under S. 110, Cr. P. C. The District Magistrate referred the matter back for further enquiry with a recommendation or advice for passing orders under S. 110, Cr. P. Code. *Held*, that the Trying Magistrate was entitled to come to the conclusion which he did and merely because another Court did not agree with that opinion there was no reason to direct the so called further enquiry. (*Ryves, J.*) *UDAIRAJ SINGH v. EMPEROR.* L. R. 3 A. 114 (Cr.).

44 All 691 : (1922) All. 429

—S. 437—Further enquiry after discharge—Order when to be made—Notice, necessity for.

It is competent to a District Magistrate to order further enquiry if in his opinion the evidence on record has not been properly appreciated 17 P. R. 1895, 10 B 131; 15 C 608, 14 M. 334 Ref At the same time unless it could be said that the order of discharge was manifestly foolish or perverse or based on an incomplete record of the evidence a further inquiry should not as a general rule be ordered. It is not a sufficient ground for retrial that the District Magistrate himself would have taken a different view of the evidence 1 Lah. 216, 130 P. L. R 1915; 10 P. R 1911 Cr. F. B., 33 I. C. 641 Rel.

Though an order for further enquiry without issue of notice to the accused is not illegal, still according to the practice of all the Courts, in India, it is considered proper to issue such notice. (*Broadway, J.*) *KALLU v THE CROWN.*

4 Lah. L. J. 411 : (1922) Lah. 59

—S. 437—Further enquiry—Order for when to be made.

Further inquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available, which has not been taken and which would support a charge for that offence. (*Krishnan, J.*) *ARUMUGA MUDALIAR In re.* 43 M. L. J. 564 :

31 M. L. T. 254 (H. C.) : 16 L. W. 494 : (1922) M. W. N. 601 : 68 I. C. 624 :

23 Cr. L. J. 592.

—S. 437—Order—Essentials of.

Where the Sessions Judge without reasons ordered further inquiry in the interests of justice *held*.—the order was entirely inadequate. (*Broadway, J.*) *DOST MAHOMED v ASA RAM*

(1922) Lah. 409,

—S. 437—Order for further enquiry—validity—Failure to consider prospect of public advantage from re-opening of case—Effect—Setting aside of order in revision—Jurisdiction.

An order directing further enquiry under S. 437 Cr. P. C. without regard to what is really the material consideration in such cases viz. the prospect of any public advantage from the case being re-opened is one passed without jurisdiction and is liable to be set aside by the High Court in revision. (*Oldfield and Ramesam, JJ.*) *KRISHNA PILLAI In re.* 43 M. L. J. 555 : 16 L. W. 585 :

31 M. L. T. 419 (H. C.) : 68 I. C. 824 :

23 Cr. L. J. 600.

## CRIM. PROCEDURE CODE (1898), S. 439.

—S. 438—Appellate Judgment of District Magistrate—Sessions Judge if can refer to High Court. See CR. P. CODE, Ss. 435 AND 438. 3 Lah. 23.

—Ss. 438 and 439—Commitment—Quashing of—Revision.

A commitment can only be quashed on a question of law. The question whether the evidence already on the record is sufficient to establish the charge is a question connected more with the propriety of the conviction rather than with the propriety of the commitment (*Kanhaya Lal, A. J. C.*) *MAHABIR v EMPEROR.*

(1922) Oudh 109. 65 I. C. 431 :

23 Cr. L. J. 79.

—S. 439—Acquittal—Conviction.

In revision the High Court cannot convert a finding of acquittal into one of conviction. The only method of securing conviction in a case of acquittal is by an appeal by the Government against the order. (*Gokul Prasad and Stuart, JJ.*) *EMPEROR v SHEO DARSHAN SINGH.*

44 All. 332 : (1922) All. 487 : 20 A. L. J. 190 :

L. R. 3 A. 18 Cr. : 65 I. C. 858 :

23 Cr. L. J. 202.

—S. 439—Acquittal—Revision against—Interference when justified.

The High Court will interfere in revision against acquittal only where it is urgently demanded in the interests of public justice, 42 C. 612 foll. (*Sir Walter Schwabe, C. J. Oldfield and Coultts Trotter, JJ.*) *SANKARALINGA MUDALIAR v. NARAYANA MUDALIAR.* 43 M. L. J. 369 :

16 L. W. 413 : (1922) M. W. N. 579 :

31 M. L. T. 342 (H. C.) : (1922) Mad. 502 :

68 I. C. 615 : 23 Cr. L. J. 583. (F. B.)

—Ss. 439 and 435—Acquittal—Revision against—Irregularities in procedure—Charge of grievous hurt—Occurrence admitted—Accused not examined—Summing up to the jury partially done—Interference in revision. See (1921) DIG. COL. 459 *GANGADHAR GOALA v. R. W. L. REED.* 64 I. C. 665 : 23 Cr. L. J. 41.

—S. 439—Application to lower Court—Omission to make—Effect of

It is a sound rule that where an application can be made in revision to a lower Court the High Court should not under ordinary circumstances entertain an application in revision unless an application has already been made to the lower Court. 30 All 116, 36 Cal. 643 foll. (*Lyle, A. J. C.*) *SAT NARAYAN SINGH v EMPEROR.*

9 O. I. J. 280 : 25 O. C. 37 : (1922) Oudh 147,

—S. 439—Complainant—Right to be heard—Defamation.

On hearing a revision the High Court could hear a private complainant in the case of an offence under Ss. 500 and 501 I. P. C. 42 C. 612 Ref. (*Ghose and Cuming, JJ.*) *ASHUTOSH DAS GUPTA v. PURNA CHANDRA GHOSH.*

36 C. L. J. 287.

—S. 439—Composition of offence in revision—Power to sanction—Legality. See CR. P. CODE Ss. 345 AND 439, 65 I. C. 432,

## CRIM. PROCEDURE CODE (1898), S. 439.

—S. 439—*Conviction of magistrate affirmed by Sessions Judge—Amendment of revision application into one from original conviction*

The High Court on an application for revision on an order of the Sessions Judge confirming a conviction by a magistrate, directed the application to be converted into one for revision of the order of the magistrate and quashed the conviction. (*Walsh, J.*) *MUNSHI LAL v. EMPEROR.*

20 A. L. J. 198. L. R. 3 A. 34 Cr. (1922) All. 21. 66 I. C. 184. 23 Cr. L. J. 248.

—S. 439—*Powers of interference—Order not final*

The High Court has wide powers of interference under S. 439 Cr. P. Code and can interfere even with orders that are not final, where it is apparent that grave injustice would be done by allowing the proceedings to continue. (*Abdul Qadir, J.*) *THAKARIA v. PURAN SINGH*

67 I. C. 589. 23 Cr. L. J. 429.

—S. 439—*Findings of fact—Power of High Court.*

The High Court's power of interference in revision with findings of fact is one that should be sparingly used. (*Daniels, J. C.*) *MAHOMED BAHUR v. EMPEROR.*

90 L. J. 488.

—S. 439—*Question of fact—Interference*

It is competent to the High Court in revision to go into the facts and if not satisfied beyond doubt as to the guilt of the accused to set aside the conviction. The rule that the High Court will not interfere in revision on a question of fact is not an absolute one. (*Ryves, J.*) *SIAM SUNDER v. EMPEROR.*

20 A. L. J. 276. (1922) All. 122. 4 U. P. L. R. (A.) 185. 66 I. C. 177. 23 Cr. L. J. 241.

—S. 439—*Reliance on wrong piece of evidence—If ground for interference.*

If a magistrate relies wrongly on a piece of evidence, there is no error or want of jurisdiction warranting an interference by the High Court. (*Adami and Ross, JJ.*) *CHULAI MAHTO v. SURENDRANATH CHATTERJEE.*

1 Pat. 75. 3 Pat. L. T. 17. 65 I. C. 616. 23 Cr. L. J. 152. (1922) P. 224.

—Ss. 439 and 195 (6)—*Sanction—Order for by Sessions Judge—Revision*

The High Court has power to interfere in revision with an order of the Sessions Judge granting sanction. 6 A. L. J. 1 Rel. (*Lyle, A. J. C.*) *NAZIR HASAN v. MAHOMED YAMIN.*

90 L. J. 282. (1922) Oudh 225. 63 I. C. 414. 23 Cr. L. J. 574.

—S. 439—*Scope of—Power of court.*

A boy was convicted under S. 323 along with his father and was sentenced to receive stripes. His father appealed but the case was compounded. The boy had no right of appeal and the judge refused to deal with the case in revision, held: S. 439 authorises the High Court to exercise any of the powers conferred on a court of appeal and if a Court of appeal can allow the composition of an offence it follows that the High Court can allow the same in revision too. (7 A. L. J. 1031 Rel.) *Lindsay, J.* *SHIBBO In re.* (1922) All. 488.

## CRIM. PROCEDURE CODE (1898), S. 471

—Ss. 439 and 435—*Subordinate court—Order by District Magistrate under S. 41 of the Bom. Dt. Police Act—Revision*

A District Magistrate passing an order under S. 41 of the Bombay Dt. Police Act acts in an executive and not in a judicial capacity and it is not open to the High Court to interfere in revision. 11 S. L. R. 113; 12 Bom. L. R. 1029; 6 S. L. R. 54; 6 S. L. R. 224 Rel. (*Fawcett, C. J. and Kincaid, A. J. C.*) *SANTAN v. EMPEROR.*

15 S. L. R. 126. 64 I. C. 663. 23 Cr. L. J. 39. (1922) Sind. 21.

—Ss. 439 (4) 470 and 471—*Acquittal of accused on the ground of insanity—Order under S. 471 not passed by acquitting Court—Power of High Court to pass orders under S. 471.*

The passing of an order under S. 471, Cr. P. C. after an acquittal has been recorded, cannot be said to alter a finding of acquittal into one of conviction within the meaning of cl. (4) of S. 439, Cr. P. Code.

Where the Court below acquitted an accused upon the ground that, at the time at which he was alleged to have committed the offence, he was insane but omitted to pass orders under S. 471, Cr. P. C. held that the High Court had power in revision to pass an order under that section. (*Kumarnaswami Sastri, J.*) *MAHAMMAD, IN RE.*

42 M. L. J. 72. (1922) M. W. N. 10. 30 M. L. T. 74 (H. C.). 65 I. C. 423. 23 Cr. L. J. 71. (1922) Mad. 54.

—S. 439 (5)—*Order of acquittal—Not appealed against by Government—Revision if lies. See CR. P. CODE, Ss. 417 AND 439 (5).*

15 S. L. R. 171.

—Ss. 456 and 491—*Habeas corpus—Power of High Court to issue writ to the mofussil—Malabar Ordinance 2 of 1921—Trial by Summary magistrate under the ordinance outside Martial law area.*

The High Court has power to issue a writ of Habeas Corpus to mofussil places and even in cases of persons who are not European British Subjects, S. 491 Cr. P. Code merely substitutes or adds for the Presidency towns a different form of procedure less cumbersome than the granting of a writ of Habeas corpus. 6 B. L. R. 392 foll.

A Summary Magistrate appointed under ordinance 2 of 1921 has no power to hold a Summary court outside the Martial law area and a conviction and sentence in a trial held outside the martial law area, for an alleged offence committed inside such area, are illegal. (*Schwabe, C. J. Oldfield and Coutts Trotter, JJ.*) *E. P. GOVINDAN NAIR. In re.*

43 M. L. J. 396. 16 L. W. 349. 31 M. L. T. 304 (H. C.). (1922) Mad. 499. 68 I. C. 838. 23 Cr. L. J. 614 (F. B.).

—S. 471—*Scope of—Power of High Court to pass orders under.*

S. 471, Cr. P. Code, does not compel the court to send the accused to the lunatic asylum. All that is necessary to see is that such safeguards are taken as would keep him from mischief.

Where the court below while acquitting an accused on the ground of insanity omitted to pass orders under S. 471, the High Court in revision

## CRIM PROCEDURE CODE (1898), S. 476.

can pass the necessary orders. (*Kumaraswamy Sastri v J*) MAHAMMAD, *In re*.

42 M. L. J. 72 : (1922) M. W. N. 10 :  
(1922) Mad. 54 : 65 I. C. 423 : 23 Cr. L. J. 71  
30 M. L. T. 74 (H. C.)

—Ss. 476 and 195—*Direction to prosecute—Grant of sanction—Duty of Court.*

It is the duty of every Court to take action of its own motion in every apparent case of forgery or perjury which is committed before it or brought to its notice and to institute proceedings in all such cases if there is a reasonable probability of the prosecution resulting in a conviction. If this is done there would be no room left for applications from private persons for sanction to prosecute. The matter of reasonable probability of the prosecution ending in a conviction is practically the only matter which a court has to consider in proceedings under S. 195 or 476 Cr. P. Code. (*Hallifax A. J. C*) GANGA PRASAD *v*. SHIAM LAL. 63 I. C. 45 : 23 Cr. L. J. 509

—S. 476—*Forgery—Offence committed by witness—Prosecution—Revision.*

It is competent to a Court to direct the prosecution of a person other than a party to the suit, viz., a witness for forgery under S. 476 of the Cr. P. Code. An order of a Civil Court under S. 476 directing a prosecution is open to revision under S. 115 of the Cr. P. Code and not under Ss. 435 and 439 of the Cr. P. Code. (*Daniels, J. C*) EJAZ ALI KHAN *v*. EMPEROR. 24 O. C. 367 : 63 I. C. 63 : (1922) Oudh 220 : 23 Cr. L. J. 228.

—S. 476—*"In the course of judicial proceedings"*—*Return of documents after disposal of case—Petition for—Order for prosecution—Legality.*

After some rent suits had been disposed of a petition was put in for return of documents before the court clerk. On a prosecution being ordered under S. 476 for forging the signature in the petition.

*Held*, under S. 476 a Civil Court can only send for enquiry or trial cases of offences "committed before it" or brought to its notice "in the course of a judicial proceeding." The words "committed before it" are qualified by the words "in the course of a judicial proceeding" and as the rent suits had been disposed of, the petitions could not be said to be filed in the course of any judicial proceeding. Hence there was no jurisdiction to take action under S. 476 (*Newbould and Ghose, JJ*) GIRIJANANDA KALI MITRA *v*. EMPEROR. 26 C. W. N. 660.

—S. 476—*Judicial Proceedings—Proceedings of Collector under S. 69, B. T. Act. See (1921) Dig. Col. 462 LAKSHAN BAR v. NARAIN HAZRAT.* 48 Cal. 1086

—S. 476—*Offence committed—Transfer of case—Different conclusion of court—Jurisdiction if taken away—High Court's duty in such cases.*

If a court is of opinion that there is ground for enquiry into an offence referred to in S. 195 Cr. P. Code, even if the case has passed out of the hands of that court and been decided by another

## CRIM PROCEDURE CODE (1898), S. 476.

court, the first court's powers under S. 476 do not come to an end. Nor does the circumstance that the other court has arrived at a different conclusion on the merits take away this jurisdiction.

In cases of revision against orders under S. 476 Cr. P. Code, the High Court must satisfy itself that there has been no unreasonable delay, that the orders are not vexatious and that the charges are not of a flimsy nature. (*Stuart J.*) SUNDAR LAL *v*. EMPEROR. 44 All. 642 : 20 A. L. J. 666 : L. R. 3 A. 93 Cr. : (1922) All. 233 (C). : 68 I. C. 827 : 23 Cr. L. J. 603

—S. 476—*Order for prosecution—Offence under S. 195 I. P. C—Offence not committed before Court or brought under its notice in the course of proceedings.*

Where an application for the transfer of a case was made before the District Magistrate on behalf of the accused by another person and the applicant went to the Magistrate's house and told him that he has given a sum of money to the Magistrate's father and had received it back subsequently *held*, the statement made by the applicant was unconnected with the application for transfer and the offence for which the applicant's prosecution had been ordered was not one committed before the District Magistrate or brought under his notice in the course of a judicial proceeding and he was incompetent therefore to pass an order under S. 476 of the Cr. P. Code in respect of that statement. (*Martineau, J.*) JIWAN SINGH *v*. EMPEROR. 3 Lah. L. J. 535.

—S. 476—*Order under—Complaint of offence under S. 193, I. P. C.*

Where a District Judge purporting to act under S. 476, Cr. P. Code, charged certain persons with offences and finally ordered that a copy of his order should be sent to the District Magistrate with a request that he would cause proceedings to be instituted after informing the police who investigated the matter, *Held* that the order was in substance a complaint and it was in the discretion of the District Magistrate to take action on it. (*Ryves, J.*) R SIMON *v*. EMPEROR. (1922) All. 438 : 66 I. C. 515 : 23 Cr. L. J. 291.

—S. 476—*Power to direct prosecution—Such court—Meaning of—Court of Subordinate Judge.*

From the use of the word "such court" in S. 476 Cr. P. Code it is clear that the court empowered to take action under that section is the same court before which the offence has been committed or under whose notice the offence has been brought in the course of a judicial proceeding. Though there may be more than one Subordinate Judge in a district, and the court of one of the judges might at any time cease to exist if he were transferred and no one sent to replace him, the work or his court being made over to the court of another judge, the fact that the court is not a permanency and may at any time be abolished does not affect the question (*Martineau, J.*) TARA CHAND *v*. EMPEROR. 67 I. C. 723 : 23 Cr. L. J. 451.

—S. 476—*Proceedings under—Prompt disposal—Decision of magistrate, not relevant in civil appeal.*

## CRIM. PROCEDURE CODE (1898), S. 476

Where in a civil suit, a judge of experience directs a party or witness to stand his trial under S. 476. Cr. P. Code, the matter should be dealt with promptly. The fact that an appeal is pending does not matter and the decision of the magistrate will not be relevant evidence in the civil appeal, (*Mears, C. J.*) *ANRUDDH KUMAR v. EMPEROR*.

L. R. 3 A 11 (Cr.)

65 I. C. 436 · 23 Cr. L. J. 85.

—S. 476—Prosecution for perjury—Procedure to be followed. See (1921) DIG. COL. 463 *EMPEROR v. WARIR BEG* 64 I. C. 143.

—S. 476—Sanction—Court acting on the evidence of witnesses whom applicant had no opportunity to cross-examine—Direction for prosecution before termination of civil proceedings.

There is no reason why a court, when any of the offences noted in S. 195 Cr. P. Code is committed in a civil court, should delay proceedings under S. 476 Cr. P. Code until the suit is disposed of, which disposal may not occur until months or years later. 32 M. 49 Ref.

Though notice that action will be taken against a petitioner under S. 476 Cr. P. Code is not necessary as a matter of law, where the prosecution has been ordered on evidence given by witnesses whom petitioner had no opportunity to cross-examine and whose evidence has thus not been tested, the lower court acts with material irregularity in directing a criminal prosecution in the matter without giving the petitioner any chance to know and meet the case against him 9 M. L. T. 192 Rel (*Wallace, J.*) *PERUMALLA VENKATASUBBIAH In re* 16 L. W. 925.

69 I. C. 440 : 23 Cr. L. J. 712.

—Ss. 476 and 195—Scope of—Duty of court.

It is the obvious duty of every court to deal with every instance in which there is even a suspicion that an offence against public justice has been committed if there is a fair possibility that enquiry will lead to the discovery of evidence sufficient to make a conviction probable, then the enquiry contemplated in S. 476 should be instituted and the court fails in its duty if it does not do it of its own motion. The application under S. 195 is in most cases a reminder to the court of the failure to do this important duty. (*Halifax, A. J. C.*) *TULSIRAM v. TILOKCHAND* 23 Cr. L. J. 605 : 68 I. C. 829.

—S. 488—Child—Adult major—Right to maintenance.

A person who has attained majority is not a "child" within S. 488 Cr. P. Code and he is capable of earning his livelihood. Consequently he cannot claim maintenance from his father. 37 M. 565 Rel (*Prideaux, A. J. C.*) *GANGARAMSA v. VISHNUSA* 5 N. L. J. 247 : 65 I. C. 631 : 23 Cr. L. J. 167.

—S. 488—Maintenance of child—Boy of the age of 17 or 18.

A father is bound to maintain a child if he is not able to maintain himself. Where a boy is 17 or 18, and is able to work and earn a living he cannot compel his father to educate him in a college and thus better his prospects. (*Maung Kin, J.*) *ABDUL RAHIM v. MA SHWE MAY* 1 Bur. L. J. 123.

## CRIM. PROCEDURE CODE (1898), S. 484.

—S. 488<sup>1</sup>—Mutual agreement—Living apart—Short quarrel between husband and wife.

Where a husband quarrelled with his wife and exchanged angry words and then the husband kept her away from the house there is no living apart by mutual agreement within S. 488, Cr. P. Code. (*Maung Kin J.*) *MA PWA KYIN v. MAUNG BA THIN*. 1 Bur. L. J. 124.

—S. 488—Order for maintenance—Effect of decree of civil court.

The subsequent decree of the civil Court supercedes any order for maintenance that may have been previously passed by a Criminal Court under S. 488 Cr. P. Code. Such a decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for custody had been duly complied with and that without any sufficient cause she has left his custody (*Das, J.*) *RAMDHEYAN RAM v. MUST. RAM. DULARIA*. 3 Pat. L. T. 51 · 65 I. C. 576 23 Cr. L. J. 144

—S. 488—Pongyi—If liable to pay maintenance.

The provisions of S. 488 apply to the case of a father who has a sufficient means to maintain the child but neglects to do so. The presumption in the case of a "Pongvi" or Buddhist priest is that he possesses no property except such as is necessary for his religious life. It is not in the public interest that a woman who allows herself to be seduced by a member of the priesthood should obtain support for her child. (*Saunders, J. C.*) *MA E SHI v. U ADITSA* 1 Bur. L. J. 97 : (1922) U. B. 15.

—S. 488 (3)—Offer to maintain—Refusal to cohabit—Effect of.

There is nothing in the Cr. P. Code which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life merely because he refuses to cohabit with her 6 M. 371 dist. (*Kumaraswami Sastri, J.*) *JAGGARAPU BASAVAMMA v. JAGGARAPU SEETARIDDI*.

42 M. L. J. 566 : (1922) M. W. N. 265 :

30 M. L. T. 315 (H. C.) : 15 L. W. 535 :

(1922) Mad. 209 : 66 I. C. 832 : 23 Cr. L. J. 336.

—S. 489—Order of magistrate under S. 488 Cr. P. Code—Suit in Civil court for declaration that child is not the child of the person ordered to pay maintenance—Maintainability of—Effect of decree of Civil Court. See UPPER BURMAH C. C. REGN. S. 13 1 Bur. L. J. 82.

—Ss. 491 and 456—High Court—Writ of Habeas corpus—Power to issue writ—Mofussil places—Persons other than European British subjects. See CR. P. CODE, Ss. 456 AND 491. 16 L. W. 349,

—S. 494—Withdrawal from prosecution—Duty of Court to give reasons for allowing—Practice. See (1921) DIG. COL. 465 *RAJANI KANTA SHARA v. IDRIS THAKUR*.

48 Cal. 1105 : 64 I. C. 280 : 22 Cr. L. J. 760.

## CRIM. PROCEDURE CODE (1898), S. 494.

—S. 494—*Withdrawal of prosecution—Effect of—Fresh complaint on the same facts.*

Where a Criminal case was withdrawn on the ground that there was no case to be made out against the accused and some evidence had been recorded when the case was withdrawn under S. 194, Cr. P. Code, it is not competent for another magistrate to proceed against the accused on the ground that there is a *prima facie* case against them except in accordance with S. 437 Cr. P. Code. (*Fawcett, J. C. and Kemp, A. J. C.*) CHANDIRAM VERHOMAL v. EMPEROR.

15 S. L. R. 131 : (1922) S. 23.

—S. 494 (a)—*Withdrawal of prosecution—Order for—Reason to be stated*

Where a court on the application of the Public Prosecutor for withdrawal of the prosecution under S. 494 (a) makes an order allowing such withdrawal and discharging the accused, the order is a judicial one. The order must contain the reasons so that the High Court may see whether the lower court's discretion has been properly exercised. 22 C. W. N. 69 Ref (*Teunon and Ghose, JJ.*) JAGAT CHANDRA ROY v. KALI MUDDI SARDAR.

26 C. W. N. 880.

—S. 494 (b)—*Withdrawal under—Effect of—If operates as a bar of further prosecution. See CR. PRO. CODE, Ss. 403 AND 494.* 66 I. C. 657.

—Ss. 497 (3) and 439—*Bail—Non bailable offence—Grant of bail by lower court—Power of High Court to set it aside.*

Persons accused of non-bailable offences should not be released on bail as a rule, but they may be so released if there are reasons for believing that the case against them is such that it is not likely to succeed, or if there are special circumstances justifying bail. Where bail is improperly granted by the lower court to persons accused of murder, the High Court can set aside the order but only after notice to the accused (*Stuart J.*) EMPEROR v. MT. BASHIRAM.

L. R. 3 A. 190 (Cr.).

—S. 510—*Certificate given by medical man—Not admissible in evidence unless proved by him as a witness. See EVIDENCE ACT, S. 45.*

24 Bom. L. R. 803.

—S. 514—*Forfeiture of security—Initiation of proceedings—Expiry of period.*

The accused was bound over to keep the peace for one year. Subsequently proceedings were started against him under S. 514 Cr. P. Code for breach of the conditions of his recognizance bond. Held that the termination of the period of the bond before the proceedings were finished, was no bar to the prosecution of the case (*Stuart, J.*) JASSI v. EMPEROR.

L. R. 3 A. 129 (Cr.) : 20 A. L. J. 692 : (1922) All. 335.

—S. 514—*Notice under—Recording of evidence—Failure to comply with requisites—Nature of proceedings.*

S. 514 lays down that it must be proved to the satisfaction of the court that the bond has been forfeited and the court should record the grounds of such proof. It is only after such grounds have been recorded that the person bound should be

## CRIM. PROCEDURE CODE (1898), S. 520.

called upon to show cause—Proceedings under S. 514 are of the nature of civil proceedings and failure to strictly comply with the provisions of the section will vitiate the proceedings (*Adami, J.*) THAKUR KRISHNA NARAIN SINGH v. EMPEROR.

3 Pat. L. T. 381 : (1922) P. 242. 67 I. C. 830 : 23 Cr. L. J. 478.

—S. 514—*Proceedings taken in time—Transfer to a court having no jurisdiction—High Court ordering de novo inquiry—Expiry of time—Effect*

Where after proceedings were instituted by a District Magistrate for forfeiting a bond within the period provided by the bond, and the case was afterwards transferred to a subordinate Magistrate, but the High Court considering such transfer unwarranted by law, directed the District Magistrate to hold an enquiry *de novo*, by which time the period mentioned in the bond had expired.

Held, as the District Magistrate was only directed to carry on proceedings which had been initiated in time, the proceedings were quite legal. (*Lindsay, J.*) UMA DUTT MISIR v. EMPEROR.

44 All. 657 : (1922) All. 503 : 20 A. L. J. 693 : L. R. 3 A. 99 Cr. : 68 I. C. 847 : 23 Cr. L. J. 623.

—S. 517—*Scope of—Direction for delivery of property already returned. See (1921) DIG. COL. 466.* JHUMAK SINGH v. TOTA MAHTO.

3 Pat. L. T. 228 : 65 I. C. 494 : 23 Cr. L. J. 110.

—Ss. 517 and 520—*Stationary Sub-Magistrate—Order under S. 517—Appeal—Forum—District Magistrate—Sub-Division—Magistrate*

A Stationary Sub-Magistrate in acquitting a person charged with an offence under S. 406, I. P. C. made an order under S. 517, Cr. P. Code, that certain jewels which a subject matter of the charge should be returned to the complainant. Held, that the court which had power to modify the order was the District Magistrate and not the Sub-Divisional Magistrate and that the order of the latter dismissing an appeal to him was right (*Ayling and Ramesam, JJ.*) JOGI VENKIAH v. STATION-HOUSE OFFICER OF NARSAPUR.

42 M. L. J. 401 : (1922) M. W. N. 191 : 30 M. L. T. 251 (H. C.) : (1922) Mad. 78 : 15 L. W. 534 : 67 I. C. 339 : 23 Cr. L. J. 387.

—Ss. 520 and 369—*Order for disposal of property regarding which offence has been committed—Order by Appellate Court sometime after—Judgment—Mere irregularity.*

A conviction for theft of two bulls was set aside on appeal but in the judgment of the appellate magistrate nothing was said about the possession of the bulls, which had been ordered to be handed over to the complainant by the court below. Sometime after the disposal of the appeal, on application by the accused the appellate magistrate the successor of the magistrate who had disposed of the appeal ordered that the bulls should be restored to the accused. Held in revision by the High Court that there was no question of jurisdiction justifying interference with the order of the appellate magistrate. 19

## CRIM. PROCEDURE CODE (1898), S. 522.

W R 3 ; 35 B 253 ; 34 M. 94 ; 38 I C. 309 Ref  
(*Odgers, J.*) SUBBA NAIDU *in re*.

43 M. L. J. 87 : 15 L. W. 664  
(1922) M. W. N. 494 : (1922) Mad 329 :  
31 M. L. T. 367 (H. C.)

—S. 522 — Order under — Acquittal of  
offence under S. 447, I, P. C.

Where an accused was acquitted of trespass under S. 447, I, P. C., Penal Code but an order under S. 522, Cr. P. Code, is passed that order is without jurisdiction as that section conferred jurisdiction on a Criminal Court only when a person is convicted of an offence attended by criminal force. (*Dalal, A. J. C.*) *EMPEROR v. ALI BAHADUR*. 24 O. C. 352 : (1922) Oudh 144 : 66 I. C. 324 : 23 Cr. L. J. 260.

—S. 522—Order under, when justified—  
Criminal force.

Where an appellate court reversed a conviction and finds there was no use of criminal force, it is bound to set aside an order for delivery of possession and direct a redelivery if possession has been given under the order. 26 M. 49, 22 I. C. 1006 Ref. (*Kumaraswami Sastri, J.*) *RAJATHAMMAL v. RAJAMANICKAM PILLAI*. 15 L. W. 533 : (1922) M. W. N. 356 : 31 M. L. T. 20 (H. C.) : (1922) Mad. 188 : 68 I. C. 38 : 23 Cr. L. J. 502.

—S. 526—Affidavit of accused—If can be used to support an application for transfer. See CR. P. Code Ss. 342 and 526 (4) 3 Lah. 46.

—S. 526—Conviction—Retrial ordered by appellate court—Expression of opinion in counter Case—Transfer.

Where on an appeal against a conviction, a retrial is ordered on account of some irregularities in procedure (e. g.) non-compliance with S 342 Cr. P. C., it is highly desirable that such retrial should not be taken by the officer who has already expressed his final opinion upon the matter (*Bucknill, J.*) *MAHADEB MARWARI v. KISHAN LAL MARWARI*. 3 Pat. L. T. 147 : (1922) P. 60.

—S. 526—Criminal case—Transfer of—  
Grounds for.

The mere fact that the presiding Magistrate as the District Magistrate in charge of the District has taken precautions against intimidation and illegal picketting by the strikers so as to avoid a breach of the peace, is no ground for the transfer of a case in which the strikers are tried under Ss. 143 and 506, I. P. C. (*Teunon and Subra Warday, JJ.*) *NOGENDRA CHANDRA DAS v. REHAN ALL*. 65 I. C. 440 : 23 Cr. L. J. 88.

—S. 526—Transfer of case — Expression of opinion by magistrate.

Where a magistrate in framing the charges against the accused observed that the offence had been proved, the case should be transferred to another magistrate for trial. (*Abdul Qadir, J.*) *SRI KISHEN v. GOKAL CHAND*. 65 I. C. 632 : 23 Cr. L. J. 168.

—S. 526—Transfer of criminal case—  
Apprehension of prejudice on the part of the  
trial Magistrate.

## CRIM. PROCEDURE CODE (1898), S. 526.

Where the pleader for the accused had communicated to him that the Magistrate had asked him (the pleader) not to defend the accused, the latter could not have confidence in the impartiality of the Magistrate and the case should be transferred (*Shadi Lal, C. J.*) *DHERA SINGH v. RAM SINGH*. 3 Lah. L. J. 528.

—S. 526 — Transfer of criminal case—  
Grounds for—Complainant's master influencing  
Magistrate—Apprehension of accused. See (1921)  
DIG. COL. 467 AWADH SINGH v. PURAN KUNDU  
64 I. C. 38.

—S. 526—Transfer—Grounds therefor.

Where before the filing of the complaint the District Magistrate made a local enquiry in an unsuccessful attempt to bring about a settlement between the parties and subsequently directed the complainant to file a complaint before him which was then transferred for disposal to the Sub Divisional Magistrate by an order discussing the merits of the complaint and expressing an opinion adverse to the accused the case was transferred under S. 526 for trial to the Court of the District Magistrate of another district. (*Kanhaiya Lal, J. C.*) *KAM SAGAR v. RAJA MAHADEO BUX SINGH* (1922) Oudh 124.

—S. 526—Transfer of criminal case—  
Grounds for—Refusal to summon prosecution  
witness for cross-examination—Error of judgment. See (1921) DIG. COL. 468 SHIVADHAN SINGH v. EMPEROR. 3 Pat. L. T. 32.

—S. 526—Transfer—Magistrate as Vice  
President of Municipal Committee starting  
proceedings.

Where the Magistrate who tried a case was a member as well as the vice President of a Municipal Committee and was present at the meeting in which the Resolution was passed, for the disobedience of which proceedings against the petitioners had been started, *Held*, under such circumstances, as a member and an office bearer of a municipality, the Magistrate is debarred from trying a case arising out of the proceedings of the municipality. The fact that he is one of the members of a Bench before which the cases against the petitioners are pending will not make any difference. (*Abdul Qadir, J.*) *MUSSAMMAT NUR NISHAN v. THE MUNICIPAL COMMITTEE*. (1922) Lah. 72:

69 I. C. 384 : 23 Cr. L. J. 704.

—S. 526—District Magistrate asking to  
withdraw certain illegal parwanas—Refusal to  
withdraw—Sufficient ground for transfer.

Certain illegal parwanas were issued by the accused prior to his arrest for the offence for which he was being tried. The District Magistrate had written to him to withdraw those parwanas but he refused to do so. Subsequently the case was started against him and he applied for a transfer of the case on the ground that the District Magistrate was prejudiced owing to his refusal to withdraw the parwanas. *Held* that there was nothing improper on the part of the District Magistrate in requesting the accused to withdraw the illegal parwanas and that it was not

## CRIM. PROCEDURE CODE (1898), S. 526.

a ground for a transfer of the case. (*Coutts, J.*)  
**MAHADEO SINGH v. THE KING EMPEROR.**

(1922) P. 494.

—S. 526 (1) (a)—*Cantonment magistrate—Secretary of cantonment committee—Order for prosecution in one capacity—Trial in another.*

Where a cantonment magistrate in his capacity as Secretary of the cantonment committee ordered the prosecution of the accused in respect of alleged building in contravention of cantonment rules and proceeded to try the case. Held that the accused might entertain a reasonable apprehension that he could not have an impartial trial and that the case ought to be transferred (*Rafiq, J.*) **HIRA LAL v. EMPEROR.**

20 A. L. J. 911 :  
 L. R. 3 A. 173 (Cr.)

—S. 528 — *Transfer of criminal case—Private discussion about the case.*

Where a Sessions judge to whose court criminal case had been committed admitted having discussed the case at the club with one or two other officers, this is a sufficient ground for transfer of the case. Such a discussion is highly improper. (*Lindsay, J.*) **MAHOMED DARAZ KHAN v. EMPEROR.** 65 I. C. 558 : 23 Cr. L. J. 126.

—S. 533...Confession recorded without enquiry as to its being voluntary—Defect if cured under. See CR. P. CODE, SS. 164 (3) AND 533.

2 Lah. 325.

—Ss. 537 and 200 —Complaint — Omission to examine complainant on oath—Serious irregularity. See CR. P. CODE, SS. 200 AND 537.

16 L. W. 220.

—S. 537—Failure to comply with S. 342 Cr. P. C. Effect. See CR. P. CODE SS. 256, 342 AND 537.

43 M. L. J. 402.

—Ss. 537 and 342—Non-compliance with provisions of the Code—Effect of the irregularity.

The test to be applied in considering whether a particular infringement of the provisions of the Cr. P. Code is one which does or does not come within the purview of S. 537 Cr. P. Code appears to be this: "does the error go to the whole root of the trial? Does it in effect vitiate the proceedings. Has the court assumed an authority which it does not possess, Has it broken the vital rules of procedure?" If the error is of such a nature that the proceedings are vitiated in their very inception S. 537 Cr. P. C. has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding. (*Stuart, J.*) **BECHU CHAUBE v. EMPEROR.** 20 A. L. J. 874 : L. R. 3 A. 168 (Cr.)

—S. 537—Omission to comply with the formalities prescribed by S. 342—If a mere irregularity. See CR. P. CODE SS. 342 AND 537.

65 I. C. 618

—S. 537—Separate offences—District charges—Failure to frame—Irregularity. See CR. P. CODE SS. 233 AND 537.

66 I. C. 672.

—S. 537—Want of sanction—Defect when cured.

## CRIM. PROCEDURE CODE (1898), S. 556.

It is the want of sanction required by S. 195, Cr. P. Code alone which is curable by S. 537. The absence of the sanction required by any other provision of law cannot be remedied, nor by any other express enactment for initiation of proceedings. (*Kemp and Raymond A. J. C.*) **EMPEROR v. MEUGHRAJ DEVIDAS.**

66 I. C. 657 : 23 Cr. L. J. 305.

—Ss. 537 and 307—Want of sanction under S. 195 Cr. P. Code,—not a ground for quashing a conviction on a reference under S. 307 Cr. P. Code. See CR. P. CODE SS. 307 AND 537.

24 Bom. L. R. 484.

—Ss. 537 (b) and 195 — *Time expired sanction—Prosecution and conviction—Prejudice.*

Where a person has been sentenced upon conviction for an offence mentioned in S. 195 of the Code the sentence is not liable to be reversed or altered on appeal or revision on the ground that the sanction required by the section had expired when the prosecution was initiated, unless it is established that the absence of sanction has in fact occasioned a failure of justice.

Where the accused pleaded guilty there is no failure of justice in the case.

22 Cal. 176 overruled ; 28 Cal. 217, approved ; 31 Mad. 80 Referred to. (*Sanderson, C. J., and Woodroffe, Mookerjee, Teunon and Richardson, JJ.*) **KHETRA MOHAN DAS v. EMPEROR.** 48 Cal. 867 : 66 I. C. 662 : 23 Cr. L. J. 310 (F. B.)

—S. 545—*Pledge of jewels—Cheating—Compensation out of fine to pledgee.*

Where the accused was convicted of cheating the complainant and obtaining jewels and pledging them, it is not competent to the magistrate to pay a portion of the fine as compensation to the pledgee. Such an order is not contemplated by S. 545 Cr. P. Code. (*Macleod, C. J. and Coyajee, J.*) **EMPEROR v. RAMCHANDRA BAPUJI.** 24 Bom. L. R. 382 : 66 I. C. 997 : 23 Cr. L. J. 341.

—S. 547—*Applicability of—Livestock.*

S. 547 Cr. P. Code only provides a summary method for realising "money payable" and these words cannot be stretched so as to include livestock or other goods (*Harrison, J.*) **EMPEROR v. PHUMMAN RAM.** 65 I. C. 621 : 23 Cr. L. J. 157.

—S. 556—*District Judge Sanctioning prosecution for offence under S. 69 of Provincial Insolvency Act—If barred from hearing appeal against conviction—"Try any case" if includes appeal—Consent—Effect of.*

Where criminal proceedings were instituted against an insolvent under S. 69 of the Pro. Ins. Act, the complaint being drawn up as required by law, by the District Judge, the same officer is disqualified under S. 556 Cr. P. Code from hearing the appeal against the conviction.

The words "try any case" are comprehensive enough to include the hearing of an appeal.

Even the consent of the accused appellant cannot affect the absolute disqualification imposed by statute (*Campbell, J.*) **MAMOON v. EMPEROR.** 4 Lah. L. J. 452 : (1922) Lah. 30 : 67 I. C. 622 : 23 Cr. L. J. 446.



## CRIM. PROCEDURE CODE (1898), S. 556.

—S. 556—Magistrate—Criminal trial—*Report to Govt. for sanction.*

A Magistrate making a report to the Local Govt for obtaining sanction under S. 195 Cr. P. Code for the prosecution of a person under S. 29 I. P. C. is not on that account incompetent to take cognizance of the case, (*Walsley and Suhrawardy, JJ.*) MD OZIULLAH v BENI MADHAB. 26 C. W. N. 878 : (1922) Cal. 298 36 C. L. J. 180.

—S. 562—First offender—Release on furnishing bond. See (1921) DIG, COL. 471 ABDUL KADER v. MON MOHAN GOPE 66 I C 75 : 23 Cr. L. J. 235.

—S. 565—Motor Vehicles Act, S. 18—*Fine—Suspension of license—Appeal.*

Where a Magistrate in addition to imposing a fine for an offence under S. 16 of the Motor Vehicles Act suspends the license of a motor driver under S. 18 (2), the sentence is appealable and also open to revision by the High Court. 9 N. L. R. 88 foll. (*Hallifax A. J. C.*) DHEKLI KUNBI v. EMPEROR. (1922) Nag. 71 : 65 I C. 425 : 23 Cr. L. J. 73

CRIMINAL TRIAL—Appeal Adjournment—Omission to require production of prosecution evidence—Effect of. See (1921) DIG COL 472 BILLINGHURST v. MOEK. 49 Cal. 182 : (1922) Cal. 334.

—Appeal—Charge framed triable by superior Court—Procedure.

Where the Sessions Judge finds in appeal that the charge framed was one that could be tried only by a court of sessions, the proper procedure is to direct the accused to be committed by such court (*Stuart, J.*) HASAN RAZA v EMPEROR. L. R. 3 A. 146 : 20 A L J 568 : 4 U. P. L. R. (A.) 152 : (1922) All. 345 : 67 I. C. 728 : 23 Cr L J. 456

—Appeal to Sessions Judge against conviction—Charge found to be false by District Magistrate on inquiry—Procedure—Instructions to Government Pleader not to support conviction valid.

Pending an appeal against a conviction the District Magistrate found on enquiry the charge was false. Held, the proper procedure was to proceed with the appeals in the ordinary course as they had not been withdrawn but it was open to the District Magistrate to instruct the Government Pleader not to support the convictions (*Stuart, J.*) BHAGWANA v. BHULLAN, L. R. 3 A. 2 (Cr)

—Approver—Corroboration—Nature of.

As an approver's evidence is tainted, other evidence which is itself tainted cannot be sufficient for purposes of corroboration. Thus a wife who knew about the conspiracy to murder her husband and even consented to it cannot be considered a corroborating witness for the purposes of a securing conviction. (*Shadi Lal, C. J. and Abdul Qadir, J.*) AHMAD NUR v EMPEROR. A. U. P. L. R. (Lah.) 110 : 68 I. C. 821 : 23 Cr. L. J. 597.

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—Bench Magistrates

The object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attention, and apply their minds to the hearing of the evidence and the determination of the points at issue and, arrive at an independent judgment in regard to the merits of the charge. This is not possible, if, while one Magistrate is recording the evidence, the other Magistrate constituting the Bench is attending to some other work. Such a procedure defeats the very object with which a Bench is constituted and might lead in some cases to a miscarriage of justice. (*Kanhayalal, J. C.*) SULTAN v. SHAM-SHER 25 O. C. 182 : (1922) Oudh 21 : 69 I C 376 : 23 Cr. L. J. 696.

—Benefit of doubt.

The silence of the deceased himself in his first information report as well as of his relatives as long as he was alive, on the point of the guilt of the accused is a circumstance of which the accused is bound to get the benefit, especially if the majority of the eye-witnesses originally named in the first information report are not produced as witnesses. (*Abdul Qadir, J.*) ATTAR KHAN v THE CROWN. (1922) Lah. 28.

—Charge—Alternative charge—Refusal of Sanction—Effect of

It is contrary to public policy and to the recognised principles of the administration of the criminal law that where a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction. He should have thought of that before, (*Walsh and Ryves, JJ.*) KOHNA RAM v EMPEROR. 20 A. L. J. 775 : L. R. 3. A. 141 Cr : 4 U. P. L. R. (A.) 162 : (1922) All 502 : 68 I C. 32 : 23 Cr. L. J. 496.

—Charge to jury—Recording of heads of charge—Record to be intelligible to appellate court. See Cr. P. CODE Ss. 298 AND 299.

35 C. L. J. 437.

—Conduct of accused during trial—Not evidence of guilt.

There is no law by which an accused person can, either by words or gestures or by exposing himself to certain physical treatment, be made to implicate himself in the crime with which he is charged, when he is on trial. Such an idea is highly repugnant to the proper administration of justice. (*Das and Bucknill, JJ.*) BAZARI HAJAM v. EMPEROR. (1922) Pat. 46 : 4 U. P. L. R. (Pat). 1 : 3 Pat L. T. 526 : 1 Pat 242 : (1922) P. 73 : 68 I C. 958 : 23 Cr. L. J. 638.

—Confession retracted—Value of.

A confession made and retracted must always be open to some suspicion, but it is sufficient for a conviction if the court is satisfied, that it was voluntarily made and true. Case law on the point noted.

The credibility of a retracted confession in each case is a matter for the court to decide, according to the circumstances of each particular case. (*Das and Adami, JJ.*) BEHARI ADRAKI v. EMPEROR. 3 P. L. T. 98 : (1922) P. 492.

## CRIMINAL TRIAL.

## ———Conviction—Basis of.

An accused person can be convicted only on evidence that is actually on the record, and not on evidence which it is believed the witnesses might have given had they not been won over. (*Harrison, J.*) *MURAD v. EMPEROR*  
68 I. C. 830 : 23 Cr. L. J. 606.

## ———Conviction — Offence to be distinctly alleged and proved—General provisions causing several offences—Conviction.

As a general rule a conviction under a section which provides a penalty for a variety of acts done in contravention of the statute, is bad for duplicity where the section contains a variety of inconsistent alternatives. (*Walsh, J.*) *MUNSHI LAL v. EMPEROR*,  
20 A. L. J. 198.

L. R. 3 A. 34 Cr. : (1922) All 21 :  
66 I. C. 184 : 23 Cr. L. J. 248.

## ———Conviction set aside on appeal—Re-trial ordered—Desnability of trial by a new magistrate—Transfer. See Cr. P. Code S. 526,

3 Pat. L. T. 147

## ———Complaint—Offence under S. 211 I. P. C.—Conviction under S. 500, I, P. C.

A conviction under S. 500 I. P. C. where the complaint and charge were under S. 211 I. P. C. is illegal 18 P. R. 1889 Ref. (*Simpson, J.*) *GAYA BARHAI v. EMPEROR*,  
90 L. J. 342.

## ———Costs—Order for when justifiable

Except in cases where the Cr. P. Code specifically provides for payment of costs the Courts have no power to award costs in Criminal matters. But the Privy Council have power under the statute to grant costs in criminal cases. (*Sir Walter Schwabe, C. J. Oldfield and Coutts Trotter, Jj.*) *SANKARALINGA MUDALIAR v. NARAYANA MUDALIAR*. 43 M. L. J. 369. 16 L. W. 413 :  
(1922) M. W. N. 579 (F. B.) :  
31 M. L. T. 342 (H. C.) : (1922) Mad. 502 :  
68 I. C. 615 : 23 Cr. L. J. 583 (F. B.)

## ———Delay in recording statement—Probative value of.

Whatever may be the explanation of the Police to record late the statement of the principal witnesses for the prosecution, the defence is entitled to ask that the evidence of these witnesses should be discarded, inasmuch as there was sufficient time and opportunity for their being tutored. (*Jwala Prasad and Coutts, Jj.*) *EMPEROR v. PUNIT CHAIN*.  
3 Pat. L. T. 413 :  
(1922) Pat. 218 : 4 U. P. L. R. (Pat) 53 :  
(1922) P. 348 : 67 I. C. 581 : 23 Cr. L. J. 421.

## ———Duty of magistrate—Directions of superior executive authority.

It is the duty of a trying magistrate to ignore extra judicial directions given by a superior authority as to the disposal of the case. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) *BASSARMAL AWATMAL v. EMPEROR*.  
15 S. L. R. 149 : 64 I. C. 511.  
23 Cr. L. J. 31.

## ———Enhancement of sentence.

In a case where injuries are inflicted in a sudden quarrel and the weapon was picked up there and then, there is no sufficient reason to enhance the sentence where as it stands it is substantial

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enough. (*Abdul Qadir, J.*) *ATTAR KHAN v. THE CROWN*.  
(1922) Lah. 28.

## ———Evidence—Conviction—Evidence available not let in

It would be unsafe to convict the accused persons on the solitary statement of a witness who is not disinterested, especially as other persons who, if his evidence were true, would be able to corroborate him are not produced. (*Martineau, J.*) *NURA v. CROWN*.  
3 Lah. L. J. 482.

## ———Evidence—Deficiency of—Responsibility of accused—Conviction.

The fact that the symptoms before the deceased's death were not incompatible with the conclusion that she had been poisoned by arsenic and that there was a suspicion that she had been maltreated by the accused do not prove that the accused was guilty of murder of his wife, especially when there was no evidence to justify the conclusion that she died of poisoning or had been murdered. The fact that by cremating the body of his wife the accused has made it impossible to obtain the best evidence as to the cause of death, is not a substitute for such evidence and the accused cannot be convicted on mere speculation. (*Gokul Prasad and Stuart, Jj.*) *JAGANNATH SINGH v. EMPEROR*.  
L. R. 3 A. 53 (Cr.) :  
(1922) All. 30 : 66 I. C. 422 (1) :  
23 Cr. L. J. 278:

## ———Evidence—Depositions in one case copied in another—Illegality.

It is illegal for a Magistrate trying a criminal case to take the depositions in one case and have them copied and used in another case (*Sanderson, C. J. and Chotzner, J.*) *MOZAHUR ALI EMPEROR*.  
36 C. L. J. 417.

## ———Evidence—First information report—Admissibility and weight. See 1921 Dig. Col. 471. KAKU v. EMPEROR.

4 Lah. L. J. 487.

## ———Medical evidence—Not always formal.

It cannot be said as a general rule that medical evidence is always formal. (*Das and Adams, Jj.*) *RAMESWAR SINGH v. KING EMPEROR*.  
(1922) P. 299.

## ———Evidence — Police coercion—value of evidence.

The fact that the statements of the witnesses were extorted by the Police under threats of implication in the crime cannot fail to detract from the value of their evidence and this is especially the case when none of them had any reason for refraining from deposing against the culprit. (*Shadi Lal C. J. and Wilberforce, J.*) *SUNDER SINGH v. EMPEROR*.  
4 Lah. L. J. 284.

## ———Evidence—Weight attached.

Where the word of a respectable person is against the word of a witness, who is merely a servant and not what might be called a particularly respectable witness, the statement of the former is preferable, and it would be in the highest degree unsafe to accept the evidence of the latter type of witness without corroboration.

No inference of complicity in crime can be drawn from the fact of friendship between

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accused who are co-villagers, and because of their being co-villagers it was quite natural that they should know each other, (*Coutts and Ross JJ.*) *THAKUR AJODYA PRASAD v. EMPEROR*, (1922) Pat. 88.

— *First information—Earlier information not recorded—Effect.*

In a trial for murder, the evidence disclosed that prior to what was recorded as first information, a report had been made to the police about the murder, but a record was not made of this nor the informant examined as a witness in the case.

*Held* the failure to record the earlier report entailed the discarding of the so-called first information, and the non-production of the person who gave the first report to the police deprived the accused of the valuable right of cross examining a material witness. (*Coutts and Ross, JJ.*) *CHANDRIKA RAM KAHAR v. EMPEROR*.

1 Pat 401 : 3 Pat L T 771 : (1922) P. 535.

— *First information—Statement made to police.*

A statement casually made to a Sub-Inspector of police is not first information and cannot be relied on as such. (*Coutts and Das, JJ.*) *DASRATH SINGH v. EMPEROR*.

67 I. C. 502 :  
23 Cr. L. J. 406.

— *Judgment—Conviction—Appearance of accused—Prejudice.*

Where a magistrate wound up his judgment by saying "his appearance and the manner of his speech are such that I have no doubt that he committed the offence" *Held* that this was in itself sufficient to condemn the whole judgment. (*Chevis, J.*) *GHULAM MAHOMED v. EMPEROR*.

65 I. C. 625 : 23 Cr. L. J. 161.

— *Jury—Inadmissible evidence read out to jury by public prosecutor—Confession—Effect of.*

Where in a Jury trial for murder, the Public Prosecutor in his opening address read to the Jury the confession made by the accused, which was inadmissible in evidence not having been recorded according to law, and the accused was sentenced to death for murder

*Held*, that however carefully the Sessions Judge had endeavoured to remove the impression by asking the Jury to ignore the confession altogether, the reading out of the confession was bound to affect in some measure the minds of the Jurors and the trial was consequently vitiated and the court ordered a new trial. (*Das and Bucknill, JJ.*) *DAMODAR RAM v. EMPEROR*. 3 Pat. L T 52 :

65 I. C. 573 : 23 Cr. L. J. 141.

— *Jury—Misdirection—Charge to Jury Essentials of—Reference to defence case. See* (1921) DIG. COL. 475. *HARI CHARAN DAS v. EMPEROR*,

66 I. C. 998 : 23 Cr. L. J. 342.

— *Local inspection of locality—Absence of record relating to—Effect on conviction.*

In a case against 4 accused under S. 457 Indian Penal Code, the Magistrate in order to test the accuracy of the defence put up took them to the locality alleged in defence and made them point out in turn the place. *Held*, the conduct

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verged dangerously near cross-examining the accused.

*Held also*, there being no record at all as to what happened at the inspection, and the Magistrate himself not having gone into the witness-box, a conviction based on the Magistrate's own knowledge of what took place is bad. (*Harrison, J.*) *NURA v. EMPEROR*.

67 I. C. 591 .

23 Cr. L. J. 431.

— *Local inspection—Notes of inspection if should be recorded—Effect of omission.*

Though there is provision in the Code of Criminal Procedure for making local inspection or for keeping a note of the inspection if made, it has been settled by authorities that a Magistrate must invariably put on record a note of his inspection. 37 Cal. 340, foll.

Where a Magistrate used the knowledge derived by him from his inspection of the locality without placing on record his note of inspection it was held that the omission of the Magistrate to place on record his inspection notes had prejudiced the accused and the conviction was set aside and a retrial was directed to be made from the stage just before the inspection of the locality (*Jwala Prasad, J.*) *ATHAR HUSSAIN v. EMPEROR*. (1922) Pat. 27 : (1922) P. 51.

— *Local inspection—Note to be placed on record.*

There is nothing in law to prevent a magistrate from making local inspection ; but it is fair that a note of the inspection should be placed on the record and the parties given an opportunity of being heard with respect to it (*Jwala Prasad, J.*) *PARMESHVAR LALL MITTER v. EMPEROR*.

3 Pat. L. T. 347 :  
(1922) P. 296 : 67 I. C. 616 : 23 Cr. L. J. 440.

— *Magistrates—Duty of—Acquittal—Adverse remarks—Propriety of—Police Manual—Compliance with.*

A Magistrate exercising judicial functions, has to divest himself of his executive powers and his judicial pronouncements should not be disfigured by an entry as required under the Police Manual, particularly as it is based upon the Magistrate's personal impressions drawn from irrelevant matters which the accused has no opportunity to meet.

Where a Magistrate acquits the accused holding the prosecution case to be false, he has no power to add in the judgment "Enter true" which is wholly inconsistent with his express finding as to the falsity of the case and the said remark together with the reasons for the same should be deleted from the judgment as the accused may be gravely prejudiced by it. (*Jwala Prasad, J.*) *BIRNARAYAN SINGH v. EMPEROR*.

3 Pat L. T. 239 : (1922) P. 97 : 67 I. C. 195 :  
23 Cr. L. J. 371.

— *Misdirection to jury—Summing up.*

A sessions judge cannot be expected to comment on every point that could possibly be argued for the accused. It is sufficient if he deals with the more important points and does not unduly press on the jury his own views on questions of fact. In deciding whether there has been misdirection, the charge to the jury must

## CRIMINAL TRIAL.

be considered as a whole (*Newbould and Suhrawardy, JJ.*) **ABDUL SALIM v. EMPEROR.**  
**85 C. L. J. 279 : 49 Cal. 573 : (1922) Cal. 107 :**  
**26 C. W. N. 680 : 69 I. C. 145 :**  
**23 Cr. L. J. 657.**

—————*Motive, evidence of—Case made out.*

A clear case made out by the prosecution cannot be disbelieved, merely because the evidence of motive is not clear, (*Newbould and Suhrawardy, JJ.*) **EMPEROR v. BALARAM DAS**  
**49 Cal. 358 : (1922) Cal. 382**

—————*Misdirection to jury—Defect in charge.*

Where the jury was asked to decide which hypothesis suited the facts better, they were in effect told that the prosecution would discharge its onus by producing the better hypothesis. The charge is defective if it does not set out all the questions that are required for decision. It is wrong to refer to the amendments of law proposed for legislation. (*Walmsley and Suhrawardy, JJ.*) **ABDUL GOHUR SIKDAR v. EMPEROR**  
**26 C. W. N. 972 : 36 C. L. J. 152 :**  
**(1922) Cal. 505.**

—————*Murder—Circumstantial evidence—Production of ornaments—Delay.*

If a person is found shortly after a murder in possession of ornaments belonging to the murdered person a very grave suspicion must rest upon him that he was concerned in the murder. When the ornaments were not produced until nearly two months after the murder the suspicion is not nearly so strong, especially where during most of the period the accused was detained by the police and in his absence some one else could have placed the ornaments where they were found (*Scott Smith and Abdul Qadir, JJ.*) **SUNDER SINGH v. EMPEROR,**  
**66 I. C. 187 :**  
**23 Cr. L. J. 251.**

—————*Murder—Conviction on circumstantial evidence.*

In order to sustain a conviction for murder purely on circumstantial evidence, the circumstances must be such as to exclude all reasonable probability of innocence (*Scott Smith and Abdul Raoof, JJ.*) **MAHOMED YAR v. EMPEROR.**  
**4 Lah. L. J. 235 : (1922) Lah. 263.**

—————*Murder—Discovery of ornaments.*

The discovery of the ornaments of the deceased in a place belonging to somebody else and without being pointed out by anybody, is no evidence against the accused. (*Piggott and Walsh, JJ.*) **MT. SUKHIA v. EMPEROR.** **L. R. 3 A. 101 (Cr.)**

—————*Murder, Evidence of,*

Where the only evidence against the accused in a murder case was that the deceased was seen in his company the previous evening, but there was no other direct or circumstantial evidence, held, he was entitled to an acquittal. The fact that the accused could not give any explanation regarding the death of the deceased did not matter at all. (*Lindsay and Kanhaiya Lal, JJ.*) **CHIDDA v. EMPEROR.** **L. R. 3 A. 133 Cr. :**  
**20 A. L. J. 564 : 4 U. P. L. R. (A) 126 :**  
**(1922) A. 340 : 67 I. C. 724 :**  
**23 Cr. L. J. 452.**

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—————*Murder—Perfunctory recording of evidence of eye-witnesses.*

Evidence of eye witnesses should not be so perfunctorily recorded that it is impossible to say therefrom whether they really saw the occurrence. This is all the more so in a case of murder (*Coults and Ross, J.*) **LACHMI LAL v. EMPEROR.** **(1922) Pat. 159 : 3 Pat. L. T. 398 :**  
**(1922) P. 40 : 65 I. C. 1002 : 23 Cr. L. J. 218.**

—————*Murder—Plea of guilty—When to be accepted.*

In a case of murder it has long been the practice of the court not to accept the plea of guilty, for murder is a mixed question of fact and law unless the court is perfectly satisfied that the accused knew exactly what was implied by his plea of guilty the case should be tried. In the case of an illiterate individual there should be a trial. (*Ryves and Gokul Prasad, JJ.*) **DALLI v. EMPEROR.** **20 A. L. J. 326 L. R. 3 A. 80 (Cr.) :**  
**(1922) All. 233 (a) : 66 I. C. 427 : 23 Cr. L. J. 283.**

—————*Murder—Pointing out the dead body—Absence of explanation of source of knowledge—Evidentiary value of.* *See Cr. P. CODE SS. 164 AND 364,* **4 Lah. L. J. 225.**

—————*Murder—Proof of—Amount of evidence.* *See (1921) DIG. COL. 477, LEGAL REMEMBRANCE v. LALIT MOHAN SINGH ROY.*  
**49 Cal. 167 : (1922) Cal. 342.**

—————*Pardanasbin eye-witness—Examination on commission if proper.* *See PARDANASHIN—CRIMINAL TRIAL.* **(1922) Pat. 159.**

—————*Proof of guilt—False defence—Effect of*

Falsehoods in a defence do not in this country even tend to indicate the guilt of the accused. Even the entire omission of an available, true and complete defence and the substitution for it of unsustainable falsehoods are so closely in accordance with the common course of human conduct that the Court should not infer from such a defence that the guilt of the accused is likely. (*Hallifax, A. J. C.*) **DOMAR SINGH v. EMPEROR.** **(1922) Nag. 87 :**  
**66 I. C. 1001 : 23 Cr. L. J. 345.**

—————*Sentence—Death—Mitigated sentence, when to be passed—Reasons to be stated,* *See PENAL CODE, S. 372* **1 Bur. L. J. 66.**

—————*Sentence—Enhancement—Prisoner having undergone sentence—Youth of offender.*

Though a sentence of 3 months rigorous imprisonment is a lenient sentence for the infliction of grievous hurt with a hatchet on a young boy, still having regard to the fact that the offender was a young man who had recently come out of jail after undergoing the sentence already imposed, the Chief Court refused to enhance the sentence. (*Shadi Lal, J.*) **EMPEROR v. DULI CHAND.** **4 Lah. L. J. 403.**

—————*Sentence—Juvenile offender—Period of imprisonment.* *See (1921) DIG. COL. 478* **ABDUL RAHMAN ISMAIL v. EMPEROR.** **46 Bom. 420 :**  
**65 I. C. 445 : 23 Cr. L. J. 93 : (1922) Bom. 169.**

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———*Sentence—Period of detention while under trial—If can count towards sentence*

The period during which a person was kept in custody as an under-trial prisoner cannot count as part of the sentence, nor can the court order it to be considered as such. (*Brashei, J*) DANGAR KHAN v. EMPEROR, 23 Cr. L. J. 593 : 68 I. C. 817.

———*Stay—Charge of cheating—Pendency of civil litigation.*

Where a civil suit is pending against the complainant in respect of a charge of cheating preferred by the latter, the criminal trial might well be stayed pending the decision of the civil case, though the civil suit was instituted after the police report. 21 P. W. R. 1912 Cr., 33 P. R. 1910. 44 P. W. R. 1911 Ref. (*Campbell, J*) JANKI DAS v. EMPEROR. 4 Lah. L. J. 409 : 38 P. L. R. (1922) : 68 I. C. 819 : 23 Cr. L. J. 595.

———*Trial by jury—Death sentence—Confirmation by High Court—Power of interference.* See CR. P. CODE SS. 376, 418 AND 423

64 I. C. 657.

———*Trial by jury—Misdirection—Murder—Essentials of charge.*

It is necessary for a learned Judge to read the very words of the section itself to the jury, if he purports to give them what the provisions of law are, and then if necessary, to explain what is the meaning of the section. Where the only direction as to what constitutes murder was contained in one sentence "Murder is the intentional killing of another human being with malice a forethought" Though it was a comprehensive way of describing what the meaning of murder was it was not the way in which the court ought to charge the jury in this country. It is usual to refer to the sections which relate to culpable homicide and to direct the jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder. Where the court did not draw the attention of the jury to the fact that many of the witnesses who were called on behalf of the prosecution were related to the initiator and prime-mover of the prosecution or of each, other and the attention of the jury has not been drawn to discrepancies in the evidence of the prosecution witnesses, there is a misdirection. Where there are several persons involved in a charge of murder the attention of the jury should be directed to their individual cases (*Sanderson C. J. and Panton, J.*) EMPEROR v. DURG CHARAN BEPARI. 26 C. W. N. 1002 : 36 C. L. J. 171 : (1922) Cal. 124 : 68 I. C. 407 : 23 Cr. L. J. 567.

———*Witness—Omission to call.*

Where the prosecution has reason to believe that the inmates of the house of the accused if examined, would not tell the truth not being induced to help the prosecution, that, is sufficient cause for omitting to call them. (*Newbould and Suhrwardy, JJ.*) EMPEROR v. BALARAM DAS. (1922) Cal. 382 : 49 Cal. 358.

**CUSTOM.** ———*Adoption—Ancestral property—Onus of proof.*

## CUSTOM.

A party asserting that land is ancestral and therefore an adoption is bad is required to prove his assertion and conjectures cannot be accepted as a substitute for proof. (*Broadway and Abdul Quadir, JJ*) MUNSHA SINGH v. UTTAM SINGH.

4 Lah. L. J. 31 : 4 U. P. L. R. (Lah.) 18 : 64 I. C. 428 : (1922) Lah. 65.

———*Adoption—Brother's grandson.—Naru Rajputs of Hoshiarpur*

Under the customary law prevalent among Naru Rajputs of the Hoshiarpur Tahsil, the adoption of a brother's grandson is valid, the term *baradarzada qariti* being wide enough to include a brother's grandson. (*Chevis and Campbell, JJ*) RAHMAT KHAN v. NAZIR AHMAD. 57 P. L. R. (1922) : 67 I. C. 374.

———*Adoption—Ceremonies for—Rights of son to proceed to collaterals.*

In the Punjab no specific ceremonies or formalities are provided under the Customary Law for adoption. The validity will depend on whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive family as son. If there was a complete adoption the right of collateral succession will be presumed till the contrary is shown (*Abdul Raoof and Martineau, JJ.*) WARYAMAN v. KANSHI RAM. 3 Lah. 17 : (1922) Lah. 105 : 66 I. C. 309.

———*Adoption—Daughter's son—Dhanijats.*

Among Dhanoi Jats of Tahsil Kharar the adoption of a daughter's son is valid 68 P. R. 1888 foll. 50 P. R. 1893 F. B. Ref. (*D. Rossignol and Campbell, JJ*) GURBAKHSI SINGH v. MT. PRATAPO. 2 Lah. 346 : (1922) Lah. 234 : 66 I. C. 133

———*Adoption—Daughter's son—Rajputs, See* (1922) DIG COL 481 SAMAND KHAN v. KHABWAJE KHAN. 64 I. C. 17,

———*Adoption—Daughter's son—Special custom—Punjab—Burden of proof Bishnois of hissar.*

In as much as the right to adopt a daughter's son is equally opposed to Hindu Law and the general customary Law throughout the province of Punjab, the burden of proving this special custom is on the party alleging it. On the evidence the Court held that among *Bishnois* of the Hissar District the adoption of a daughter's son is not valid by custom. (*Shadi Lal, C. J., and Harrison, J.*) MOTI v. BAGRAWAT. 64 I. C. 189.

———*Alienation—Agriculturist—General customary law—Money raised for purposes of trade in cattle—Necessity—Duty of lender to make enquiries—Payment of revenue See* (1921) DIG COL 481. KABUL SINGH v. KALA SINGH. 87 I. C. 737.

———*Alienation—Ancestral Property Proof of.*

Where it is shown from the settlement papers that the plaintiffs and the last male owner were descended from a common ancestor and that there has been continued devolution by inheritance of the properties in question it is a legitimate

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inference that the property is ancestral 72 P. R. 1913 9 P. R. 1914 35 C 1039 foll. (*Chevies, J.*)  
**PUNJABI SINGH v. GULAB SINGH.**

69 I. C. 143

—*Alienation—Bequest to daughter—Suit by reversioner—Decision—Value of as evidence*

A proprietor bequeathed his lands and house to his daughter and she in her turn made a will in 1886 leaving the property to the deft, her sister's son, and son-in-law. The daughter died and the plff, collateral of the deceased male owner, sued for possession of his property contending that it reverted to them and that the daughter had no power to make a will in favour of the deft. It was found that in a prior suit to contest the will instituted by the brother of the last male owner, the Will was found to be valid and that the daughter had full powers of alienation. There was no appeal against that decision which became final. *Held*, in the present suit that though the prior decision did not operate as res judicata it was very strong evidence in favour of the will and that the daughter took an absolute estate under its terms. (*Shadi Lal and Martineau, JJ.*) **ANWAR KHAN v. NUR KHAN**

67 I C 272.

—*Alienation—Binding nature of major portion supported by necessity or antecedent debt*

Where the debts to discharge which an alienation was effected were antecedent debts and except to a trifling extent, the alienation was supported by necessity, the alienation should be upheld. (*Chevies and Scott Smith, JJ.*) **MT. JOWALI v. NAND SINGH.**

4 Lah. L. J 351.

—*Alienation—Consent of the reversioner—Consent given before hand—Effect of.*

A consent given to a contemplated alienation by a sonless proprietor is as binding and as valid as a consent given to a completed transfer and the assent of the nearest reversioner makes the alienation good against the world. 59 P R 1904 7 P. R 1905, 78 P. R. 1908 foll. The onus of proving bad faith on the part of the reversioner lies on these alleging it.

An undertaking given by a reversioner not to contest an alienation which a sonless proprietor might make in the future does not require registration. (*Scott Smith and Harrison, JJ.*) **GULAB v. MEHNDI.**

4 L. L. J. 52 : 67 I C. 417 :  
 3 Lah 112 : (1922) Lah. 95

—*Alienation by daughter—Property inherited from husband—Right of reversioners to impeach.*

Under the general customary law of the Punjab females in possession of property inherited from relations, but not given as a free and absolute gift, have no right to alienate such property permanently. The heirs or reversioners have a right to contest the validity of such an alienation and have it declared that their rights would not be affected in any way. (*Abdul Raoof and Martineau, JJ.*) **JHANDHA v. MT. JIVAN.**

67 I. C. 522

—*Alienation by female—Right to challenge.*

Persons who are heirs to an estate are entitled to challenge alienations effected by females

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who are holding on life tenure under custom. Para 23 of Rattigan's Digest of customary law runs counter to the principle of Hindu Law and custom does not exclude a daughter's son from inheritance on the ground of his mother having predeceased her father or grandmother. Under the Hindu Law a female takes only a life interest in the property inherited by her from a male and the nature of her interest does not depend upon the existence or otherwise of persons having a right to succeed to the property after her death.

An estate of a widow under the customary law is subject to the same restriction as that of a widow under Hindu Law. Where the persons contesting the alienations are males whose right to inherit the estate is beyond dispute there is no custom which prevents them from impugning such alienations, they are entitled to contest C A. 128 of 1917 ref. Where there is no custom applicable to a case the plaintiffs can fall back on their personal law. (*Shadi Lal, C J. and Martineau, J.*) **GOBINDA v. NANDU.**

(1922) Lah 217.

—*Alienation—Gakhars of Malpur—Gift by sonless proprietor—Riwaj-i-am*

Where the Riwaj-i am contains an entry that among gakhars a sonless proprietor can alienate ancestral property as he liked, the onus is on the person who contests the validity of such a gift to prove it. *Held* also on the other evidence in the case, such a right in the sonless proprietor was in accordance with the custom of the land. (*Martineau and Harrison, JJ.*) **MT. SARDAR KHANAM v. AMIR ZAMAN KHAN.**

3 Lah. 392.

—*Alienation—Gift—Family arrangement—Effect of.*

Where as a result of a family arrangement effected with the sole object of preventing disputes between the sons and grandsons of a proprietor certain properties are allotted to them it could not be presumed that the latter were ultimately intended to get more than the share they would be entitled to by succession according to custom (*Leslie Jones and Wilberforce, JJ.*) **AHMAD DIN v MUHAMMAD TUFAIL**

4 Lah L. J 376.

—*Alienation—Gift—Khanadamad—Mussalman Gujars of Kharar Tahsil—Ambala Dt.*

It is not competent to a proprietor belonging to the sect of Mussalman Gujars of Kharar Tahsil in Ambala Dt, to make a gift of ancestral land in favour of a *Khanadamad* in the presence of collaterals. (*Le Rossignol, J.*) **CHANAN v. NUR DIN.**

(1922) Lah. 121 : 65 I. C. 98.

—*Alienation—Gift—Sonless proprietor—Ancestral land—Khulshra Jats—Hoshiarpur Dt.*

Among the Khulshra jats of Tahsil Garhshanker Hoshiarpur Dt no custom had been proved by which a sonless proprietor could give away his ancestral land to his paternal aunt's grandson in the presence of collaterals. (*Scott Smith and Abdul Raoof, JJ.*) **NATHU v. BANNA.**

3 Lah 344

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— *Alienation—Law applicable—Gujrat Khatris of Golpur*

Khatris of Golpur, Tahsil Pind Dadan Khan, District Jhelum, are governed by agricultural custom in matters of alienation.

Having regard to the facts (1) that the Khatris of Golpur formed a compact village community and (2) that all with very few exceptions earn their living by agriculture, tilling the soil with their own hands, and that this has been the occupation of the Khatris of the village from the time when the village was founded, the onus is on those who allege that the Khatris of Golpur are not governed by agricultural custom to prove the assertion, 50 P. R. 1895, 51 P. R. 1901; 16 P. R. 1906; 23 P. R. 1914, 63 P. R. 1910; 107 P. R. 1901, 5 P. R. 1906; 12 P. R. 1906; 59 P. R. 1908 Ref. (*Martineau, J.*) *HIRA NAND v. HAYAT MOHAMMAD*.

4 U. P. L. R. (Lah) 6 : 64 I. C. 180.

— *Alienation—Law applicable—Sayads of Alawalpur.*

In matters of alienation Sayads of Alwalpur in the Jullundur District are not governed by agricultural custom but by Mahomedan Law (*Leslie-Jones and Martineau, JJ.*) *KHUSHI MAHOMED v. BARU MAL*.

64 I. C. 8.

— *Alienation—Law governing—Saibal-khatris.*

Saibal khatris of Dinga, Gujarat District, are not governed by agricultural custom in matters of alienation. (*Broadway, J.*) *LACHMAN DAS v. GANGA RAM*

64 I. C. 264.

— *Alienation—Necessity—Consideration—Bona fide payment, question of fact.*

Where there are several items of consideration for an alienation a finding regarding their genuineness and the necessity for them is one of fact and not open to question on second appeal. Where the alienee has made a bona fide payment to a previous mortgagee in order to obtain possession of the land he is entitled to credit for this amount. (*Le Rossignol and Wilberforce, JJ.*) *HAKUMAT RAI v. WADINHAWA SINGH*.

4 Lah L J 243.

— *Alienation—Necessity—Decree debt.*

Where an alienee who is an outsider finds that there is a decree debt to discharge which the property is sold he need not make any further inquiry and the alienation cannot be impeached by the reversioners by going behind the decree. Where however the surrounding circumstances are such as to raise suspicion or where it is proved that the alienee had knowledge of the bad faith of the decree debt, then he must prove necessity for the alienation. (*Chevis and Campbell, JJ.*) *RAM SINGH v. RULIA*.

3 Lah. 139 :

(1922) Lah. 299 : 68 I. C. 99.

— *Alienation—Necessity—Fictitious recitals of consideration—Entry in sale deed—Effect of* See (1921) DIG. COL. 484. *PUNJAB SINGH v. ARGAN* (1922) LAH 250.

4 Lah. L. J. 472.

— *Alienation—Necessity—Male proprietor.*

Under the customary law of the Punjab the position of a male proprietor as regards ancestral property is similar to that of a widow and he

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cannot alienate the property in anticipation of future necessity. 67 P. R. 1884; 11 P. R. 1885 Ref. (*Scott Smith and Martineau, JJ.*) *KHAZAN SINGH v. SUHEL*. 4 Lah L, J 305.

— *Alienation—Necessity—Proof of—Duty of alienee.*

It is not the duty of an alienee to see to the application of the money, but an alienee who deals with a person with a limited power of alienation, must satisfy himself that if money was required for the liquidation of an alleged debt, there was in fact such a debt in existence." In the 1st instance it is on the vendee to prove that the debts mentioned in the sale deed actually did exist and that there was necessity for the sale. 65 P. R. 1900; 104 P. R. 1887 foll. (*Abdul Raoof, J.*) *SAHIB DIN v. RAJA*.

(1922) Lah. 257 : 66 I. C. 58

— *Alienation—Necessity—Sale by limited owner—Small portion found not to be for necessity—Fictitious item.* See (1921) DIG. COL. 485. *GHULAM MAHOMED v. MAHOMED. SHAH*

66 I. C. 898.

— *Alienation—Necessity—Small debt—Lapse of time.*

Where it is necessary to purchase food and clothing and pay for it subsequently and such payment becomes technically necessity, it is equally regular to borrow the sum necessary to purchase such supplies and it is not absolutely essential that a man should first come into debt and then borrow to pay his debts. Considering the smallness of the sum taken, the fact that it was recited that it was taken on account of scarcity, that it was not shown that the vendor had any land beyond the small area which he sold, and the long interval that had elapsed after the alienation without any objection being taken by the other collaterals, the Court held that the alienation was supported by necessity. (*Harrison, J.*) *RAMJI LAL v. RAM SARUP*.

48 P. L. R. 1922 : (1922) Lah. 368.

— *Alienation—Necessity—Small portion of consideration not found necessary—Form of decree.*

When the amount of the consideration for a sale of ancestral property that is found to be without necessity represents only a small portion of the entire consideration and the sale itself is one entered into as an act of good management, the sale should be upheld. 8 P. R. 1908. 79 P. L. R. 1914. 130 P. R. 1906 foll. (*Broadway, J.*) *BIRU v. SAMANDA*.

67 I. C. 276.

— *Alienation—Occupancy rights—Consent of landlord—Status of reversioners to challenge alienation.*

It is competent to the reversionary heir of an occupancy tenant to dispute the validity of its alienation in favour of a stranger of his ancestor's occupancy rights although such alienation had received the assent of his landlords. It is not necessary for plaintiff in such a case to prove that the common ancestor held the land as an occupancy tenant. All that they have to prove is that they are the reversionary heirs of the alienor and that if the land had been the ancestral property of

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the plffs they could have contested the alienation. 98 P. R 1907 F B. foll 12 P. R 1904 : 115 P R 1901 Ref. (*Scott Smith and Harrison JJ*) BAGU v MT DANI 3 Lah 69 (1922) Lah 278 : 67 I. C. 38.

— — — *Alienation—Powers of—Rohtak Tahsil—Rivaj-i-am.*

In the Rohtak tahsil a proprietor has very wide powers of alienation and an alienation by him can be challenged only on grounds valid under Hindu law. A very large part of the customary law regarding restrictions on alienation is purely case-made law and the law primarily applicable to Hindus is Hindu law modified by custom.

20 I C 373 appr,

In the Rohtak tahsil the rivaj-i am places upon the plff the onus of proving that he has a right to attack the alienation. (*Le Rossignol, J.*) GIANI v. TEK CHAND. 11 P. L. R. 1922 : 64 I. C. 549. (1922) Lah. 69.

— — — *Alienation — Religious endowment — Dohli tenure.*

The dohli tenure is a peculiar kind of tenure to be found in the south eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine or to a person for religious purposes. In the Revenue records the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose for which the grant is, made is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office, the proprietors can eject him and put in some one else under a like tenure.

A tenure of this kind cannot be alienated by sale or mortgage and there can be little doubt that any alienation of that character, if made by the dohlidar, would be absolutely void. The alienation can be challenged by his successor. (*Shadi Lal, C. J. and Harrison, J.*) (SEWA RAM v. UDEGIR. 2 Lah. 313 : 25 P. L. R. 1922 65 I. C. 252.

— — — *Alienation — Reversioner — Right to obtain declaration—Collaterals.* See (1921) DIG COL 455. PADAN NATH v. KANSHI RAM. 66 I. C. 913.

— — — *Alienation—Right to set aside—Collaterals—sale in execution of decree.*

Under the customary law of the Punjab it is open to a collateral to challenge a sale *inuitum* e. g. a sale in execution of a decree. 18 P. R. 1908 Rel. (*Abdul Raoof, J.*) GHANAYA v HAZARA SINGH. (1922) Lah 224 : 65 I. C. 992

— — — *Alienation—Setting aside—Collaterals—Right of.* See (1921) DIG. COL 486. INDAR SINGH v. BASANTA. 4 Lah. L. J. 13 : (1922) Lah. 91

— — — *Alienation—Right to impeach or set aside—Inaction of father—Son's rights not affected.*

Where the plff's father was absent from the village in which the land was situated and took no steps to have the alienation set aside but at

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the same time there was no collusion between the alienor and alienee and the plaintiff's father and no acquiescence on the part of the plaintiff's father, the plff as reversioner could sue to set aside the alienation. The plff. does not claim from or through his father but directly from the last holder. (*Broadway, J*) FEROS v GHULAM SARWAR 67 I. C. 379.

— — — *Alienation—Setting aside —Form of decree.*

Where in a suit by a reversioner to set aside an alienation or for declaration that the sale is not effective against the plaintiff's reversionary interest, the court finds that the alienor had full power of alienation, the court could not declare the sale to be not binding on the plaintiffs merely because a portion of the consideration for the sale had not been paid. (*Wilberforce and Martineau, JJ*) KHULLU v. LIKAL 4 Lah. L. J. 22 : (1922) Lah. 117.

— — — *Alienation—Setting aside — Mortgages more than 12 years old—Subsequent Sale.* See (1921) DIG COL 486 BUR SINGH v. HAZARA SINGH 3 Lah. 99 : (1922) Lah 275.

— — — *Alienation—Setting aside—Rights of presumptive reversioner.*

Though the intervening holder is young and may have sons, it is not a reason for refusing the next male reversioners a decree that an alienation is invalid and not supported by necessity or consideration (*Chevis and Scott Smith, JJ.*) MUSSAMMAT JOWALI v. NAND SINGH. 4 Lah L. J. 351.

— — — *Alienation by widow—Tarar jats of chakwal—Sisters if entitled to question alienation—Rivaj-i-am, entries in*

Among the Tarar jats of Chakwal, sisters are heirs in the absence of collaterals and are entitled to contest the validity of an alienation made by the widow.

An entry in the Rivaj i-am which is not opposed to general custom is a strong piece of evidence. (*Scott-Smith and Harrison, JJ.*) AHMAD v. MT. BANO. 3 Lah 40 : (1922) Lah 114 . 67 I. C. 629.

— — — *Alienation—Will—Gift of reversion to daughter—Gift by mother to daughter—Marriage of daughter with khatri.*

Where a father makes a will giving the reversion after the death of his wife in favour of his daughter who was then a Jatti her subsequent marriage with a khatri does not deprive her of the rights under her father's will. (*Le Rossignol and Wilberforce, JJ*) NARAIN SINGH v. MT. DIAL KAUR. 4 Lah. L. J. 469.

— — — *Applicability of—Khatris—Presumptions*

The initial presumption in the case of khatris is that they follow Hindu Law. (*Broadway, J.*) LACHMAN DAS v. GANGA RAM. 64 I. C. 264.

— — — *Applicability of — Khatris of mauza Salima Taksilmoga—Ferozepore Dt.*

The initial presumption in the case of khatris is that they followed the Hindu Law and the onus of displacing it is on those alleging they are governed by custom. A custom without instances



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is inconceivable. (*Abdul Raoof and Campbell, JJ.*)  
SUNDAR SINGH v. SUNDAR SINGH.

66 I. C. 45.

— *Caste—Rajput—Mohal*

There are no persons in the Punjab who have any real right to be described as Mohals except Rajputs and some Jats who rightly or wrongly claim that they are really of a Rajput origin. *Held*, that plaintiff had failed to prove that he was a Rajput by caste. (*Chevis and Scott Smith, JJ.*) SECRETARY OF STATE FOR INDIA v. GHULAM RASUL KHAN. 4 Lah. L. J. 79 : (1922) Lah. 323

— *ESSENTIALS OF—Custom in derogation of Hindu or Mahomedan law.*

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. (*Sir Lawrence Jenkins.*) MAHOMED IBRAHIM ROWTHER v. SHAIK IBRAHIM ROWTHER. 45 Mad. 308.

43 M. L. J. 69 : (1922) M. W. N. 470 :

36 C. L. J. 64. 24 Bom. L. R. 944 :

(1922) P. C. 59. L. R. 3 P. C. 149 :

26 C. W. N. 793 : 30 M. L. T. 85 :

15 L. W. 354 : 67 I. C. 115 : 49 I. A. 119 (P. C.)

— *Essentials of valid custom—Proof of instances where custom has applied*

"Custom" implies, not that in a given contingency a certain course would probably be followed, but that that contingency has arisen in the past and that a certain course has been followed, and it is quite outside the province of courts to extend custom by the process of deduction from the principles which seem to underlie customs which have been definitely established. (*Shadi Lal, C.J. and Le Rossignol, J.*) DALIPA v. DALLU. 4 Lah. L. J. 336.

— *Gift—Re-marriage of widow—Extinction of line of donee—Effect.*

Re-marriage of a widow does not entail forfeiture of the estate taken by her according to the customary law.

In the case of a gift made to a family, the heirs of the donor may succeed eventually to the estate on the extinction of the line of donees. (*Chevis and Campbell, JJ.*) DHANNUN v. BHAGWANI.

67 I. C. 555

— *Hindu Law—Applicability of—Law of joint family applicable equally with the law of inheritance. See HINDU LAW APPLICABILITY OF.*

31 M. L. T. 183 (H. C.)

— *Impartibility—Proof*

The fact that for a number of generations a particular estate has remained undivided, though other properties of the family has been undivided would not by itself show the existence of a family custom or a custom attaching to a tenure of the estate. (*Dhobley, A.J. C.*) KRISHNAJI v. NILKANTH. 18 N. L. R. 163.

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— *LOCAL CUSTOM — Proof of—Evidence necessary.*

A local custom need not be shown to be immemorial, if it is sufficiently certain and reasonable to satisfy the requirements of a valid custom 17 A. 87 foll. (*Fawcett J. C. and Kemp, A J C*) SHAH MAHOMED v. RAMZAN.

66 I. C. 833.

— *Local Custom—Proof of—Right of way—Antiquity—Open use*

A court should not find a local custom unless it is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or force and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things with which it is concerned. The evidence must be sufficient to show that the right has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the locality. The doctrine of lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. The question of legal origin is only of importance where it is suggested that the right claimed might have originated within the time of memory, whatever that time may be. In the case of a custom its legality depends on such considerations as its reasonableness and its certainty. As to the length of user or enjoyment which must be proved before a local custom may justifiably be inferred no definite rule can be laid down. But if the existence of the custom depends on oral evidence, and the user of enjoyment is taken back as far as living memory can be expected to go, then in the absence of rebutting evidence it is not unreasonable to say, *praesumitur retro* or to infer an immemorial enjoyment of the right, or say, in Bengal, an enjoyment from the time of the Permanent Settlement. (*Richardson and Suhrawardy, JJ.*) ALIMAHOMED v. SHEIKH KATU. 36 C. L. J. 280.

— *Maintenance — Illegitimate children of Mahomedan concubine by Hindu father.*

The plaintiffs, the two Mahomedan concubines and their illegitimate sons by a deceased Hindu gentleman, brought a suit against the legitimate son of the latter for arrears of maintenance.

*Held*, that plaintiffs had failed to prove any claim to maintenance by family custom.

The plaintiffs could not appeal to Hindu Law; nor could the case be decided upon general considerations of equity merely because Hindu Law is silent as to the claims of illegitimate Mahomedan progeny of a Hindu. (*Chevis and LeRossignol, JJ.*) CHARANJIT SINGH v. AMIR ALI KHAN.

2 Lah. 243 : 64 I. C. 892.

— *Manjh Rajputs—Marriage with widows—Whether prohibited—Offspring whether illegitimate.*

The custom among Manjh Rajputs of the Jagraod Tasil, prohibiting re-marriage of

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widows being opposed to natural justice, equity, and public policy cannot be upheld and the offspring being otherwise legitimate, are entitled to inherit their father's property. (*Le Rossignol and Harrison, JJ.*) MAULA BAKSH v FATEH JANG. (1922) Lah. 358 : 68 I. C. 857.

——— *Marriage — Legitimation—Hindu, Sikh and Mussalman convert to Sikhism—Legality of marriage.*

One K, an owner of property, in two districts had married two wives but had no issue. He was persuaded that if he married a Muhammadan woman she could bear him a son and he, therefore married an Arain woman J. who bore him a son P. P. obtained mutation of all lands in his name. On his father's death near collaterals brought a suit to recover the lands on the ground that K was not competent to alienate his land and that P was not the lawful heir. The suit was dismissed by the 1st court on the ground that the plffs were precluded by reason of the consent of their ancestors which he found was neither collusive nor wrongful.

*Held*, that the plaintiff-appellants were not competent to deny the legitimacy of P. 69 P. R. 1917. Relied on.

46 P. R. 1912 and 99 P. R. 1913 Ref. (*Lastlie-jones and Broadway, JJ.*) LACHMAN SINGH v. PARTAP SINGH 3 Lah. L J 366

——— *Memons—Hindu Law—Applicability of—Law of Succession and inheritance—Law of joint family—Extent of applicability See HINDU LAW APPLICABILITY OF.* 24 Bom. L. R. 978

——— *Partition.—Widow of deceased — Co-parcener—Rights of.*

It is within the rights of a widow of a deceased co-parcener to demand a partition of the joint holding and though she once agreed to take a certain sum as maintenance from the co-sharers of the deceased she is not debarred thereby from claiming partition of the holding. (*Abdul Raoof and Martineau, JJ.*) MUSSAMMAT THAKRI v. SADHU SINGH, 54 P. L. R. 1922 : 67 I. C. 356.

——— *Partition—Widow's right—Jullunder District—Entry in Riway-i-am—Burden of proof.*

Where the Riway-i-am of the Jullunder District is in favour of the widow's right to ask for partition of the joint estate of her husband the onus is on the person who denies it to prove that she is not entitled to partition. (*Le Rossignol and Abdul Quadir, JJ.*) SHADI v. MT. JEONI, 3 Lah. 236 : (1922) Lah. 362 : 68 I. C. 553

——— *Pre-emption—Proof of custom—Fatehabad—Compromise recognising custom.*

A judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. *Held*, that a custom of pre-emption had not been proved in the town of Fatehabad. 2 Lah. 83 foll 116 P. R. 1908 Ref. (*Abdul Raoof and Martineau, JJ.*) PERBHU v. TOTA, 3 Lah. 136 : (1922) Lah. 286 : 67 I. C. 71

——— *Proof of.*

Custom must be proved by evidence and courts cannot deduce the existence of one custom from

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that of another. It is not the function of a court to say what a custom ought to be, but its duty is confined to enforcing such customs as known to exist (*Chevis and Campbell, JJ.*) DHANNUN v. BHAGWANI 67 I. C. 555.

——— *Sodhies — Law applicable — Debts of ancestor—Liability for.*

Sodhies are governed by customary law in matters of alienation and in respect of the liability of sons for debts contracted by their father, (*Broadway and Harrison, JJ.*) LABH SINGH v. THE FIRM RUR CHAND TULSI RAM. 4 L. L. J. 64 : (1922) Lah. 122.

——— *Succession—Aroras of Taunsa town — Powers of alienation.*

Where the deceased belonged to a mercantile community and was a resident of a town the presumption is that he was governed by his personal law in the matter of alienation and the onus is heavily on the persons who claim to the contrary to establish the existence of custom overriding the personal law

The Riway-i am contains merely an expression of opinion which cannot be raised to the dignity of a custom, unless it is followed in practice for a sufficiently long period and recognised as binding by the members of the community.

A provision in the Riway-i-am that a gift cannot be made in favour of a daughter in the presence of near collaterals is too sweeping to govern all Hindus residing in towns.

Aroras of Taunsa are not governed in the matter of alienation by agricultural custom. (*Shadi Lal and Wilberforce, JJ.*) ASA NAND v. MT. ROSHNI BAI 2 Lah. L. J. 178 : 68 I. C. 92.

——— *Succession—Collaterals—Abadi.*

A first cousin twice removed is a near collateral and succeeds to an abadi in preference to the landlords, 116 P. R. 1918, 106 P. R. 1919 Rel. (*Shadi Lal C. J. and Campbell, J.*) HARJAS v. HARKE. 46 P. L. R. 1922 : (1922) Lah. 366 : 68 I. C. 885.

——— *Succession—Collaterals of fourth degree — Onus.*

Where the question is one of succession to a non-proprietor, remote collaterals are excluded and a collateral in the fourth degree has the onus upon him to prove that by custom he is entitled to succeed (*Abdul Raoof and Martineau, JJ.*) SHER JANG v. MUNSHI RAM. 3 Lah. 33 : (1922) Lah. 115 : 67 I. C. 964.

——— *Succession—Collaterals — Exclusion of daughter—Evidence of custom — Riway-i-am—Entries in—Value of.*

The onus of proving that by custom among gaur Brahmans of Mauza Chhapri in the Thanesar Tahsil of the Kamal District collaterals in the ninth degree excluded daughters in succession to non-ancestral property rests on those alleging the custom. Entries in the riway-i-am opposed to all principles of Customary law and unsupported by instances do not operate to shift the onus of proof. 5 P. R. 1908, 86 P. R. 1908; 84 P. R. 1917, 13 P. R. 1917 Rel.

The existence of entries in the riway-i-am was not a sufficient reason for depriving successful

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party of his cost (*Scott-Smith and Abdul Qadir, JJ.*) *MANDHAR v. NANTI*. 2 Lah 366

—Succession—Daughters—Collaterals of seventh degree—Ancestral property—Preference Onus.

The burden of proof as to whether remote collaterals, such as of the sixth degree, exclude daughters, rests on the party who asserts its existence. 86 P. R. 1908 1011, *Held*, on the evidence that among Bain Jats of Khera, Garshankar, tashil, District Hoshiarpur, daughters exclude collaterals of the seventh degree in succession to ancestral property. Case law discussed. (*Wilberforce and Abdul Qadir, JJ.*) *MUSSAMMAT MANO v. BASANT SINGH*. 3 Lah. L. J. 547. 64 I. C. 243 (L.)

—Succession—Daughter—Mother—Who is the preferential heir—Weavers of Bakli Ghuzan—Jullundur Dt.

Village custom generally recognises the mother's right of succession in preference to that of the daughters of male collaterals. So held in a case which arose among the weavers of Basti Ghuzan, Jullundur Dt. 69 P. R. 1878 Dist. (*Chevis J.*) *MT. SULTAN BIBI v. ISMAIL*. 69 I. C. 136.

—Succession—Daughter—Right of residence.

Under the general custom of the Punjab daughters have a right to reside in their father's house until they marry or to whichever event first takes place. (*Broadway, J.*) *MAHANDA v. MT. GAUHRE*. 66 I. C. 433.

—Succession—Daughters and collaterals—Onus—Entries in *riwaj-i-am*.

Collaterals of sixth degree exclude daughters from succession among the Hindu Jats of Ludhiana Dt. In the case of collaterals remoter than the fifth degree, the initial burden of proof is on them to show that they exclude the daughter. The more remote the collateral heavier is the onus. 86 P. R. 1908, 41 P. R. 1914 rel. An entry in the *ri-waj-i-am* that collaterals of the sixth degree succeed in preference to daughters shifts the onus, 45 P. R. 1917 1011, (*Scott Smith and Broadway, JJ.*) *MT. DHAN KAUR v. SUNDER* (1922) Lah. 387 : 3 Lah. 184 : 67 I. C. 415.

—Succession—Exclusion from—Exclusion of daughters—Scope of the rule

A custom of exclusion of daughters and their issue from inheriting their father or maternal grandfather's property does not lead to the inference that they are excluded from inheriting to their mother or maternal grandmother's property (*Wazir Hasan, A. J. C.*) *BIJAI BAHADUR SINGH v. MATHURA SINGH*. 90 L. J. 327 : 4 U. P. L. R. (O. G.) 66 : (1922) Oudh. 278 : 68 I. C. 555.

—Succession—Exclusion—Female heirs—Daughters—Sisters and Sister's sons.

Where under a family custom daughters are excluded from inheritance, there is a presumption that sisters and sister's sons are also excluded from the category of heirs. So held in the case of a family of Saraura in Oudh, (*Dolal and Wazir Hasan, A. J. C.*) *DILDAR HUSAIN v. FATEH BAHADUR*. (1922) Oudh 105 : 65 I. C. 287.

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—Succession—Females—Brother's daughter—Sister—Rights of descendants.

*Held*, that on the evidence the pliffs have failed to prove a custom among Lamin Rajputs of Tahsil Nurpur, District Kangra, that a brother's daughter and a sister and their descendants have a right of succession in the absence of all male collaterals (*Shadi Lal, C. J. and Le Rossignol J.*) *DALIPA v. DALLU*. 4 Lah. L. J. 336.

—Succession—Grandson of first cousin.

The grandson of a first cousin has no right to succeed under the customary law of the Punjab. (*Chevis, J.*) *SHER DIL v. GULAB*. 68 I. C. 767.

—Succession—Jaswal Rajputs—Test.

In deciding whether Jaswal Rajputs observe the *Pagwand* or *Chundwand* rule of succession, the safest guide is the rule which is proved to have been observed in the family of the parties. (*Le Rossignol J.*) *NANAK CHAND v. MUNSHI RAM*. 67 I. C. 608.

—Succession—Jats—Collaterals—Rights of.

Among the Jats of the Punjab who have migrated to Meerut, reversioners irrespective of degree, succeed equally to the last land-holder, and each branch take its share *per stirpes*. (*Rafique and Lindsay, JJ.*) *DHARAM SINGH v. HIRA*. 44 All. 390 20 A. L. J. 221 L. R. 3 A. 148 : (1922) All. 141 : 65 I. C. 828.

—Succession—Jats of Raowal—Son and daughter-in-law—Entry in *Rivaj-i-am*—Onus of proof.

Where the entry in the *Rivaj-i-am* showed that among the Jats of Raowal in Tahsil Jagraon in the Ludhiana District a daughter-in-law succeeded along with a son, *held*, it was sufficient to throw the onus of proof on the son, if he wants to prove the daughter-in-law is excluded (*Broadway and Martineau, JJ.*) *JAGIR SINGH v. MT. SANTI*. 3 Lah. 181 : (1922, Lah. 389 : 68 I. C. 711.

—Succession—Jates.

Among Jates of Shadia full brothers exclude half brothers by custom. (*Le Rossignol and Abdul Qadir, JJ.*) *KHUDAYAR v. AMIR* (1922) Lah. 169 : 68 I. C. 681.

—Succession—Koreshis—Law governing.

In a suit between members of the Koreshi tribe, when neither party proves any custom affirmatively, recourse should be had to Mahomedan Law. (*Abdul Raouf and Campbell, JJ.*) *MT. GHULAM ZOHRRA v. NUR HASAN*. 3 Lah. 278 : (1922) Lah. 406.

—Succession—Law governing Koreshis of Taragarh—Onus of proof.

Where Koreshis of Taragarh claimed to be governed in matters of inheritance by the general custom of Punjab agriculturists and not by Mahomedan Law, the onus of proof is upon them to establish it (*Abdul Raouf and Campbell, JJ.*) *NUR HASAN v. GHULAM ZOHRRA*. 3 Lah. 274 : (1922) Lah. 222.

—Succession—Land gifted—Reverter—Right of.

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The rule of reversion to the donor's line on the death of donee without lineal heirs under customary law is not applicable where the donee is a stranger to the donor.

137 P. R. 1908; 14 I. C. 73, Foll

12 P. R. 1892. (F. B.) 127 P. R. 1907, dist. (*Martineau and Abdul Qadir, JJ.*) MULA SINGH v. AMIN CHAND.

2 Lah. 284; 64 I. C. 161.

—Succession—Law or Custom—Sayads of Khakhanda—Rohak District—Females—Right of representation.

Though generally the Saiyads of Khakhanda, Rohak Dt. have for a long time followed custom, in matters of succession they have recognised widely the right of females in accordance with their personal law.

60 P. R. 1878; 82 P. R. 1887, 173 P. R. 1889; 46 P. R. 1890; 143 P. R. 1893; 120 P. R. 1909; 143 P. W. R. 1910 foll

Both under the Hindu law and custom, the whole estate of the last male owner vests in his widow and the husband's life is assumed to continue in her person. Succession to the husband opens at the date of the widow's death. Among Saiyads of Khakhanda the right of representation exists in favour of females, at any rate in the absence of near male heirs. 82 P. R. 1887; 143 P. W. R. 1910; 120 P. W. R. 1909 foll. A daughter who succeeds by right of representation has in every way the right of a male including the right to contest alienations made by the widow. 135 P. R. 1908 foll. (*Wilberforce and Martineau, JJ.*) MUSSAMMAT NASIB-UN-NISSA v. MUSSAMMAT AHMADI-UN-NISSA. 2 Lah. 383; 66 I. C. 494 (2)

—Succession—Murderer and his son if excluded—Public policy.

Where a person has been murdered with the sole object of securing his property, the murderer along with his son is excluded from inheriting the property of the deceased, in spite of the fact that the property is ancestral property, as their succession, would be opposed to public policy. The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through and not merely from him. In such a case the vesting of the succession is not prevented but what was vested in accordance with the law is wrested away on the grounds of justice and equity. 41 P. R. 1906 and (1904) 27 Mad. 591, 600, 18 P. R. 1908 F. B. distinguished (*Broadway and Martineau JJ.*) MT. JIND KUAR v. INDAR SINGH. 3 Lah. 103 (1922) Lah. 293; 67 I. C. 526.

—Succession—Right of adopted son to inherit to collaterals. See CUSTOM—ADOPTION. 3 Lah. 17.

—Succession to self acquisitions—Daughter and collaterals.

A daughter excludes collaterals in the succession to self-acquired property according to the customary law of the Punjab unless a custom is proved as opposed to the customary law of the Province. (*Broadway and Abdul Qadir, JJ.*) GURDIT SINGH v. MT. ISHAR KAUR.

3 Lah. 257; (1922) Lah. 392; 68 I. C. 551.

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—Succession—Right of sisters, in the absence of collaterals. See CUSTOM, ALIENATION. 3 Lah. 40.

—Succession—Sister—Ancestral property—Pathans of Ludhiana Dt.

Under the customary law prevailing among the Pathans of the Ludhiana Dt. sisters and their sons do not succeed in the presence of any collaterals who can prove their relationship to the deceased. A female intervening in the line of descent acts as a conduit pipe to pass on the property as ancestral property to her sons and their descendants. 32 P. R. 1895 (F. B.) foll. (*Scott Smith and Abdul Qadir, JJ.*) KHWAJA MAHOMED v. AHMAD KHAN. 66 I. C. 482.

—Succession—Sisters—Exclusion—Wajib-ul-arz.

Held, on a construction of the wajib ul arz in the case that a custom was established whereby a brother excluded his sister and step-sister from succession to property. (*Daniels, J. C. and Dalal, A. J. C.*) MUMTAZUNNISA BEGAM v. WAZIR ALI. 65 I. C. 308.

—Succession—Sister—Half-sister—Arains of Nawankote—Tahsil Lahore.

Among Arains of Nawankote, Tahsil Lahore a sister has a right of succession. Also half-sister succeeds to the property of her half-brother in preference to his mother's father's brother (*Martineau, J.*) MAHTAB BIBI v. DIN MUHAMMED. 64 I. C. 155.

—Succession—Son of appointed heir.

The son of an appointed heir who predeceased the appointer is not entitled to succeed to the appointor's property in the absence of a special custom to that effect. (*Shadi Lal, C. J. and Scott-Smith and Harrison JJ.*) MELA SINGH v. GURDAS. 3 Lah. 362; 68 I. C. 858 (F. B.)

—Succession—Widow—Nature of estate—Rights of reversioner.

A widow succeeding to a limited interest in her husband's estate is subject to the same restrictions on her power of alienation as a widow holding a limited estate under the Hindu law. In either case the next heir has a right to protect the inheritance by challenging unauthorised alienations made by her. 135 P. R. 1908 foll. (*Shadilal, C. J. and Le Rossignol, J.*) DALIPA v. DALU. 4 Lah. L. J. 336.

—Succession—Zargars of Batala—Law governing.

The Zargars of Batala are non-agriculturists and prima facie they would follow Mahomedan and not agricultural custom. The onus is on the party who wants to set up succession by custom to show it. (*Broadway and Abdul Qadir, JJ.*) ABDUL KARIM v. MT. AMAT UL-HABIB. 3 Lah. 397.

—Validity—Essentials of—Special custom.

A custom to be legally binding must be ancient certain and invariable, and a family custom at variance with the general custom and the personal law of the parties requires even more cogent evidence than an alleged general custom, before

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it can be held to be established. (*Chevis and LeRossignol, JJ.*) *CHARANJIT SINGH v. AMIR ALI KHAN.* 2 Lah. 243 : 64 I. C. 892.

— *Village site—Alienation—Proprietor and non-proprietor, rights of.*

Under the general customary law of the Punjab non-proprietors have no power of alienation of site in villages and there is no special custom to the contrary in mauza khana in Jullundur District. The acquiescence of some of the proprietors of the alienations of sites of houses does not imply an abandonment of their right to the site. 13 P. R. 1889, 50 P. R. 1889, 85 P. R. 1822 foll. The mere fact that there are number of houses, shops and wells in a village with a population of three thousand inhabitants and that it is also a place full of artisans whose wares were sold outside and there were Khatri Brahmins and other non-agricultural tribes as part of the population do not constitute the village into a town. (*Chevis and Campbell, JJ.*) *RAM LOK v. BHAGWAN SINGH.* (1922) Lah. 158 : 65 I. C. 154

— *Trade custom—Unreasonable—Not to be recognised.*

A trade custom to be recognised by a court of law must be universal as well as reasonable. A custom allowing an agent to make himself to a principal and thereby profit himself at the expense of the principal, is unreasonable, and cannot be implied in a contract of agency. (*Piggott and Walsh, JJ.*) *KISHORI LAL v. JIWAN LAL.* 4 U. P. L. R. (A) 59 : 67 I. C. 231.

— *Trade Custom—Proof—Oral evidence Usage—Commercial usage.*

Usage is proved by the oral evidence of persons who must become cognizant of its existence by reason of their occupation in the particular trade or business and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that every body acknowledged it in the trade and knew of it or might know of it if he took pains to enquire. (*Greaves J.*) *WITTENBAKER v. J. C. GALSTAUN.* 36 C. L. J. 256.

— *Widow—Acts affecting estate—Reversioners, if bound.*

Any act of a widow prejudicing the estate will not be binding on the reversioners except for the life of the widow. They are not bound to contest the acts during her life time. The creation of occupancy rights being an alienation, can be challenged by the heirs in accordance with the well recognised principles of Customary law (*Scott Smith and Dundas, JJ.*) *NAND SINGH v. MT DHAN KAUR.* 68 I. C. 299 : 2 Lah. L. J. 573.

— *Widow—Remarriage—Effect on inheritance.*

On the remarriage of a widow her rights in her deceased husband's estate come to an end according to the general custom of the Punjab as prevalent among agriculturists. (*Broadway J.*) *MAHARAJA v. MT. GAUHRE.* 66 I. C. 433

— *Widow—Gift of portion to estate to nearest reversioner—Effect of.*

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The rule of Hindu law that a widow cannot make a valid gift of a portion of the estate in favour of the next male reversioner does not apply to cases governed by customary law 50 I. C. 498 Dist. (*Scott-Smith and Dundas, JJ.*) *JAGGA v. BHAG MAL* 4 Lah. L. J. 432.

**CYPRES DOCTRINE**—Applicability—Vagueness and uncertainty in a charitable bequest—Doctrine to be extended as much as possible. See WILL-CONSTRUCTION. 65 I. C. 820.

**DAHAYAK**—Nature of right—Decree of Settlement Court—Rights under.

A decree for "dahyak" does not of itself connote any right to possession of land and no under-proprietary right entitling the holder thereof to retain a lease of a village can be inferred from a "dahyak" tenure. The words "dahyak" and "birt" are used indiscriminately and a "dahyak" right may connote merely certain shares of the *nikasi* of the village. That is a quite different thing from a heritable and transferable under-proprietary right in the lands. (*Lovell S. M. and Ferard, J. M.*) *MAHABIR v. RAM PRASAD* L. R. 3 A. 268 (Rev.).

**DAMAGES**—Attachment before Judgment—Completion of attachment if necessary to give a cause of action—Absence of reasonable and probable cause—Malice—Compromise of suit—Effect of.

In a suit for damages for wrongful attachment before judgment the facts were that the defendant had caused the attachment before judgment of the plaintiff's goods on the allegation that defendant had executed deeds of transfer in favour of his relations with a view to defraud creditors. The only fact proved in support of the allegation was that plaintiff had, two years before the application for attachment, purchased certain properties in the name of his wife and had subsequently paid for improvements on it. On the passing of the order of attachment, the court aamin at the instance of the deft. proceeded to the plaintiff's shop and took the goods out of the shelves whereupon the plff. paid the suit amount. Thereupon the attachment warrant was returned. Held that the deft was liable in damages because the attachment before judgment was obtained without reasonable and probable cause and therefore maliciously. The plff. was entitled to damages even though the attachment was not completed. (*Oldfield and Venkatasubba Rao, JJ.*) *JOSEPH NICHOLAS v. SIVARAMA AIYAR.* 45 Mad. 527 : 15 L. W. 442 : 30 M. L. T. 269 (H. C.) : (1922) M. W. N. 242 : (1922) Mad. 206 : 66 I. C. 760.

— *Breach of contract—Tenant giving up premises before the expiry of lease—Rights of landlord—Measure of damages. See LANDLORD AND TENANT, RELATIONSHIP.*

35 C. L. J. 175.

— *Cause of action—Co-sharer—Ouster from property.*

Where there has been a complete ouster of one co-sharer by another the former is entitled to recover damages from the latter (*Buckland and Cumming, JJ.*) *PARBATI MAJHI v. DIGABATI MAJHI.* 64 I. C. 465.

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## —Cause of action—Illegal restraint.

The cause of action for a suit for compensation for illegal restraint arises on the date of the actual loss or damage or at the latest when plaintiff comes to know of such loss. 8 A L J 573 Rel. (Gokul Prasad, J). THAKURAIN AMAR KUAR v. POHAP SINGH (1922) A. 139. 66 I C 852.

## —Cause of action—Injunction Malice.

Where a person has without sufficient or reasonable cause obtained a temporary injunction which has caused loss to his opponent the latter can sue the former for damages without any proof of malice (Abdul Raouf and Abdul Qadir, JJ) L. EVANS v. ARTHUR MUICK 45 F. L. R. 1922 : (1922) Lah. 303.

## —Cause of action—Institution of legal proceedings—Injury—Compensation—Costs.

The mere failure of a litigant to establish his claim to relief in a civil suit does not necessarily, in fact does not usually—give the successful party a cause of action for damages simply by reason of his success. Even if an action has been brought falsely and maliciously and without reasonable or probable cause, it does not follow that the bringing of the action will furnish a cause of action in a subsequent suit to the person who has been sued. The first step is to prove special damage, and in the absence of the proof of special damage, no action for damages will ordinarily lie. The reasons are that the bringing of an ordinary action does not as a natural or necessary conclusion involve any injury to a man's property, and, further that the only costs which the law recognises and for which it will compensate him are the costs properly incurred in the action itself. For this the successful defendant has already been compensated. But the case is different when the bringing of an action does as a necessary consequence involve an injury to property which cannot be compensated by the grant of costs in the action. (1883) 119 B. D 674 foll : 43 C 550 diss. (Stewart and Kanhaiya Lal, JJ.) ARIAN SINGH v. PARBATI.

44 A. 687 : (1922) All 465 : 20 A. L. J. 636 : L. R. 3 A 408

—Collision—Pleadings and proof—Appellate Court when should interfere. See (1921) DIG COL. 493. REES v. JOHN YOUNG. 66 I C. 745

—Defamation—Suit against vakil for words used during argument—Not maintainable—English and Indian Law. See TORT-DEFAMATION.

(1922) Pat. 85.

—Election—Cause of action—List of voters—Intentional misdescription—Malicious removal of name—Damages—Liability for.

In India as in England, if any duly qualified person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote and so as to give the returning officer a right to refuse his vote he has suffered a legal wrong and is entitled to recover damages, which may be made punitive if the omission is shown to be the result of malicious intention.

In such a suit brought against the Municipal Board as well as individual members forming the Board, if liability is eventually established, that

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liability in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. (Walsh and Stuart, JJ.) MUNICIPAL BOARD, AGRA v. ASHARFI LAL 44 A 202 :

20 A. L. J. 1 : 65 I. C. 984 (1922) All. 1

—Malicious prosecution—Elements of—What is a prosecution—Master and servant—Liability of master for prosecution treated by servant. See MALICIOUS PROSECUTION.

64 I. C. 741.

—Malicious Prosecution—Application for sanction to prosecute—If sufficient, See MALICIOUS PROSECUTION.

65 I. C. 705.

—Measure of—Breach of contract to deliver goods—Market rate on due date to govern—Settlement between buyer and third party—Effect of. See CONTRACT ACT, S. 73.

15 S. L. R. 214.

—Measure of—Contract for the sale of land—Breach—Date for ascertaining quantum of damages. See CONTRACT ACT, S. 73.

15 S. L. R. 21

—Measure of—Contract—Tort—Trespass—Bonafides.

Damages for trespass are at large, but at least the plaintiff is entitled in every case to nominal damages. If the defendant makes a *bonafide* mistake a court ought to be content to award nominal damages, but if a defendant takes a risk which he knows to be a risk and persists in fighting when he knows or ought to know that he is wrong, his conduct ought to be measured in some way by the special damages which the Court is entitled to award. The measure of damages in contract is quite different to that in tort. In contract the plaintiff can only recover the actual pecuniary loss. In tort he is entitled to special damages for trespass to property. Circumstances may aggravate the plaintiff's grievance, and can be dealt with by some special sum which is awarded partly as a solatium, and partly in *terrorem* to other persons who may be disposed to act as the defendants have done, (Walsh and Ryves, JJ.) SOHA LAL v. LALA AMBA PRASAD.

L. R. 3 A. 494 : 20 A. L. J. 886.

—Measure of—Copyright—Infringement. See COPYRIGHT.

67 I. C. 983.

—Measure of—Rate of exchange—Date for conversion.

In a suit for damages by reason of negligence on the part of the defendant as a common carrier, the loss caused to the plaintiff must be measured by the rate of exchange prevailing on the date of the breach and not that prevailing at the date of judgment (1920) 2 K. B. 704 ; (1920) 2 K. B. 709 ; and (1920) 2 K. B. 714 foll. (Rankin, J.) DEKHARI TEA CO., LTD v. ASSAM-BENGAL RAILWAY CO., LTD.

48 Cal. 886 : 66 I. C. 469.

—Nominal—Trespass—Use of force—No loss to reputation or to person.

Where a person was given a slight push on the wrong assumption that he was a trespasser but it is found he has not suffered in person or in reputation, he is entitled only to nominal damages

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(*Newbould and Panton, JJ*) KUMUD KANT. CHAKRABURTHY v. BIGNOLD. 68 I. C. 664.

—Railway—Carriage of goods—Risk note form B—Deviation of route—Loss of goods—Railway not protected. See RAILWAY, 24 Bom. L. R. 316

—Suit against Secretary of State—Erroneous disposal of property produced in a criminal case—No cause of action for suit. See CAUSE OF ACTION, 20 A. L. J. 420

—Suit for—Cause of action—C. P. Code O. 21 R. 2—Failure to certify satisfaction of decree—Execution and realisation of decree—Remedy of judgment debtor. See C. P. CODE O. 21, R. 2 1 Bur. L. J. 207,

—Principles of assessment.

The principle of assessment of damages is that the party entitled thereto is to recover the profits which he would have made, if the contract had not been cancelled. Some factors to be taken into consideration in determining the amount of damages are (a) The rates charged must not be in excess of the prevailing market rates (b) Chapter of accident must be taken into account, and (c) the fact that the personal energies of the party released from the contract could be directed into other channels of enterprises, has also to be taken into account (*Dawson Miller and Bucknill, JJ.*) JUGAL KISHORE & BABU HOMESWAR (1922) P. 79.

—Vendor and purchaser—Purchaser's knowledge of defect of title—Effect of—Right to damages for non-performance of contract.

44 F. L. R. 1922.

**DEBTOR AND CREDITOR**—Extinguishment of the debt—Creditor succeeding to debtor's estate Effect of—Merger. See MERGER 16 L. W. 678.

**DECLARATORY SUIT**—Maintainability—No cloud thrown on title—Effect. See WILL—EXECUTOR. 42 M. L. J. 567.

**DECREE**—Amendment—Executing court—No power to amend even obvious error. See C. P. CODE, Ss. 151 AND 152. 15 L. W. 301

—Amendment—Mistakes in plaint reproduced in judgment and decree—Power of Court to amend. See C. P. CODE, S. 152. 66 I. C. 693

—Construction—Benefit of doubt.

Where the language of a decree or judgment is ambiguous or doubtful the benefit of the doubt ought to go to the judgment debtor. (*Kanhariya, J. C.*) GOKARAN SINGH v. MANGLI. 66 I. C. 673.

—Construction—Compromise decree—Creation of charge for maintenance—Enforceability in execution—Separate—Suit when necessary. See C. P. CODE, O. 34, Rr. 14 AND 15 35 C. L. J. 61.

—Construction—Decree on award—Reference to award when permissible. See (1921) DIG. COL. 500. NARAYANA AIYAR v. BIVARI BROTHERS. 45 Mad. 103 : (1922) Mad. 221 : 68 I. C. 673

**DECREE.**

—Construction—Maintenance—Declaratory or executory.

A court construing a decree will, if possible, avoid such a construction as may in future result in multiplicity of suits between the parties in respect of a matter which has been finally settled. Held, that the decree for maintenance in favour of the plaintiff was not merely declaratory of a right to maintenance but that it enabled her to recover that maintenance from the talukdari and non talukdari property to the extent to which they were respectively liable. 18 W. R. 175 ; 19 C. 139 ref. 15 O. C. 99 dist. (*Daniels and Wazir Hasan, A. J. C.*) RANI BIJAI RAJ KOER v. THAKUR JAI INDRA BAHADUR SINGH. 9 O. L. J. 5 : (1922) Oudh 34 : 66 I. C. 982

—Construction—Mortgage—Foreclosure decree—Village—Khudkash land.

Where a foreclosure decree in respect of a whole village specifies particular *Khudkash* fields by their number the decree holder cannot claim other *Khudkash* lands not specified in the decree as falling within the general description of lands held in *khudkash* right. (*Kotwal, A. J. C.*) HAZARILAL v. HAZARIMAL. 68 I. C. 476

—Construction—Order-in-Council—Interest—Mesne profits—Compensation for improvements.

An order in Council directed that on payment by the appellant of certain sums of money, due in respect of mortgages and interest thereon at 6 per cent., the appellant should recover possession of the property together with mesne profits : Held, that interest should run concurrently with the mesne profits, that being the construction which the Board had placed upon the order upon an application for review

Part of the mesne profits having been due to permanent improvements made by the appellant, a deduction of 10 per cent. was properly allowed by the High Court in respect thereof. The increased rents that could be properly attributable to the improvements could be properly set off against the mesne profits even though they were not actually executed by the persons in possession at the date of the decree but by persons from whom they had purchased the property. (*Lord Buckmaster.*) RAJA RAI BHAGWAT DAYAL SINGH v. RAM RATAN SAHU. 42 M. L. J. 243 : (1922) M. W. N. 102 : 4 U. P. L. R. (P. C.) 7 : 24 Bom. L. R. 336 : 3 Pat. L. T. 229 : 15 L. W. 481 : 65 I. C. 69 : 35 C. L. J. 121 : (1922) P. C. 91 : 26 C. W. N. 257 : 20 A. L. J. 26 (P. C.).

—Construction—Reference to pleadings. See (1921) DIG. COL. 501. SURAJ PRASAD PANDEY v. SOMRA MAHTO. 68 I. C. 903.

—Construction—When allowed.

A decree like any other document is open to construction. But the remedy by construction is only appropriate if the language is ambiguous. If the language is plain and there is no ambiguity the proper remedy for a variance between decree and judgment is to apply for amendment—Any construction must be if possible, to make it conform to the judgment. (*N. R. Chatterjee and Richardson, JJ.*) MAHA RAJ KUMAR SHOSHT

## DECREE.

KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI, 35 C L J. 339

## —Execution.

In executing a decree, the executing court is confined to the four corners of the decree itself. (*N. R. Chatterjee and Richardson, JJ.*) MAHA RAJ KUMAR SHOSHI KANTA ACHARJI CHOWDHURI *v.* RAJA SARAT CHANDRA ROY CHOWDHURI. 35 C L J. 339

—Execution—Declaratory decree or judgment—Remedy by execution not open. See RIGHT OF SUIT, 36 C L J. 101.

—Execution—Possession of share decreed—Partition proceedings—Effect of—Enquiry into substituted property See C. P. CODE, S. 47. 49 I A. 139

—Execution—Rateable distribution—Rival decree holders—Right of one to impeach the decree of the other as being fraudulent—Executing Court not to go behind decree. See C. P. CODE, S. 73. 24 Bom L R 1

## —Fictitious decree—Effect of

A decree which is fictitious does not require to be set aside; for a collusive and fraudulent proceeding in a court is not a judicial proceeding and is to be treated as availing nothing to the party who sets it up. (*Greaves and Cumming JJ.*) SUSHI KUMAR SARKHEL *v.* CHANDRA KUMAR SAMADDAR CHAUDHURI, 35 C L J. 348; 68 I C. 322.

—Instalment decree—Failure to pay instalment—Right of decree holder to execute whole decree—Relief against consequences of default. See (1921) DIG. COL. 531. NARSINIA GOPAL *v.* BALVANT MADHAV. 46 Bom. 463; 64 I C. 570 (1922) Bom. 170

## —SETTING ASIDE—Fraud—Plea in defence—Decree acted upon.

Where a decree has been obtained by fraud, a party to the decree as a defendant in a subsequent suit can plead that the prior decree was vitiated by fraud and therefore not binding on him even though he had not sued to avoid the decree. 26 C 891; 27 C, 11 Rel. If however he had acted in accordance with the decree, he cannot be allowed to challenge its validity, unless he proves specifically the circumstances which constitute the alleged fraud on him of the Court. (*Mookerjee and Chotzner, JJ.*) PULIN BEHARI DEY *v.* SATYA CHANDRA DEY. 36 C L J. 367.

## —Setting aside—Consent decree—Mistake—Unilateral mistake—Effect of revival of suit.

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them. Where two parties are at arms length, either of them may *prima facie* remain silent and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. A consent decree could be

## DECREE—Setting aside.

set aside only on a ground which would justify a cancellation of the agreement on which the decree is passed. Though a suit does not lie to set aside a decree in a previous suit on the ground that the judge in passing that decree made a mistake, yet as an agreement may be rectified for an appropriate mistake so may also the consent decree based upon such agreement. A mistake on the part of one party only, not caused or actively assisted by the act of the other party cannot invalidate the agreement or the decree based thereon. 43 C 217, 34 C L J. 257 8 C W N 473 34 C, 703 Pat L J 465 Ref. When a consent decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree. 2 C 184; 6 C 687 9 C 810, 11 C, L J. 456, 15 C. L J. 217; 22 C. L J. 313, 39 M. 823 Rel. (*Mookerjee and Chotzner, JJ.*) MAJOR A Y. REILLY *v.* RAJKUMARI. 36 C L J. 245; (1922) Cal 493.

## —Setting aside—Fraud—Ex parte decree—Suppression of summons.

Where a decree is obtained ex parte after suppression of summons and on a misrepresentation of the facts to the Court, such a decree can be set aside by a separate suit and it stands on a different footing from a decree obtained by perjury. (*Chatterjee and Pearson, JJ.*) THE INDIA PROVIDENT COMPANY LTD. *v.* GOVINDA CHANDRA DAS. 65 I. C. 318.

—Setting aside—Fraud—Jurisdiction—Cause of action where arises. See C. P. CODE S. 20, Cl. (c)— 65 I. C. 318.

## —Setting aside—Fraud—Non-service of summons.

Mere non-service of summons is not a ground for a suit to set aside a decree. It must be shown that the opposite party was guilty of fraud in causing the suppression of summons and thereby keeping the plaintiff in ignorance of the suit. (*Jwala Prasad and Adami, JJ.*) RANI CHHATRA KUMARI *v.* PANDA RADHA MOHAN SINGARL. 3 Pat L. T. 451; 66 I. C. 137; (1922) P. 291.

## —Setting aside—Fraud—Perjury.

Perjury and suppression of evidence do not constitute such a fraud as would vitiate a judgment 38 M. 203 foll. (*Coutts Trotter and Ram-esam JJ.*) BALAKRISHNA MUDALIAR *v.* SAMINATHA MUDALIAR. 16 L W. 132; (1922) M W. N. 463 (1922) Mad. 404; 69 I. C. 12.

## —Setting aside—Grounds for—Suppression of evidence.

A suit to set aside a decree on the ground that in the former suit accounts were suppressed is not maintainable. 45 I. C. 775 foll. (*Prati, J.*) ARLANDU *v.* C. T. A. A. L. SITHAMBARAM CHETTY. 1 Bur. L. J. 129.

—Setting aside—Minor—Attainment of majority at the date of decree—Effect of—Decree not voidable at the instance of minor. See MINOR. 4 Lah. L. J. 298.

—Setting aside—Minor—Gross negligence of guardian—Fraud—Collusion. See MINOR. 22 A. 195 (Rev.)



**DECREE—Setting aside****Setting aside—Minor—Guardian-ad-  
item—Improper alienation**

Where a minor sues to set aside a decree as against him on the ground that he was not properly represented in the suit in which the decree was passed, the Court can go into the merits of the prior litigation and see if the minor was properly represented therein. 25 B. 337; 13 A. L. J. 437; 43 A. 104; 28 A. 137 Ref. (*Lindsay and Ryves, JJ.*) MURLIDHAR v. PITAMBAR LAL. 44 A. 525; 20 A. L. J. 329.

4 U.P.L.R. (A) 170. (1922) All 91; 66 I.C. 372.

**Setting aside—Minor—Mortgage suit—  
Negligence of guardian—Omission to raise valid  
plea—Necessity.**

A minor is not bound by a decree passed against him in a suit where his guardian showed gross negligence such as not setting up a good defence of which he must have been aware. Fraud and collusion are not the only grounds on which a decree against the minor can be set aside. Where a guardian *ad item* of a minor allows an *ex parte* decree to be passed against his estate without setting up a valid plea, namely, that the mortgage sued on was neither beneficial nor necessary. (*Spencer and Ramesam, JJ.*) CHANDURU PUNNAYYAN v. RAGAM VIRANNA.

45 Mad 425. 42 M. L. J. 429; 15 L. W. 427.  
(1922) M. W. N. 213; (1922) Mad. 273.

**DEED—Construction—Ambiguity—Description  
of property—Falsa demonstratio**

The general rule is that where in a grant of land there is a repugnancy between the terms of grant and any plan or diagram the former will prevail. It is however, subject to the qualification that where the plan or the boundary is a part and parcel of the description itself, the general rule ceases to apply. Where in a grant the description of the parcels is made up of more than one part and one part is true and the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as *falsa demonstratio* and will not vitiate the grant (*Wazir Hasan, A. J.*) ABDUL GHANI v. ASHQ HUSAIN (1922) Oudh 162.

66 I. C. 442

**Construction—Ambiguity—Construction  
against grantor—Conduct of parties—Rele-  
vancy of.** See (1921) Dig. Col. 503. KALIKAN-  
D SINGH v. RAJA SIVA NANDAN PAL SINGH.  
(1922) P. 122; 63 I. C. 625; 3 Pat. L. T. 149.

**Construction—Ambiguity—Evidence of  
user—Latent or patent ambiguity—Admissibility.**  
See EVIDENCE ACT, S. 93. 64 I. C. 824.

**Construction—Boundaries and area—  
Conflict between.**

It is a well established rule that where the boundaries can be ascertained effect must be given to the description by boundaries irrespective of area. But if the boundaries are uncertain, then area must be considered. 41 C. 49 Ref. (*Newbould and Ghose, JJ.*) HARI MOHAN MODAK v. RAMESWAR DAS. 64 I. C. 737.

**Construction—Aulad—Meaning of.**

Where the words in the compromise were "used aulad hogi wo sab malik hogi", the

**DEED—Construction**

word "aulad" is used in its generic sense and includes male and female children 114 P. R. 1900 is a better guidance for the interpretation of the words "aulad" than 89 P. F. 1889. (*Le Rossignol and Abdul Quadir, JJ.*) SAIDAN v. FAZAL (1922) Lah. 215.

**Construction—Boundaries and area—  
Difference between—Which to prevail.**

If the boundaries specified in a lease can be identified the ordinary rule is that the statement of area must give away to the description of boundaries (*Teunon and Newbould, JJ.*) SHEIK BARA KALIM v. RAJENDRANATH ROY. 64 I. C. 751.

**Construction—Boundaries and area—  
Conflict between—Land found to be of less area.**

Where there is a conflict between the descriptions of the boundaries and the quantity of land conveyed, the description of the boundaries if precise and accurate dominates the description of the area. But this is not an inflexible rule and may be displaced in a particular case. (*Campbell, J.*) NARAIN DAS v. JAWAHAR SINGH. 50 P. L. R. 1922.

**Construction—Charge—Annuity.**

A provision in a deed granting an annuity that it is to be paid out of the estate of the grantor creates a charge on the estate in respect of the annuity. (*Teunon and Newbould, JJ.*) RAJENDRA MOHAN MOULIK v. UPENDRA NATH GUHA. 64 I. C. 518.

**Construction—Clauses altering rule of  
succession and restraining alienation—Effect.**

Where by Clause (a) of a deed, a right of pre-emption was created among the parties to the partition and by clause (b) if any co-sharer dies *lawalad*, the property left by him was to be divided amongst his near co-sharers according to their shares, and by Clause (c) no co-sharer could have the right of creating title in favour of a daughter's son in his divided share directly or indirectly.

Held Paragraphs (b) and (c) of the deed could not be looked upon as creating a legal contractual relationship between the parties to the deed. Paragraph (a) undoubtedly creates a legal contractual relationship, but paragraphs (b) and (c) go much further. The intention there is to alter the rules of succession and to restrain the right of transfer. The attempt to alter the rules of succession is obnoxious in view of the well-known Tagore case, and the restrictions laid down in paragraphs (b) and (c) cannot be enforced. (*Stuart, J.*) MT. MOHADAI KUAR v. BAGESHAR RAI. (1922) All. 293.

**Construction—Compromise stipulation  
that two ladies are to hold certain property for  
life—Gift over to plaintiff on death of both—  
death of one of the life tenants—Rights of  
parties.**

Where in a certain compromise decree it was stipulated that two ladies would take into possession certain lands for maintenance for life and after the death of both of them, the plaintiff will take possession of the lands and where after the death of one of the ladies, the plaintiff wanted to

**DEED—Construction.**

take possession of half of the lands demised. *Held*, that it was clearly a grant of land to the two ladies for life as maintenance, that is to say, they were joint tenants of the property and that the plaintiff was not entitled to recover possession until the death of both the ladies. (*Miller, C. J. and Coutts, J.*) CHANDRA MOHAN DUTTA v. SASIBALA DAS. (1922) Pat. 39.

4 U. P. L. R. (Pat) 7 : 3 Pat L. T. 623 : (1922) P. 68 : 65 I. C. 277.

**Construction—Condition precedent and condition subsequent—Sale.**

A condition precedent if not complied with vitiates a sale but a condition subsequent does not. (*Chitty and Richardson, JJ.*) DYAM KHAN v. SARAT CHANDRA DE 26 C. W. N. 218.

**Construction—Contract—License to cut trees and make sleepers on payment of royalty—Breach of Contract—Intention of parties**

Appellants, entered into a contract in writing with respondents whereby they acquired the right for a term of just over 4 years to cut Sakhua trees for the purpose of making sleepers upon which a royalty was payable at certain rates. When work had been in operation for a short period, the respondents cancelled the contract and retook possession. In determining the question whether the landlord was entitled to cancel the contract, the court considered the document as a whole in order to find out the true intention of the parties and held that the mere failure to cut sleepers at a certain rate every month did not entitle the landlord to terminate the contract. (*Miller, C. J. and Buckmill, J.*) JUGAL KISHORE v. BABU HORRESHMAR, (1922) P. 79.

**Construction—Deed of doubtful import—Conduct of parties See (1921) Dig. COL 504**  
 PROMOTHA NATH RAY CHAUDHURI v. DINAMANI CHAUDHURANI. 65 I. C. 826**Construction—Description of document.**

The true construction of a document does not depend upon the name given to it but it must be determined with reference to all its terms. (*Dalal and Wazir Hasan, A. J. C.*) KARIM DAD KHAN v. MT. BIBI GHAFURAN. 9 O. L. J. 104 : (1922) Oudh 42 : 66 I. C. 110.

**Construction—Duty to examine terms—Istimrari patta—Proprietary rights,**

A Court construing a grant must look to its terms and ascertain its legal effect with reference to them. A deed styled an *istimrari patta* authorised the grantee to continue in possession of the property conveyed, generation after generation, on payment of revenue to the grantors. The deed further recited that the grantees and her heirs had the same rights of ownership as the grantors and the grantors and their representatives had no claim to, or had no power of interference in the property conveyed. *Held*, that the documents conferred complete proprietary right on the grantees in respect of the lands conveyed. (*Wazir Hasan, A. J. C.*) LIAQAT HUSAIN v. NAROTAM DAS.

4 U. P. L. R. (J.C.) 1 : 65 I. C. 780,

**DEED—Construction.****Construction—Further Charge—Description of properties—Sufficiency.**

Where a mortgagor took a fresh advance under the terms of a document styled a mortgage and the document gave the boundaries and description of the properties as in the original mortgage.

*Held*, that the document constituted a deed of further charge 64 I. A. 83 ; 20 A. L. J. 601 ; 6 A. L. J. 255 ; 31 A. 482 Rel. (*Simpson, A. J. C.*) GAYA PRASAD v. RACHPAL.

4 U. P. L. R. (O. C.) 110 : 9 O. L. J. 484

**Construction of—General rule.**

If the meaning of a term in the original agreement is doubtful, assistance might be sought from the conduct of parties. Apart from ambiguity, the mere fact that the parties have acted on an erroneous construction of an instrument furnishes in itself no reason why the courts should not follow the general rule that an instrument should be construed according to its natural meaning in the light of the circumstances in which it was executed. (*Richardson and Suhrawardy, JJ.*) RAJA BIRUPENDRA NARAYAN SIMHA BAHADUR v. MIDNAPORE ZAMINDARY COMPANY LTD., (1922) Cal. 300 : 63 I. C. 937

**Construction—Gift by husband to wife—“Malik” meaning of—Principles of construction—Mokurari lease, if can be granted.**

Where a husband gifts properties to his wife as “*malik*”, but the instrument of gift contains limitations as regards alienation and also provisions as regards final devolution, *Held*, the intention of the donor was clear *i. e.* to provide for the donee and also for the ultimate devolution of the property. The grant is in effect the grant of an ordinary Hindu widow's estate. The absence of a clause restraining the donee from granting a *mokurari* lease, does not lead to the conclusion, she is empowered to grant it.

It is always dangerous to construe the words of one document by the construction put upon similar words in another document. All the clauses of the particular document must be looked at and given effect to, ignoring none as redundant or contradictory.

The word “*malik*” is not a term of art, and does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be. (*Coutts and Ross, JJ.*) ASHURFI SINGH v. BISESWAR PRATAP NARAIN SAHI.

1 Pat. 295 : (1922) Pat. 70 : 3 Pat. L. T. 273 : (1922) P. 362 : 65 I. C. 977.

**Construction—Gift by husband to wife—malik mustakil Kamil—Provision in favour of future son or daughter—Effect.**

Where a husband gifted away properties to his wife, making her the permanent and full owner “*malik mustakil, Kamil*”, but adds a final clause to the effect that if a son or daughter is born and lives at her death, that person is to be the permanent or full owner.

*Held*, the deed should be construed as a whole and the mere use of the words “*malik mustakil Kamil*” did not confer an absolute estate, as it would be inconsistent with the last clause—Taking the document as a whole, it conferred only a life interest. (*Coutts and Ross, JJ.*) SORABH PANDE v. RAJ KUMAR PANDE. (1922) Pat. 74

**DEED—Construction)****Construction—Gift or will.**

Where a Mahomedan lady executed a deed by which she purported to give away the whole of a zemindari estate, reserving for herself the usufruct of a portion for her life and directed the donee to pay the Government revenue on the whole from that time :

*Held*, the deed was a gift *inter vivos* and not a will. (*Sir John Edge*). MAHAMMAD ABDUL GHANI v. FAKHAR JOHAN BEGAM.

44 A. 301 : 20 A. L. J. 994 : 43 M. L. J. 453 : 31 M. L. T. 21 (P. C.) : 25 O. C. 95 : 27 C. W. N. 53 : 9 O. L. J. 369 : L. R. 3 P. C. 198 : (1922) P. C. 281 : 24 Bom. L. R. 1268 : 68 I. C. 254 : 49 I. A. 195 (P. C.)

**Construction—Intention that several parties should be executants—Deed signed by some only of the executants—Effect of**

If a contract in writing is executed by some only of the several persons who purport to join in the contract and were intended to be parties to it and to execute the document, that document constitutes only a proposed agreement which has never been perfected, and it cannot bind even those who did execute it. 25 M. 389; *Laich v. Wellake* (1840) 11 A. L. J. 969 Ref. 31 M. 114 d. st. (*Hallifax, A. J. C.*) RAMCHANDRA v. RUPRAO. 64 I. C. 726.

**Construction—Kar—Meaning of**

*Held* on the interpretation of the document in question that an exemption from liability to pay any *Kar* covered revenue, rent or any kind of tax including road cess. (*Newbould and Cumings, JJ.*) ANNADA CHARAN DE SARKAR v. HABIBULLA. 65 I. C. 598.

**Construction—Mortgage—Lease—When parts of the same transaction—Question of fact, See C. P. CODE, O. 2, R. 2.**

69 I. C. 54.

**Construction—Patta—Increase of rent—Accretion.**

In the year 1790 the Government granted a sanad by which they granted the plaintiff's predecessor-in-title a taluk within specified boundaries in the Sunderbans. The revenue on the lands was to be ascertained from time to time on the extent of the cultivated lands at a rate which was to be gradually increased to As. 8 as after which it was to be fixed in perpetuity. The taluk was surveyed from time to time and assessments were made on the basis of the additional areas found to be cultivated. The Government in the year 1916 claimed to assess the lands formed by alluvion within the specified boundaries since the year 1719 not at the rate of As. 8 specified in the patta but at the rate of As. 12 a bigha.

*Held*, that the lands comprised within the specified boundaries were permanently settled with the plffs. under the patta of 1790 and that the alluvial accretion could not be charged at more than As. 8 per bigha, which was the maximum rate leviable under the patta. (*Woodroffe and Cumings, JJ.*) PARBATI CHARAN SAHA v. SECRETARY OF STATE FOR INDIA. 35 C. L. J. 445.

**Construction—Principles of.**

In order to decide what is the meaning of one document, it is not very helpful to consider the interpretation placed upon another, though some-

**DEED—Construction**

what similar document, under possibly different circumstances, in another case, (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDE v. BISHUN DATT PATHAK. L. R. 3 A. 308.

**Construction—Principle of.**

No general rule can be laid down with regard to the construction of documents and each document must be interpreted according to its own terms, (*Kanhaya Lal J. C. and Dalal, A. J. C.*) SHAIKH RUTAB ALI v. MAHOMED ZAMAN BEG. 9 O. L. J. 101 : 66 I. C. 106.

**Construction—Principles of—Interpretation of other deeds.**

It would not be safe to import considerations into the question of construction of a document which might have arisen or may arise with reference to the question of construction of documents. In the case of construction of documents the only question is how the law is to be applied to the particular facts put before the court. (*Wazir Hasan, A. J. C.*) LACHHMAN DAS v. BHAGWANT RAM. 65 I. C. 707.

**Construction—Recitals—Operative portion—What passes under the deed—Zerai—Raiyat—Bihar.**

*Per Dawson Miller, C. J.*—Where there is an ambiguity in the operative part of the deed one should look back to the recitals and be guided by what is therein contained in interpreting the ambiguity. This canon of construction; however, does not apply in all cases where there is a doubt or difficulty in the construction of a document. If one is satisfied upon the natural construction of the operative part of the deed that certain property passes notwithstanding that the construction may be difficult, the recitals have no binding force.

*Per Das, J.*—Recitals in a conveyance are subordinate to the operative part and where the operative part is doubtful and it is impossible to say, on a mere reading of it, to which properties it refers then the recitals can and ought to be used to explain its meaning. While for the purpose of construing the operative part, the whole of the instrument may be referred to, yet the recitals leading up to it are more likely to furnish the key to its construction than the subsidiary clauses of the deed. (*Miller, C. J., Das and Adami, JJ.*) BHONU LAL CHAUDHURI v. VINCENT. 3 Pat. L. T. 653 : 65 I. C. 882 (F. B.)

**Construction—Sale or mortgage—Tests.**

The question whether a transaction is a mere mortgage in the form of sale must depend upon the intention of the parties which may be found in the deed itself or gathered from the circumstances attending the transaction in each case, (*Chatterjee and Teunon, JJ.*) MADHAB CHARANDAS v. RAJANI MOHAN DAS. 64 I. C. 583.

**Construction—Security bond—Personal liability—Signature by directors.**

A surety bond executed by the appellants who are the Directors of the Luxmi Co. Ltd to the Manager of the Marwar Bank was in these terms: "In consideration of your allowing the Luxmi Co. Ltd. to overdraw sums not exceeding in the aggregate of Rs 50,000 only (on the security of the Luxmi Co. Ltd demand pro-note in your

**DEED—Construction.**

favour of date) we hereby pledge for the repayment on demand of the said overdraft, etc. etc." The deed was signed by the appellants. *Held* that the bond created a personal liability. Any other construction would nullify the object of the security bond. The only materiality of the security bond would be if it gave some new security and some fresh liability, and therefore the natural construction to put upon what is indicated by the use of the imperfect but definite expression "pledge" is that the fresh liability of the three signatories personally was the new security introduced. (*Viscount Haldane, J.*) *PANNA LAL v. NIHAL CHAND* 43 M. L. J. 66.

(1922) M. W. N. 376 : 26 C. W. N. 737.

16 L. W. 80 36 C. L. J. 5 :

24 Bom. L. R. 971 : 31 M. L. T. 129 :

2 P. L. R. (P. C.) 1922 (1922) P. C. 46 :

67 I. C. 423. (P. C.)

— — — — — *Construction—Settlement of property on trust—Gift of absolute estate.*

A parsi lady executed a deed of settlement of which she appointed one M. and her son Rustomji the trustees, and by which she settled the immovable properties for herself for life, and after her death on Rustomji for his life and after Rustomji's death in trust for his "sons and their male heirs in equal shares absolutely as tenants in-common." The deed contained no power of revocation. There was a maintenance clause referring to the share to which an infant son or his male heirs should be entitled. The settlor first died and her son died next himself leaving three sons. *Held* that the three grandsons of the settlor took on the settlor's sons's death the trust properties absolutely in equal shares as tenants-in-common. (*Shah A. C. J.* and *Marten J.*) *DADABHAI FRAMJI CAMA COWASJI DORABJI*

24 Bom. L. R. 1111.

— — — — — *Construction—Substance of the transaction.* See (1921) DIG. COL. 507, *KUSUM KUMARI DASI v. DASARATHI SINHA* 67 I. C. 210.

— — — — — *Construction—Will—Authority to adopt.* See (1921) DIG. COL. 507, *SRIJAGANNATHA GAJAPATHI ANANGA BHEEMA DEO KESARI v. SRI KUNJA BEHARI DEO.*

4 U. P. L. R. (P. C.) 32 : (1922) P. C. 162 :

30 M. L. T. 124 (P. C.) 26 C. W. N. 374 :

24 Bom. L. R. 600 : 64 I. C. 458 (P. C.)

— — — — — *Execution—Admission of signature or thumb impression if amounts to admission of execution.* See *BURDEN OF PROOF.*

20 A. L. J. 672.

— — — — — *Execution—Formalities—Corporation—Execution of deed on behalf of.*

Where by the constitution of a corporation any special mode of execution of its deeds is prescribed or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding be executed in the manner or with every formality so prescribed. A public corporation should comply strictly with provisions in the statute regarding execution of contracts 34 C. 103

**DEFENCE OF INDIA RULES, R. 25.**

*Ref. (Mookerjee and Chotzner, JJ.) J. D. EZEKIEL v. ANNADA CHARAN SEN.*

36 C. L. J. 109.

— — — — — *Execution—Signature—Some of the executants signing document—Effect.*

Where the names of some of executants of a document do not appear at the top, the question arises whether the party not having signed the document regularly at the foot yet meant to be bound by it as it stood or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the signature is for purposes of execution effective. (*Mookerjee and Chotzner, JJ.*) *J. D. EZEKIEL v. ANNADA CHARAN SEN*

36 C. L. J. 109.

— — — — — *Material alteration—Effect of—Intention of parties.* See (1921) DIG. COL. 508 *KRISHNA KISHOR DE v. NAGENDRA BALA CHAUDHURANI.*

66 I. C. 694

— — — — — *Material Alteration—No knowledge by party affected.*

A document is vitiated and deprived of all its effect by the making of a material alteration in it without the knowledge of the party affected by it. (*Hullifax, A. J. C.*) *GANGA PERSHAD v. MOTIRAM.* (1922) Nag. 191. 63 I. C. 268.

— — — — — *Material alteration—Suit on original consideration—Maintainability.*

Though a bond is materially altered by an addition to the amount due thereunder, the plaintiff could succeed on proof of the loan by independent evidence and obtain a decree for the amount of the loan. 5 C. W. N. 56 *Ref. (Newbould and Panton, JJ.) KHOSAL MAHOMED v. AMIRUDDIN MAHOMED PRAMANIK.*

63 I. C. 331.

**DEFAMATION** — *Privilege—Statements in pleadings—Not absolutely privileged.* See *PENAL CODE, S. 499.*

65 I. C. 204.

— — — — — *Privilege—Legitimate—Covenant—Extent of—Malice—Personal charge—Privilege of pleader.* See (1921) DIG. COL. 509. *SHIVA KUMARI DEVI v. BECHARAM LAHIRI.*

66 I. C. 604.

— — — — — *Vakil—Suit for damages—Words used in the course of argument—Immunity from liability—English and Indian law.* See *TORT—DEFAMATION* (1922) Pat. 85.

**DEFENCE OF INDIA RULES, R. 25—Cognizance of offence on police Report—Complaint—Necessity for.**

All District Magistrates in the Punjab were empowered by notification dated 22nd April 1919, to order or authorise complaints to be made in respect of such offences as came within the purview of R. 25 (1) committed within their jurisdiction. Where the District Magistrate of Jullundur directed the Superintendent of Police to make enquiry, complete the case and send it up for trial and in due course the police put up a challan before the Dt. Magistrate and the case was sent to the trying Magistrate who disposed of it. *Held*, that the so called chellans by the

**DEKHAN AGRI. RELIEF ACT (1879), S. 1.**

police must be regarded as a complaint and that the Magistrate was properly seized of the case, 16 P. R. 1890; 28 P. R. 1883, 2 P. R. 1892, 3 P. R. 1892 dist. (*Broadway, J.*) KHUSHAL SINGH v. EMPEROR. 67 I. C. 337 : 23 Cr. L. J. 385

**DEKHAN AGRICULTURISTS RELIEF ACT, (VII of 1879)—Mortgage decree—Instalments—Failure to pay some—Darkhast, effect of Step-in-aid of execution in respect of all instalments then due, See LIM. ACT, ART. 182** 24 Bom. L. R. 284

—Mortgage—Decree Nisi—No necessity for decree absolute—Effect of making decree absolute—Step-in-aid of execution. See C. P. CODE, S. 48. 24 Bom. L. R. 269.

—Ss. 1, 3 and 11—*Applicability of—Agriculturist in other provinces—Extension of Act—Meaning of.*

The Dekhan Agriculturists Relief Act is not applicable to an agriculturist who earns his livelihood wholly and principally by agriculture at Deraghazi Khan, outside the Bombay Presidency or at any place to which the Act has not been extended. What is meant by the extension of an Act to a district is, the extension of a substantial portion of the Act and not merely the extension of a particular section or one or more sections 44 B. 217; 4 B. 360 Rel. (*Raymond, A. J. C.*) FIRM OF AYA RAM TOLARAM v. FIRM OF RAI HIT RAM 66 I. C. 682

—S. 2—Agriculturists—Income derived from fruits of mango trees—Agricultural income. See (1921) DIG. COL. 509 HIRALAL RAYCHAND SHAH v. PARBHULAL SAKHIDAS SHAH. 46 Bom. 48 : 64 I. C. 117 : (1922) Bom. 146

—S. 10 A—Sale of land—Oral agreement for redemption—Unregistered *Kabuliyat*—Admissibility.

Appellant sold certain lands by a sale deed to respondent. Subsequently respondent orally agreed to allow appellant to redeem on payment of the principal and interest and the agreement was embodied in an unregistered *Kabuliyat*. Held that notwithstanding the non registration of the *kabuliyat* appellant could prove the contemporaneous oral agreement under S. 10 A, of the Dekhan Agriculturists Relief Act and claim redemption on the ground that the sale was really a mortgage. (*Kennedy, J. C. and Raymond, A. J. C.*) RAIS HAMBIRKHAN v. MURIJMAL. 15 S. L. R. 160 : 65 I. C. 356.

—S. 10 A—Sale or mortgage—Oral evidence—Admissibility of—Suit for partition.

For S. 10 A of Dekhan Agri. Relief Act to be applicable, it is only necessary that an agriculturist must be a party to the suit and that some transaction shall be in issue entered into by such agriculturist or the person, if any, through whom he claims, which shall be of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act. S. 10 A is not limited to suits mentioned in S. 3 ch. (w), (y) or (z). (*Macleod, C. J., and Ceylan, J.*) HALLAPPA KALLAPPA z. IRAPPA GIRI MALLAPPA. 24 Bom. L. R. 406 : (1922) Bom. 415 : 67 I. C. 844

**DEKHAN AGRI RELIEF ACT (1879), S. 15.**

—S. 10 A—First suit for declaration that a sale was in reality a mortgage—Second suit on independent *Satekhat* not barred. See C. P. CODE, S. 11 EXPLN. 24 Bom. L. R. 236

—Ss. 11 and 20—*Ex parte decree—Execution proceedings—Application for instalments.*

A decree for money was obtained *ex parte* on the Original side of the Bombay High Court against the defendant who was described as a merchant in the plaint. During the course of the execution of the decree debt. applied for instalments on the ground he was an agriculturist. Held that the defendant could not raise plea that he was an agriculturist in execution proceedings as the point must be deemed to have been decided against when the original side of the High Court entertained the suit and decreed it. If he were an agriculturist the High Court would not have had jurisdiction to entertain the suit and as the debt. was not an agriculturist at the date of the decree he could not raise the plea in execution proceedings. 37 B. 486 Ref. (*Shah A. C. J. and Crump, J.*) MULJI PURSHOTTAM v. GOVERDHAN DASS. 24 Bom. L. R. 1291.

—S. 12—Compromise of suit—Admission of claim—Power of court to re-open compromise —O. 23, R. 3—See C. P. CODE, O. 23, R. 3. 24 Bom. L. R. 88.

—Ss. 12, 13—*Instalment bond—Failure to pay instalments—Accounts under the Act—Amount due under bond less than amount due under accounts—Result.*

Where money under a mortgage bond is payable by instalments, but as a result of default, a suit is brought and accounts are taken under the provisions of the Dekhan Agriculturists' Relief Act, but the figures arrived at are much larger than the amount ordinarily due under the bond itself, held the Act being to protect agriculturists the party can not be made to pay the bigger amount as a result of his seeking relief under the Act. (*Macleod, C. J. and Shah, J.*) VITHALDAS BHAGWANDAS v. MURTAJA HUSEIN. 48 Bom. 764 : (1922) Bom. 201 : 24 Bom. L. R. 267 : 67 I. C. 151.

—S. 13—Agriculturists—Trader—Taking of accounts See (1921) DIG. COL. 510 NARAYAN LAXMAN ADHIKARI v. CHAPSI DOSA. 46 Bom. 419 : (1922) Bom. 168 : 64 I. C. 1002.

—S. 13—Suit for account of a mortgage—Result of account showing that moneys due were in excess of mortgage amount—Decree for excess See (1921) DIG. COL. 510 RAGHUNATH SHIVAJI KULKARNI v. RAMCHANDRA NARAYAN JOSHI. 46 Bom. 384 : (1922) Bom. 289 : 64 I. C. 928.

—S. 15—*Decision that plaintiff is an agriculturist—Whether a preliminary decree.*

A finding on an issue whether a party to a suit was an agriculturist prior to taking accounts under the provisions of Dekkan Agriculturists' Relief Act is not a preliminary decree within the meaning of Ss. 2 and 97 of C. P. C. (17 Bom. L. R. 324; 23 Bom. L. R. 92 follow. (*Macleod,*

**DEKHAN AGRI. RELIEF ACT (1879), S. 15 B.**

C. J. and Kanga J.) JAISHINGRA MADHARAU  
RANU v. VENKATARAO SATWJI RAO.  
(1922) Bom. 336 (2).

—S. 15 B—*Instalment decree—Grant of in favour of a person not an agriculturist at the time.*

S 15 B of the Dekhan Agriculturists' Relief Act does not empower the court to grant instalments under a decree to a person who at the time of the decree was not, but has thereafter become an agriculturist. (Macleod, C. J. and Coyajee, J.)  
DEVU JETHIRAM GULJAR v. KEVAPPA SATAPPA.  
24 Bom. L. R. 370 : (1922) Bom. 220  
67 I. C. 840

—S. 22—*Immoveable property of agriculturist—Attachment and sale in execution of money decree Exemption—Limits of.*

The result of S. 22 of the Dekhan Agri. Rel. Act is that when immoveable property is sought to be attached in execution of a money decree, and it is found that at the time of attachment such property belongs to an agriculturist, then it shall be free from the attachment. But it does not follow that such protection continues. When the agriculturist to whom the property belongs dies and the property goes into the hands of his heir or legal representative who is not an agriculturist. The section denotes that the only question to be decided when immoveable property is sought to be attached for a money decree, is whether at that time it belongs to an agriculturist or not, and it is not permissible to read into the section any further words so as to make the section read that property should still be protected from attachment if it once belonged to an agriculturist judgment debtor, although it has passed by inheritance or otherwise into the hands of a person who is not an agriculturist. The object of the section was to protect in the hands of an agriculturist immoveable property belonging to him from which he derived the greater part of his income and the necessity for such protection is at once removed when such property passes into the hands of a person who is not an agriculturist. (Macleod, C. J. and Shah, J.)  
MARUTI BABAJI TOTRE v. MARTAND NARAYAN KULKARNI  
24 Bom. L. R. 749 : (1922) Bom. 213  
69 I. C. 96.

**DIVORCE—Adultery—Proof of—Corroboration—Necessity for.**

In a divorce case the uncorroborated testimony of a single witness is insufficient to prove a charge of adultery. If however there is evidence of a similar character in regard to other offences which can be treated as corroboration, then the testimony of a single witness as to adultery is sufficient to justify a decree for divorce. (Mears, C. J. and Banerji, J.)  
COLLARD v. MARIE AGNES COLLARD.  
44 A. 254 : 20 A. L. J. 82  
(1922) A. 7

—Adultery—Proof of—Uncorroborated Testimony of husband or wife—Insufficiency of. See DIVORCE ACT, S. 7.

43 M. L. J. 441 (F. B.)

—Costs—Practice as to.

The rule in divorce cases is that even though a wife's defence fails or her counter-charges

**DIVORCE ACT (1869), S. 7.**

break down or she has been proved guilty of adultery, the husband has to pay her costs. The policy of the matrimonial law in England and among Christians in India, has always demanded that the husband shall always be responsible for his wife's costs. Indeed the usual practice in every husband's petition is to require him to deposit a sum for the wife's costs before the petition is allowed to proceed. (Walsh and Stuart, JJ.)  
PATRICK NARMAN DWYR v. H. M. C. DWYR  
(1922) All. 243 : 66 I. C. 494.

—Grounds for—Cruelty and adultery—Uncorroborated testimony of petitioner insufficient to prove charge. See DIVORCE ACT, Ss. 7 AND 17.  
42 M. L. J. 562.

—Parties—Adultery—Co-respondent—Necessary party to proceedings. See DIVORCE ACT, S. 7.  
43 M. L. J. 441. (F. B.)

—Procedure—Decree nisi—Petitioner to go into the witness box

In all divorce cases the petitioner must come into the witness box, petitioner must be sworn, and he must prove his case because, among other things, the judge has to satisfy himself whether there is any collusion between the parties and he has further to satisfy himself as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court set aside the decree nisi. (Mears, C. J. Walsh and Kanhaya Lal, JJ.)  
HOWARD v. HOWARD.  
20 A. L. J. 853.

**DIVORCE ACT (IV of 1869) Ss. 7 and 17—Decree nisi for dissolution of marriage—No proof of service of petition—Confirmation by High Court—Proof of cruelty—Corroboration.**

The High Court will not confirm a decree for the dissolution of a marriage if it is not satisfied that the respondent was in fact served with a petition for divorce. It is contrary to the principles and rules on which the Court for Divorce and Matrimonial causes in England acts and gives relief, to act on the uncorroborated testimony of a petitioner either to establish adultery or cruelty. Under S. 7 of the Indian Divorce Act the courts in this country should follow the same rule. (Schwabe, C. J. Oldfield and Phillips, JJ.)  
PAYNE v. PAYNE.  
42 M. L. J. 562 :  
16 L. W. 16 : (1922) Mad. 350 (F. B.)

—S. 7—Proceedings for divorce—Uncorroborated testimony—Charge of adultery against a known person—Necessity of impleading him as respondent.

In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. Where charges of adultery are made against a known person, he ought to be made a co-respondent unless the judge should otherwise direct. (Sir Walter Schwabe, C. J. Coultas Trotter and Kumaraswami Sastry, JJ.)  
PENDURTI JOSEPH v. PENDURTI RAMAMMA.  
43 M. L. J. 441 :  
16 L. W. 689 : (1922) M. W. N. 637 ;  
31 M. L. T. 416 (H. C.) : 68 I. C. 931 (F. B.)

## DIVORCE ACT (1869), S 15

—Ss 15 and 37—*Suit for dissolution of Marriage on the ground of wife's adultery—Dismissal of suit—Grant of alimony—Order Ultra vires.*

Where a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, it is not competent to the court as part of the decree in the suit to grant permanent alimony to the wife (*Krishnan and Ramesam, JJ*) *DEVASHAYAM v DEVAMONY*.

43 M L J 763

—S 17—*Scope of.*

The obvious intention of the legislature as expressed in S 17 of the Divorce Act is that the High Court upon a reference for confirmation, should review the entire evidence and come to its own conclusion whether facts sufficient to justify a decree for dissolution of the marriage are or are not established by that evidence (*Mears, C J Piggott and Walsh, JJ*) *A A GARLINGE v I R GARLINGE* (1922) All 504

—Ss 18 and 19—*Grounds for divorce—Fraud—Concealment of loathsome disease—Syphilis—Existence at the time of marriage—Effect of—Impotency—Cruelty—When a sufficient ground for divorce* See (1921) DIG COL 514 *BIRENDRA KUMAR BISWAS v HEMLATA BISWAS*

67 I C 949

—Ss 19 (4) 36 and 37—*Marriage void ab initio—Power of High Court to order permanent alimony when confirming a decree* See (1921) DIG COL 515 *TURNER v TURNER*

64 I C 924

—S. 35—*Costs*

Where a petition for the dissolution of marriage on the ground of adultery is made and is filed by the husband and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel as is reasonable under the circumstances (*Mears C J Piggott and Walsh, JJ*) *A A GARLINGE v I R GARLINGE*, (1922) All 504.

—S 57—*Remarriage within six months of the confirmation of decree nisi—Validity of—Duties of ministers licensed to solemnise marriage* See (1921) DIG COL 516 *TURNER v TURNER*

64 I C 924

**EASEMENT**—*Acquisition of—Finding as to* See (1921) DIG COL 515 *AHMAD BAKHS v MT PALI*

66 I C 922

—*Abandonment—Light and air—Access of, to windows—Demolition of wall—Delay in rebuilding—Evidence of abandonment* See EASEMENTS ACT, S 15 Explan 2

24 Bom L R. 83

—*Air—Access of wind*

There is no easement for the free access of breeze; *Webb v Bird* 13 C B N, S 841 Rel (*Mookerjee and Chotener, JJ*) *SAROJINI DEBI v. KRISHNA LAL HALDAR*, 36 C L J 406

36 C L J 406

**EASEMENT**

—*Customary right—Right of way—Local custom—Prescription—Lost grant*

A customary right is not an easement in the legal sense of that term. Customary rights have their origin in grant or prescription, but it is not necessary that in every case there should be evidence from which a lost grant may be presumed. Nor is it necessary that the custom should be traced back for the whole time necessary to make it immemorial (*Richardson and Suhrwardy, JJ*) *ALI MAHOMED v SHEIKH KATU*

38 C, L J 280

—*Extinguishment—Merger—Landlord and tenant—Purchase of holding by landlord—Tenant continuing in possession at enhanced rent—Effect of.*

The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate for no person can have an easement in land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be coextensive, equal in validity, quality and other circumstances of right. If there has been unity of possession merely and not unity of seisin for estates in fee simple, an easement which has been thereby suspended will revive on severance of the union but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive, unless they are recreated on severance of the former dominant and servient estates. Where though there was an execution sale of the tenancy and a purchase by the landlord the tenant continued in occupation in the undisturbed enjoyment of the right of irrigation and the only visible result of the sale was that the rent was substantially enhanced. Held, that the right of irrigation from the landlord's tank possessed by the tenant was not extinguished but momentarily suspended and revived (*Mookerjee and Chotener, JJ*) *TINKARI PATHAK v RAMGOPAL PATHAK*

36 C L J 161

—*Fishery rights if one—Nature of right—Acquisition—Limitation* See LIM ACT, ART. 144 (1922) Pat 195

—*Right of way—Deviation from, when permissible* See EASEMENTS ACT, S 22

24 Bom L R 437

—*Landlord and tenant—Acquisition of easement right by tenant—Grant—User—Right to take water*

Although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor he may claim a right of easement based on immemorial user, as there is no reason why an owner of land should not grant any privilege he pleases to his tenant. Where the enjoyment of a right to take water from the landlord's tank was continued uninterrupted for a long series of years such enjoyment should be attributed to a legal origin and the court should presume a grant of an agreement. A tenant can establish his right to irrigate his field from his landlord's tank by proof of open and continuous user from

**EASEMENT**

time immemorial 29 C 363, 38 M L J 28, 6 C 394; 4 C 633, 30 C, 281 Rel

If the user of the easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of the intervention of such tenancy should not be sufficient to defeat the right acquired by the lapse of time, unless, indeed, it is further shown that the landlord, up to the time he granted the lease was in ignorance that any such right was claimed (*Mookerjee and Chotzner, JJ*) *TINKARI PATHAK v. RAMGOPAL PATHAK* 36 C L J 161

———Natural right—Natural stream—Diversion—Injury to neighbouring land owners—Damages *See* (1921) DIG, COL 517 *SAMI ULLAH v. MAKUND LAL* 43 All 688

———Partition—Severance of status—Right to easement *See* EASEMENTS ACT, S 13 25 O C 251

———Right of way—Acquisition of, by prescription—If period enjoyed by predecessor can be tacked on *See* LIMITATION ACT, S 26, 1 Bur L J, 99

**EASEMENTS ACT Ss 4 and 7—Easement—Right to gather fruits falling on neighbour's land—Easement—Severance of tenancy,**

A right to go on to a neighbour's land to gather the fruits that fall there from a portion of a tree alleged to belong to the plaintiff is not an easement within the meaning of S 4 of the Easements Act. Such a right cannot be acquired by prescription (*1895*) A C 1 foll (*Coutts Trotter and Ramsam, JJ*) *SARANGAPANI AIYANGAR v. SADAGOPAN NAIDU* 43 M L J 152 16 L W, 98, (1922) M, W N 421 31 M L T 78 (H C), (1922) Mad 398 68 I C 968

———S 7—Easement—Benefit of, only for dominant tenement—No right of servient owner to insist on continuance by dominant owner

An easement exists for the benefit of the dominant tenement alone and the servient owner cannot insist on its continuance by the dominant owner or claim damages for abandonment. If however water running through an artificial channel on a neighbour's land has all along been flowing to the plaintiff's land it is open to the plaintiff to insist on its continuance on the footing of a lost grant or old arrangement (*Bucknill, J*) *FUDU SAHU v. SARBAN* 65 I C 84

———S 7—Easement—Surface water—Right to collect and use—Right to let water on lower land—Rights of servient owner

Every land-owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and can not be bound to prevent it from so doing. He cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. If he should acquire such an easement the owner of the servient tenement

**EASEMENTS ACT (1882), S 7.**

acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water that is water not passing through a defined channel. The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where the right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement (*Arkright v. Gill*, (1839) M & W 203, *don v. Shrewsbury Ry Co* (187) L R 6 Q B 578, 2 C L R 141 Ref (*Miller, O J* and *Mullick, J*) *MT SARBAN v. PHUDU SAHU*, (1922) Pat 305 4 U P L R (Pat) 105

[ON APPEAL FROM 65 I. C. 84]

———Ss 7 and 13—Natural right—Right to light and air—Privacy—Easement by implication—Partition

Every one may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect does not by itself, give the latter a cause of action, in the absence of other circumstances. If windows are opened, the neighbour may, by building on his own land obstruct the light which would otherwise reach them. Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear, in order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter for, where there is a valid express agreement fairly made, the law does not indulge in presumptions, and the rights of the parties will be upheld according to the terms of such agreement, in such circumstances, no question arises as to grant of easement by implication.

Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or an advantage of a continuous and apparent nature, and sells the one in favour of which such continuous and apparent quasi-easement exists, the easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication.

*Ewart v. Cochrane*, (1861) 4 Mac H.L. 117, *Wheelden v. Burrows*, 12 Ch. D 31, *Bayley v. G W Ry & Co* 26 Ch D 434, *Brown v. Alabaster*, 37 Ch D 490, *Watts v. Kelson*, 6 Ch A 166, *Swan v. Cotton*, (1916) 2 Ch 459 Rel

The same principle has been applied to partition of joint properties. On a severance of tenements by a partition of joint property and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty.



## EASEMENTS ACT (1882), S. 7.

14 C 797, 26 C 516, 8 B. H. C. R 181 14  
B 452, 28 M 495 (*Mookenjee and Chotzner*,  
JJ) SAROJINI DEBI v. KRISHNA LAL HALDAR  
36 C L J 406

—S 7—*Natural right—Right to fishery—*  
*Defendant on ownership of soil or right to occu-*  
*pation*

The ownership of free natural elements, such as air and water, and of all wild animals living therein is obtained by occupancy or appropriation. It is a right incidental to the ownership of the land upon which the air or the water lies, just as much as is the right to make the silt deposited by rivers or the lava thrown up by a volcano or the rain or snow falling from the sky (*Mulick and Ross, JJ*) HENRY HILL Co v. SHEORAJ RAI

3 Pat L T 53 (1922) P 9 64 I C 346

—Ss 7 and 15—*Natural Stream—*  
*Meaning of—Rights of riparian owners—Pres-*  
*cription*

Where the water of a river during its course is largely increased in volume by percolation cannot be said to be a stream with channel 1897 A. C. 129 foll. Where the plffs have been using the water for more than 20 years but not as of right they cannot be said to acquire by prescription a right to the use of such water (*Martineau, J*) NAGINA SINGH v. MALHI,

3 Lah L J 555 64 I C 158

—S 13 (e) and (f)—*Scope of—Partition—*  
*Right to easements*

There is a distinction between the cases falling under S. 13 cl. (e) and cl. (f) of the Easements Act. Under the former the plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition and under the latter he has to prove four things (1) that the easement was apparent (2) that it was continuous (3) that it was necessary for enjoying his share after partition as it was enjoyed at the time when the partition took effect and (4) that no intention inconsistent with the easement claimed was expressed or necessarily implied in the partition. No right of easement after partition arises on the ground that the easement is necessary for enjoying a share as it was enjoyed immediately before partition. (*Ashworth, A. J. C.*) BRIJ MOHAN LAL v. CHANDRIKA SINGH

25 O C 261

—S 15—*Acquisition of easement—Pro-*  
*jecting eaves—Extent of the burden*

All that a delt whose eaves project over plff's land can acquire after 20 years is an easement imposing the burden on the servient tenement of having that projection over it. Even if he acquired the right to project his roof over the plff's land and to discharge rain-water over the plff's land, he could not acquire a title to the plaintiff's land. His rights would be in the nature of an easement, which he could only acquire either by grant or by prescription (*Macleod, C. J. and Coyajee, J.*) KASHIBHAI KALIDAS v. VALLABHBHAI

24 Bom L R 305 (1922) Bom 83  
67 I C 356

—Ss 15 and 17 (c)—*Easement—*  
*Acquisition by prescription—Rights which*

## EASEMENTS ACT (1882), S. 15

cannot be so acquired—Rights of owners of lands on lower level to receive rainwater passing through higher lands, *See* (1921) DIG Col 520 BASWANTAPPA IRAPPA DESAI v. BHIMAPPA YELLAPPA, 46 Bom 115 (1922) Bom 378

—Ss 15 and 26—*Easement—Right of way*  
*for scavengers through dwelling house—Mode of*  
*acquisition*

S 15 of the Easements Act does not exclude or interfere with other titles and modes of acquiring easements. In the case of long enjoyment of a right claimed a legal origin should be presumed when there has been a long continued assertion of such a right if such a legal origin were possible. Where user is proved the presumption is that it is of right till the contrary is proved. There is no presumption of a license. Where for a period of over 30 years the plaintiff's privy had been cleaned by scavengers passing through the defendant's house *Held* the user must be presumed to have been as of right and that the plff had acquired a right of way through the deff's house for the scavengers to pass into the plaintiff's privy 6 C 394, 4 L W. 128 foll. 8 C W. N 359 dist (1891) A C 228 7 A C 633 Ref (*Kumaraswami Sasri and Devadoss, JJ*) KUNJAMMAL v. RAJH NAM PILLAI, 45 Mad 633 42 M L J 417

(1922) M W N. 143 15 L W 266  
(1922) Mad 5 31 M L T. 150 (H C)  
66 I C 11

—S 15—*Easement—Waste land—Acqui-*  
*sition of right over*

The mere fact that the land is waste does not necessarily show that no right can be acquired over such land. If that were so, the right of user over almost every pathway in the mofussil would be lost, inasmuch as almost every pathway lies over waste land 18 C W N 735 Ref. In determining the question whether an user of way over waste land was as of right or not, the court would have to consider the character of the land, the relation between the parties and the circumstances under which the user took place 1 C W N 359 Ref (*Chatterjee and Pantou, JJ*) MAHOMED NURAL HAQ v. BAKSU MANDAL

65 I C 509.

—S 15—*Right of passage for sweeper—*  
*Acquisition of*

Where a sweeper uses the lane on the land of another openly and as of right for 20 years, the right of passage has been acquired as an easement (*Macleod, C. J. and Shah, J.*) YOSEF DAVID VARU LEKAR v. MOSES SOLOMON TALKAR

24 Bom L R 298 (1922) Bom 79

—S 15 Explan 2—*Easement—Acquisi-*  
*tion by prescription—Interruption—Dominant*  
*tenement destroyed by fire during the period of*  
*acquisition—Re construction of the house—*  
*Effect of*

The plaintiff built his house in 1897, in one of the walls of which he opened several windows, while he was enjoying light and air through those windows the house was burnt down by fire in May 1905, but it was re-constructed immediately afterwards. In 1918 the defendants commenced to build on their own land so as to block up the windows in the plaintiff's house. The plaintiff having sued

**EASEMENTS ACT (1882), S 18**

to restrain defendants from obstructing the light and air through his windows, the defendants contended that the plaintiff had not acquired the easement for the prescriptive period, as there was an interruption in his enjoyment during the time the house was destroyed by fire.

*Held*, overruling the contention, that the plaintiff had acquired the right of easement for his windows by prescription.

Where the owner of a building, who is in the course of acquiring a right of easement by prescription, has his house burnt down, but begins immediately to re-build his house and places the windows exactly in the same position as the old ones, he can be regarded as enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. If, however there is any delay in re-building, then that might be evidence of an intent on not to resume the user. (*Macleod, C J, and Shah, J*) **RATANLAL BHOLARAM v GULAMHUSEN ABDUL ALI**

46 Bom 448 24 Bom L R 83  
(1922) Bom 3 67 I C 250

— **S 18 — Custom of privacy—Larkhana-city—Sindh**

*Held* on the evidence that there was a custom of privacy with respect to the roofs of houses in the city of Larkhana in Sindh. (*Fawcett, J C and Kemp, A J C*) **SHAH MAHOMED v RAMJAN**

66 I C 833

— **S 22— Right of way—Deviation from, when permissible.**

The general rule is that a right of way once defined cannot be altered and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. S 22 of the Easements Act does not deal with the question whether the servient owner, when once the right of way has been defined, can substitute a new way and recourse must therefore be had to the common law. (*Macleod, C J and Coyajee, J*) **DHUNDIRAJ BALKRISHNA PHALNIKAR v RAMCHANDAR GANGADHAR KALE**

24 Bom L R 437  
(1922) Bom 407 67 I C 413

— **S 28—Easement—Imposition of different burden on servient tenement—Legality of**

Where an easement is claimed over another's property the servient tenement should not be saddled with a heavier burden than what the plaintiff has succeeded in proving. But when a particular mode of user is no heavier than the mode of user proved, the plaintiff may be allowed to use it in that particular way, e.g. the user of a way for horses may include the right to lead smaller animals as well but not larger animals or loads. The user of a path for the passage of men, carts and palanquins, may also entitle the dominant owner to take cattle, processions and corpses along the path as the latter user does not add to the burden on the servient tenement. (*Suhrawardy and Cuming, JJ*) **RAM KUMAR MAZUMDAR v MOHIM CHANDRA DUTTA**

65 I C 579.

— **S 30—Transfer of one part of tenement—Condition of land transferred—Accommodation**

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— **Severance—Easement of necessity—Presumption** See (1921) DIG Col 521 **TUSTU MONDAL v KENARAM MONDAL** 65 I C 22

— **S 59—License—Enjoyment for a long time—Revocation**

A licensee cannot by enjoying the license for any length of time acquire rights adverse to that of the licensor. Where certain tenants of a zamindar built thatched sheds on waste lands with his permission but these sheds were not appurtenant to their holdings, the tenants did not acquire a right adverse to the Zamindar and the latter could revoke the license at his pleasure. (*Mears C J and Gokul Prasad JJ*) **BHOJ RAJ v HARDWA**

20 A L J 608 L R 3 A 390

— **S 60—License—Death of licensor—Revocation**

A license is of a personal character not merely as regards the grantee, but also as regards the grantor. The license ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. It is open to the heirs of the licensor to treat the licensee as a trespasser and eject him without notice of revocation. (*Kotwal A J C*) **KARELAL v BADRIPRASAD**

18 N L R 76 1922 Nag 162  
68 I C 107

— **S 60—License—Revocation—Abadi plot—Cultivation for several years—Right of grantee to revoke license** See C. P CODE REV ACT S, 203 67 I C 873

**EJECTMENT—Cosharer—Trespasser on land**

One of the co-sharers can sue to eject a trespasser from the joint land. (1901) A W N 36 foll. (*Lindsay and Kanhaya Lal JJ*) **SRI THAKURJI v HIRA LAL**

44 All 634

20 A L J 609 (1922) All 408 L R, 3 A 581

— **Decree for—Illegal sub letting—Admission by tenant—Procedure**

Where in a suit to eject a tenant for illegal sub letting the tenant agrees to eject the sub tenant and the latter states that he has given up the holding, a formal decree should be given so as to serve as evidence of possession. (*Burn J, M and Pearson, J M*) **KALWA v GANGA SAHAI**

L R 3 A 483 (Rev)

— **Demarcation of area—Refusal to eject**

Where in a suit in ejectment the plot from which debt was sought to be ejected was not demarcated on the spot and the matter was not so clear that demarcation could be made in execution proceedings. *Held*, the court was justified in refusing ejectment. (*Hopkins, S M, and Burn, J, M*) **MAKHAN LAL v, BINDA**

L R 3 A 453 (Rev)

— **Failure to comply with terms of lease—Relief against forfeiture—T P Act, S 114**

In a suit for ejectment on the ground that the terms of the lease had not been acted upon, the defendant pleaded that the standard rent fixed

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had been paid duly to the Rent Controller and all terms of the lease complied with in terms of the standard rent

*Held*, the proper rent was the one fixed by the Controller and as all terms of the lease had been complied with, though in terms of the standardised rent, the lease was subsisting. Even if there was a forfeiture, it could be relieved against under S 114, T P Act. The operation of the section, is not in any way affected by the provisions of the Rent Act (*Greaves, J.*) **AHINDRA NATH CHATTERJEA v TWISS** 49 Cal 150 (1922) Cal 394

———Landlord and tenant—Trespasser—Right of landlord to sue in ejectment *See* C P TEN ACT, S. 35. 64 I C 902

———Lease from year to year—Re entry only on conditions—Lessee if can be evicted in the absence of those conditions *See* AGRA TENANCY ACT, S 11 (a) 4 U P L R, 18 (B R)

———New tenancy—How created

A tenancy is terminated by ejectment. A fresh tenancy will only commence if the tenant is re-admitted by the landholder or recognised by him as his tenant; such recognition can be assumed from the receipt of rents (*Hopkins, S M and Fremantle, J M*) **KUNWAR MUHAMAD KARAMAT ALI KHAN v JUGLA** L R 3 A 208 Rev

———Notice—What tenant should prove  
*Nature of proof*

In a suit for ejectment, the tenant must give *prima facie* evidence he is entitled to remain in possession. It is not sufficient that the tenant should make statements on oath. Other evidence is required (*Burn, J M*) **MUSSAMMAT SANJHARI v KANDHAYA BAKSH** L R, 3 A, 31 Rev

———Occupancy holding—Lease and mortgage to same person—Ejectment before redemption

Where a simple mortgagee was given a lease with a stipulation that the lease would not be cancelled till the mortgage was redeemed, and subsequently on the expiry of the period fixed in the lease the mortgagor without redeeming sued to eject the mortgagee. *Held*, that the latter was liable to ejectment (*Hopkins, S M and Fremantle, J M*) **MT. TAJAN v SADHO RAM** L R 3 A 443 (Rev)

———Parties to suit—Non joinder of person under whom defendant holds—Effect

A decree for possession can be given in an ejectment suit against the person in juridical possession, even if for some reason or other, the plaintiff does not implead or claim any relief against the party who has put the defendant in actual possession of the land (*Das and Adams, JJ*) **BHAGWATI KUER v JAGDAM SAHAY**, 3 Pat L T 429 (1922) P 352 67 I C 597

6 Pat L J 604  
———Possessory title—Onus on defendant to prove better title.

Where a person in possession of a property is dispossessed by another the onus is on the latter to show that he had better title than the former.

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2 Pat L, J 61 Ref (*Jwala Prasad, A C J and Das, J*) **AWADH BIHARI DIKCHIT v JITU SAHU** 64 I, C 243 (Pat)

———Possessory title—Right to eject defendant—Joint possession

It is open to a plaintiff who was in possession but was dispossessed by the deft to sue for recovery of possession on the strength of his possessory title. If the defendant shows an equal right or title with the plaintiff, the latter will be entitled to be put in joint possession with the former. If the plff has a better right than the deft, the latter must surrender possession 26 M 514, (1921) M W N 243 Rel (*Kumaraswami Sastri and Devadoss, JJ*) **KAJI AMIR SAHIB v KAJIR MAHOMED ALI AHMAD SAHIB** 15 L W 430 (1922) M W N 439 66 I C 237

———Proof of title—Effect

In a suit for possession where plaintiff proves his title, but the defendant who is in possession failed to prove a title by adverse possession the suit must be decreed 13 A C 793 foll (*Pratt J*) **KATI MUTU ASARI v MEERA HUSSAIN** 1 Bur L J 251

———Sub-tenancy—Proof of relationship—Onus.

Where the plff seeks to eject the deft as his sub tenant, *prima facie* the burden lies on the plff to prove the relationship of land holder and tenant. The mere fact that the plaintiff is the tenant in chief and is the recorded occupancy tenant at the settlement does not prove the sub tenancy (*Hopkins, S M*) **BADAM v TULSHI** L R 3 A 398 (Rev)

———Suit for—Demarcation of land—Absence of

The fact that the land in suit is not demarcated on the spot is not sufficient ground for refusing ejectment. It must be shown that the land in suit is not capable of demarcation to entail a dismissal of the suit for ejectment (*Hopkins, S M*) **SAMINATH PANDE v RAM RAO KRISHNA JATAR** L R 3 A 82 (Rev)

———Suit for—Plaintiff to prove title

In a suit in ejectment or declaration and injunction, plaintiff can succeed only on the strength of his own title and not on the weakness of a defendant's title (*Abdul Raouf and Harrison, JJ*) **MT DURGA DEVI v MT SHIB DEVI** 4 Lah L, J 173 (1922) Lah 83

———Title—Proof of—Demarcated land—Identity

In suits in ejectment the question is not whether the land is not demarcated so as to require no further demarcation, but whether it is identifiable, and whether there are boundaries or divisions which have been once fixed and which though they may not now be traceable on the spot, can be reconstructed from the records (*Hopkins, S M and Fremantle, J M*) **MT. BADRUNNISSA v BHIKHARI** L R 3 A 420 (Rev.)

———Title—Proof of—Possession—Presumption from

The decision of the Full Bench in *Raja Shiva Prasad Singh v Hira Singh* (1921) 2 Pat. L T

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487 does not lay down the proposition that in no case could the probabilities and presumptions be taken into account in a suit in ejectment. The rule there laid down was that it is only in cases where there is no evidence of the plff as to dis-  
possession or, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession. But it must not be considered that merely because where evidence was given by both sides and the court which had to determine the case had a difficulty upon the evidence or even considered that evidence not altogether satisfactory that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title (*Muller, C J and Mullick J.*) **TIAN SAHU v MULCHAND SAHU**  
3 Pat L T 460  
(1922) P 432 67 I C 631

——— *Proof of title — Onus on plaintiff — Weakness of defendant's title*

Where plff sues to recover possession of land on declaration of his title, he must prove his title. If he fails to do so, the mere failure of the defendant to establish his title does not help plaintiff (*Greaves and Panton, JJ*) **ABDUL AZIZ v AMIR ALI**  
67 I C 149

**ELECTION** — Voter's list — Intentional misdescription of name of duly qualified person from list of candidates — Malicious removal of name — Liability for damages. See **DAMAGES**.  
44 A 202

**EQUITY** — Principles of — Absence of statutory provisions — English rules.

Where no specific statutory directions are given, judges are bound to act according to justice, equity and good conscience and there is a large preponderance of judicial opinion in favour of the view that the principles applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England. 24 C W N 982 ref to (*Das and Adam, JJ*) **JAGAT MOHAN NATH SAHI DEO v KALIPADA GHOSH**, 1 Pat 371 (1922) Pat 85  
3 Pat L T 276 (1922) P 104 66 I C 861

**ESTOPPEL** — Acquiescence — Silence — Sale of joint property by one of three brothers — Other brothers standing by for years and allowing vendee spend large sums on building

Where one of three brothers sold ancestral property and the other brothers with knowledge of the sale kept quiet while the vendee was spending moneys in building on the land sold. Held that the plaintiffs' long silence coupled with the fact that they knew all along of the building operations and abstained from asserting their own rights, showed that they acquiesced in the sale and that they were consequently estopped from asserting those rights in a suit. 177 P W. R. 1911, 13 Bom L R 162, 19 Cal W N 882, 39 P W R 1910 foll. 20 C W N 657; 9 All 474, 16 All 328, 21 All. 496 (P C.) Ref. (*Broadway and Harrison, JJ*) **PHANPAT RAI v. GURANDITTA MAL**  
2 Lah. 268 64 I C 520.  
10 P. L. R. 1922,

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——— Act of parties — Agreement for issue of inam title deed in the names of two persons — If either can contend there is no title in the other. See **INAM — ENFRANCHISEMENT**  
30 M L T 334 (H C)

——— Act of parties — Compromise — Unregistered — Change of position. See **COMPROMISE**  
66 I C 412,

——— *Compromise — Title — Recognition of — Proceedings under S 145*

A dispute under S 145 Cr P Code relates only to the possession of the properties and consequently a compromise of the proceedings does not estop a party from denying the title of the other (*Banerji and Gokul Piasad, JJ*) **GOPI DASS v MADDO LAL**  
20 A L J 932  
L R 3 A 639

——— *Conduct — Admission of adoption in documents, Effect,*

Where a person executed a registered document declaring he had adopted another, and in mutation proceedings described himself as the guardian of such adopted son and even entered into a compromise wherein for valuable consideration he gave up all intention of repudiating such adoption, he would be estopped from alleging there was no adoption (*Rafique and Piggott, JJ*) **KUNWAR UDIT NARAYAN SINGH v DIVAN RANDHIR SINGH**  
L R, 3 A 642

——— By conduct — Alienation of family properties — coparcener acting in concert but not joining — Effect. See **HINDU LAW JOINT FAMILY**  
65 I C 577

——— *Execution — Purchaser subject to mortgage — Estoppel affecting mortgagor — Purchaser if bound*

A purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor and consequently he cannot dispute the validity of a mortgage which the mortgagor himself is estopped from questioning. 22 C 909, 10 C L J 150, 21 C L J 441 Rel. (*Mookerjee and Cuming, JJ*) **NANDA LAL AGRANI v JOGENDRA CHANDRA DATTA**  
36 C L J 421

——— *Execution Sale — Decreeholder selling his own properties by mistake — Purchase in execution — Subsequent setting aside the sale*

Where in execution of a money decree the decree-holder under a bona fide mistake brought to sale certain of his own properties as those of his judgment debtor and the sale was confirmed and delivery of possession was made to the purchaser, Held that the decree holder was estopped from setting up his own title to the properties as against the auction-purchaser notwithstanding the fact that his mistake was a bona fide one. 20 C, 296 foll. (*Ayling, O C J and Odgers, J*) **RAMASWAMI KONAN v KULANDAIVELU PILLAI**,  
15 L W 272 (1922) M W N 121  
(1922) Mad 63,

——— *Execution sale — Property sold as that of one judgment debtor — Others' acquiescence with knowledge — Effect*

Where in execution of a decree against several persons, a certain property was attached and sold

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as that of one of the judgment-debtors and the others though they had knowledge of the proceedings and were present at the sale raised no objections whatever and even allowed the sale to be confirmed

*Held*, in a subsequent suit by them against the auction purchaser for possession on the ground that they had an interest in the property, they were estopped by their conduct at the sale and even subsequently by allowing the sale to be confirmed 10 I A 25 and 15 I A 171 ref to (*Lyle, A J C*) **ABDUL RAZZAQ v MUHAMMAD HAJJAN**, (1922) Oudh 11 90 L J 131 67 I C 797

—Execution Sale—Incumbrances Notification of—Purchaser not estopped from questioning consideration for incumbrances *See C P CODE, O 21, R 66* 20 A L J 732

—Fraudulent Conduct—Party guilty of—Not to deny truth of representation

To allow a patwari conceal his cultivation by falsifying the records and then afterwards to plead that these records are incorrect would be infringing the maxim that no man shall be allowed to profit by his own fraud (*Hopkins, S M and Fremantle, J M*) **SAHDEO PRASAD v RAM SAHAI** L R 3 A, 257 (Rev)

—Inconsistent positions—Not to be taken, A party litigant cannot be permitted to take up inconsistent positions to the detriment of his opponent 27 C L J 535, 5 C L J 95 Ref (*Mookerjee and Panton JJ*) **BAMA CHARAN CHAKRAVARTI v. NIMAI MANDAL** 35 C L J 58 (1922) Cal 114 64 I C 903

—Knowledge of parties—Question of law, There can be no estoppel where both parties know the full facts (*Ayling and Odgers JJ*) **RAJAMBAL AMMAL v SHANMUGA MUDALIAR** (1922) M W N 481

—Landlord and tenant—Acquiescence—Erection of structures—Demolition

To raise a plea of estoppel against a landlord seeking to demolish structures erected by a tenant, it is not enough for the tenant to show that the landlord stood aside and allowed the structures to be erected. One of the essential elements of equitable estoppel is that the person who sets up that estoppel must have acted in good faith and must have been under the belief that he had a right to put up the buildings. Where the buildings in dispute have been in existence for a long period and certainly for over 12 years and the landlord has been aware of their erection and kept quiet all along, he cannot turn round and claim to demolish the buildings so erected (*Lindsay, J*) **MUSSAMMAT DELARI KOER v SALIG RAM** 4 U P L R. (A) 82 66 I C 603 (1922) A 210

—Landlord and tenant—Admission into land on receiving fees—Effect—Absence of for *mal* lease.

Where a zemindar took nazrana and admitted the tenant into the land pending the execution of a lease deed, he is estopped from denying that he had admitted the tenant into the land with the intention of giving a lease. The fact that a registered lease was not given does not affect the

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question (*Burn, J M*) **RAJA DURGA NARAIN SINGH v JODHA** L R 3 A 543 (Rev)

—Landlord and tenant—Allowing a person to be recorded in settlement as occupancy tenant—Ejectment

A Zemindar is not estopped from denying a person's occupancy rights by reason of the fact that he allowed them to be recorded at settlement as occupancy tenants and also sued them for enhancement of rent the consent to the entry at settlement merely amounts to an admission and in the absence of any evidence that the tenant was bad to change his position for the worse, plea of estoppel is not maintainable (*Hopkins, S M*) **CHIDDA v NAWAB MUMTAZ-UD-DOULAH** L R 3 A 252 (Rev)

—Landlord and tenant—Permanent tenancy—Grant of, by ghatwali—Grantor estopped from denying rights of grantee *See LANDLORD AND TENANT, PERMANENT TENANCY* 6 Pat L J 687

—Landlord and tenant—Silence of landlord—Conduct of lessee

Where the tenants knew perfectly well what their rights were and they were not deceived or encouraged in any way, the mere silence of the landlord or his inaction does not create an estoppel against him. Further to create an estoppel it must also be shown that he was aware of what his rights were and that he had the power to prevent the tenants from building (*Miller, C J and Mulhok, J*) **BUDHAN TELI v MADANMOHAN LAL** 3 Pat, L T 485 68 I C 653

—Mortgage—Purchase subject to

Where a purchaser assumes liability for the discharge of certain mortgages on the property and receives consideration therefor, he is bound by them (*Scott Smith and Dundas, JJ*) **ALLAH DITTA v GIAN SINGH** 4 Lah L J 454

—Mortgagor and Mortgagee—Occupancy tenant—Unregistered Mortgage by—Denial of title

The rule that an occupancy tenant who makes an usufructuary mortgage of his holding to another man is estopped from alleging that the other man is his sub-tenant has no application where the mortgage is unregistered and so ineffective to pass the mortgagor's rights in the property (*Hopkins S M and Fremantle, J M*) **RAM CHARAN KUNBI v SHIVA JAGAT KUNBI** L R 3 A 161 (Rev)

—None against statute

There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit (*Suhrawardy and Cuming, JJ*) **NAFAR CHANDRA PAL CHOWDHURY v BHUSI MOLLA** 65 I C 581.

—None against statute—Unregistered Lease—No specific performance *See REGN ACT, Ss 17 (1) (D) AND 49* 26 C. W N. 329.

—Question of law

A representation as to a question of law cannot give rise to an estoppel (*Ayling and Odgers, JJ*) **RAJAMBAL AMMAL v SHANMUGA** (1922) M, W N, 481.

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—Representation—Compromise relating to occupancy holding—Sale in cases of default—Effect. See LANDLORD AND TENANT,

1 Pat 153

—Representation—Necessity for—Suit in ejectment by landlord against tenant

The proprietors of certain lands sued to eject a tenant D but the suit was dismissed on appeal by the High Court on the ground that D was a rayat and that no valid notice to quit had been given to him. Pending an appeal to the Privy Council D's legal representatives sold the holding to defts. The plaintiff's did not admit the validity of the sale but the defendants were brought on record before the Privy Council and the appeal was eventually dismissed. In a subsequent suit to eject defendants *Held* that the plaintiffs were not estopped from suing in ejectment inasmuch as there was no representation on their part of the existence of any occupancy right in D (*Sir John Edge*). DAMODAR NARAYAN CHOWDHURY v MILLER, 16 L W 692

69 I C 134 (1922) P C 349

4 U P L R (P C) 108 31 M L T 205 (P. C)

—Representation—Omission to object at partition proceedings—Effect of

Defts set up a gift in their favour and on that basis claimed a share in partition proceedings. Plaintiff objected to the right of the defendants but was persuaded not to press his objections. He also did not oppose the redemption of a mortgage by defendants as he was not quite certain about his own right of succession. *Held*, that the plaintiff's conduct was insufficient to raise a plea of estoppel against him (*Leslie Jones and Abdul Raouf, JJ.*). BISHEN SINGH v BULANDA

4 Lah L J 419

—Representation—Ownership of land—Mortgagee unaware of false title—Mortgagor cannot take advantage of fraud. See REGISTRATION ACT, S, 28

(1922) All 231

—Res judicata—Difference between—Principles underlying. See C P CODE S 11

(1922) Pat 33

—Result of—Changing the law of the land—Not to be allowed. See REGISTRATION ACT, S 49.

L R 3 A 229 (Rev)

—Truth known to both parties—Effect. See REGISTRATION ACT, S 49

L R 3 A 229 (Rev)

**EVIDENCE** — Admissibility — Document requiring registration—Absence of registration—Effect of, See REGISTRATION ACT, S 49

L R 3 A 229 (Rev)

—Admissibility—Objection to—Ground of objection not raised in the court below—Effect of

Where a piece of evidence not proved in the proper manner has been admitted without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received without objection in direct contravention of an imperative provision of law, the principle on which un-objected evidence, is admitted, does not apply. 8 C W

## EVIDENCE

101 Ref (*Sahrawarty and Cuming, JJ*) SUD HANYA KUMAR SINGH v GOWR CHANDRA PAL 35 C L J 473 (1922) Cal 160 27 C W, N 134 68 I C 86

—Admissibility—Objection to mode of proof

An objection as to the mode of proof not taken in the Courts below cannot be taken for the first time in second appeal (*Chatterjea and Pearson, JJ*) ALI MAHAMMAD KHAN v MAHA RAJ BEPARI, 36 C L J 186 64 I C 266

—Admissibility—Objections to—Consent of parties—Waiver

Parties if so minded may ordinarily agree that evidence shall be taken in a particular way. That is not a matter which can be said to affect the jurisdiction of the court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used. 43 M 609, 38 M 160 foll. If a party to a suit consents to the recitals in prior judgment being taken as proof of a will, he cannot object to their admissibility on appeal (*Spencer and Devadoss, JJ*) GOPU NATARAJA CHETTY v RAJAMMAL 43 M L J 448 16 L W 122 (1922) M W N 464 31 M L T 125 (H, C) (1922) Mad. 394 69 I C 15

—Admissibility—Objection to—Waiver, See 1921 DIG COL 257, KALIKANAND SINGH v RAJA SHIVA NANDAN PRASAD SINGH

3 Pat L T 149 (1922) P 122

—Admissibility—Recitals in deeds not inter partes

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence (*N. R. Chatterjee and Suhrawardy, JJ*) SOROJ KUMAR v UMED ALI 35 C L J 19 (1922) Cal. 251.

—Admissibility—Power of court to refer to documentary evidence not exhibited—Oppportunity to parties.

No court has a right to look at any document or any papers other than those on the record unless he gives to the parties to the suit an opportunity of being heard and making their submissions with regard to what is contained in documents outside the record to which the Judge desires to refer, (*Greaves and Pantou, JJ.*) ALTAP ALI CHOUHDURY v SRIMATI JARINA BIBI 67 I C 871

—Admissibility—Road cess returns—Relation of landlord and tenant. See LANDLORD AND TENANT, 68 I. C 676,

—Admissibility—Weight—Distinction between—Absence of entry in a document—Relevancy of

The absence of entry in a document in which one would expect an entry is relevant, though the weight due to such fact is one to be determined in the light of the general evidence in the case. 45 C 878 Rel. The question whether a document is admissible in evidence as a public document is distinct from the question whether the contents are binding on persons not parties to it (*Mookerjee*

## EVIDENCE

and Chotzner, JJ) TARA KUMAR GHOSH v KUMAR ARUN CHANDRA, 36 C. L. J. 389,

—Admissions in invalid document—Effect

Even if a document may not be valid for the purposes for which it was intended, it may be used as evidence of an admission by the person executing it when its execution has been admitted or proved (Miller, C J and Adams, J) GRANT v EKLAL JHA 3 Pat L T 387 (1922) P 171 67 I C 49

—Appreciation of—Falsity in portions—Credibility of the rest of the evidence

The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is not now implicitly followed by courts in the appreciation of evidence. It is the duty of the court to sift the evidence and separate the truth from the falsehood if it can, (Maung Kin J) MAUNG PO GYAW v. MAUNG SO 1 Bur L J, 213

—Appreciation of—Parties interested in the result of the suit,

It is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case unless that evidence receives corroboration from surrounding circumstances, (Das and Adams, JJ) MUSSAMMAT CHANDRAMA KUER v. RAMGAYAN (1922) P. 111 67 I C. 57

—Batwara Khashra—Admissibility,

A Batwara Khashra is admissible in evidence 38 I. C. 491 followed, (Coults and Das, JJ.) BABU TRILOKE PRASAD SINGH v. LALA UMANAND LAL (1922) P 447

—Batwara papers—Writs of attachment—Admissibility,

Writs of attachment issued in 1792 and 1797 and prepared when the collector took possession of a Zemindari for non-payment of revenue and Batwara papers are admissible in evidence to show the non existence of tenures (Mookerjee and Chotzner, JJ) TARA KUMAR GHOSH v KUMAR ARUN CHANDRA SINGH 36 C. L. J. 389

—Criminal case—Deposition of witnesses taken in a previous trial—Admissibility—Conviction.

The accused and his father were placed together on trial but after the trial proceeded for sometime, it was decided to hold two separate trials and the judge then began the trial of the accused and exhibited the evidence already given at the joint trial. Then that judge ceased to hold office and his successor decided to hold trial *denovo* but exhibited the depositions of witnesses in the previous trial without examining them *denovo*. Held that in doing so there was an irregularity in the procedure which would vitiate the proceedings and that the consent of the accused would not cure such irregularity 12 C W N 140 foll. In such a case the appellate court has not plenary discretion to decide whether the accused has been prejudiced by the irregularity 39 M 449 Ref. (Oldfield and Ramesam, JJ) KOTTAMMAL K UMMAR HAJEE In re (1922) M W N 644 16 L. W. 697; 43 M. L. J. 659

## EVIDENCE.

—Dying declaration made to Sub-Inspector

A statement made to a Sub-Inspector of Police just before death is not evidence (Coults and Ross, JJ) LACHMI LAL v EMPEROR (1922) Pat 159 3 Pat L T 398

(1922) P 40 65 I C 1002 23 Cr L J 218

—Civil appeal—Proceedings under S 476 Cr. P. C. directed to be instituted by the first court —Decision of magistrate not relevant evidence in the appeal See CR P CODE, S 476,

L R 3 All 11 Cr

—Finger prints—Value of—Duty of court

There is nothing in the so-called science of finger prints or the qualification of an expert in it which prevents the court from applying its own eyes and mind to the evidence and verifying the results submitted to it by experts. The argument in finger print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger prints in question, 27 I C 900 Ref (Oldfield and Ramesam, JJ) PUBLIC PROSECUTOR v VIRANNA (1922) M W M 642 16 L W 663 31 M L T. 427 (H. C.)

—Hearsay evidence—Statement of kanungo

The statement of a kanungo that in the course of a *partial* he tested the entries of the land in suit and found the appellant *ghaur qabiz*, and the respondent in possession cannot mean more than that the kanungo was informed by other persons of the facts as to possession. This is secondary evidence and inadmissible (Hopkins, S M and Fremantle J M) HUKUM CHAND v BULWANT SINGH 4 U P L. R. (B R) 105 L R 3 A 506 (Rev.)

—Judgment—Admissibility of—Extent of

The production of judgment in a previous case merely established the fact that there has been a judgment but it does not prove the correctness of the previous decision (Mookerjee and Cuming, JJ) BAIDYA NATH DUTT v ALEF JAN BIBI 36 C L J 9

—Judgment—Not inter partes—Admissibility in evidence to prove assertion of title, See EVIDENCE ACT, Ss 13 AND 41 65 I C 699

—Maps—Thak and Survey maps—Admissibility in evidence

Thak and survey maps are not conclusive as to whether lands which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court 2 C 91 Ref (Mookerjee and Cuming, JJ) SECRETARY OF STATE FOR INDIA v UPENDRA NARAIN ROY 36 C L J 336

—Pedigree—Proof of—Pedigree not admissible unless person preparing it had special means of knowledge See EVIDENCE ACT, S. 32 (5) 9 O. L. J. 146.

## EVIDENCE

*Pleadings—Substance of, reproduced in judgment*

The substance of the pleadings narrated in the judgments may furnish evidence of the allegations made by the parties on that occasion, 9 C 586, 3 C L J 521, 15 M 19, 15 M 378, 18 M 73 Rel (*Mookerjee and Cuming, JJ*) KAILAS CHANDRA NAG v, BIJAY CHANDRA NAG 36 C L J 434

*Proof of fact—Personal testimony alone, if sufficient*

It is wrong for a judge publicly to say that it is impossible for anybody in this country to prove a fact merely because his own testimony is the only evidence on the subject, (*Walsh and Ryves, JJ*.) CHANDER SEN v, MAN MOHAN LAL L R 3 A 17

*Purohit's books—Entries in admissibility.*

Entries in the books of a purohit as to the relationship of the pilgrims are admissible in evidence (*Broadway and Moli Sagar, JJ*.) KARTAR SINGH v KIRPA SINGH, 30 P L R 1922

*Recitals in will—Value of*

The recitals in a will are not admissible in evidence to prove the truth of the facts mentioned in the will but they can be looked at for the purpose of seeing whether it is consistent with the assertions made by the testatrix in her life time (*Ghose, J*) PROMOTHO NATH MULLICK v PROMDNO KUMAR MULLICK 26 C W N 772

*Rejection of—Power of court—Refusal to examine witness*

Any particular answer given by a witness may after it is given, be ruled out as irrelevant but no court can say beforehand that all the evidence not yet taken is going to be irrelevant and the court's belief that the evidence is biased is not a valid ground for refusing to record it (*Batten, J C and Halliday, A J C*) BHAGCHAND v MUSAJI, 68 I C 272

*Retracted confession—Value of*

Even a retracted confession is admissible in evidence, but the jury must be allowed to decide what value should be attached to it (*Newbould and Suhrawardy, JJ*) ABDUL SALIM v EMPEROR, 49 Cal 573 26 C W N 680 (1922) Cal 107 35 C L J 279 69 I C 145 23 Cr L J 657

*Secondary evidence—Admissibility*

If a proper case has not been established for the admission of secondary evidence of the contents of a written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined (*Mr Ameer Ali*) RANA SHEONATH SINGH v BADAN SINGH 48 Cal 997 26 C W N, 226 20 A L J 443 64 I C. 194 (P C) (1922) P C 146

*Suspicion—Not a ground for decision* See (1921) DIG COL 529 BEPIN KRISHNA ROY v JAGESHWAR ROY, 66 I. C. 345.

## EVIDENCE ACT (1872), 11.

*Suspicion—Not a ground for judicial decision*

A Court should not rest its decision merely on suspicion unsupported by legal testimony 25 C, W, N 409 (*Mookerjee and Cholsner, JJ*) PROMODE KUMAR ROY v MADAN MOHAN SAHA. 36 C L J 396

*Thumb impression—Value of—Forgery*

A court should exercise great caution in arriving at a conclusion by a comparison of thumb impressions. The positive evidence of witnesses who were undoubtedly present and eye witnesses to the transaction should not be lightly brushed aside 1, C W N 339 C W N 520 Ref (*Mookerjee and Cuming, JJ*) BAIDYA NATH DUTT v ALEF JAN BIBI 36 C L J 9

*Will—Proof of—Attesting witnesses—Duty of propounder to call—Similarity in handwriting—Value of* See WILL—EXECUTION 44 All 495.

EVIDENCE ACT (I of 1872) S 4—'Conclusive'—Declaration under S 6 (3)—Land Acquisition Act in what sense Conclusive See LAND ACQUISITION ACT, S 6 (3) 48 Cal. 916

*Ss 6 and 8 — Res gestae—Report by woman raped—Statements to neighbours*

Where a woman who had been raped, on being questioned by a relative of her husband, told him that the accused had raped her and asked him to report the matter to her father in law and subsequently made the same statement to her father in law, *Held*, that the statements were inadmissible under S 6 but admissible as a complaint under S 8 of the Evidence Act. (*Martineau, J*) RAMAN v EMPEROR 4 Lah L J 491.

*Ss 11, 13 and 32 (2)—Deed—Recitals as to boundaries—Admissibility of—Persons parties to deed living*

Documents between strangers containing recitals as to the boundaries and throwing light on the ownership of the property in dispute are not admissible under S 11 or 13 but are admissible under S 32 (2) of that Act. 5 C, L J 55, 14 C L J, 167 (1910) M W N 664, 19 C W N, 468 Ref (*Predeaux, A J C*) TRIMBAK v GANESH 68 I C, 314.

*Ss 11, 13 and 32 (3)—Documents not inter partes—Recital of boundaries—Admissibility in evidence*

Recitals of boundaries in documents between third parties are not admissible in evidence under Ss 11 and 13 of the Evidence Act but they might be admitted under S 32 (3) when they are the statements made by persons of the character described in the opening words of that section, that is to say, persons who are dead or who cannot be found or for other reasons there stated cannot be examined as witnesses 35 C L J, 19, 14 C L J 467, 15 C L J 7 Ref (*Newbould, J*) ABDUL RAHIM KAZI v, JONABALI SIKDAR 68 I C 323

*Ss 11 and 13—Landlord and tenant—Evidence of relationship—Ex parte decrees,*



## EVIDENCE ACT (1872), S 13

Ex parte decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of those decrees (*Graves and Panton, JJ*) ANUKUL CHANDRA DHAR v KAMALA KANTA ROY. 67 I C 787.

—S 13—Document or judgment not inter partes—Assertion of rights—Evidence—Admissibility

A judgment not inter partes, but which relates to the subject-matter of a suit and evidences the assertion of a right in controversy is admissible under S 13 of the Evidence Act (*Buckland and Cumming, JJ*) PARBATI MAJHI v DIGPATI MAJHI 64 I C 465

—S 13—Document not inter partes—Admission of plaintiff's rights—Admissibility

In a suit in which the question was whether a certain land was the *man* land of the plaintiff or the *joti* of the defendant an *ekianama* addressed by a stranger to the plaintiff's ancestor describing the law as *man* is admissible under S 13 of the Evidence Act as it is both a transaction in which the right was claimed and an instance in which the right was exercised. Case law referred to (*Coutils and Ross JJ*) SABRAN SHEIKH v ODOY MAHFO 1 Pat 375 (1922) P 488 3 Pat L T 792

—S 13—Evidence of transaction—Admission of document—Recitals if admissible

Where a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, but the recitals are not evidence, especially if they are mere assertions by a person who is alive and who might have been brought before the court as a witness (*Mookerjee and Chotzner, JJ*) NEHAR BEWA v KADOR BAKSH 68 I C 282

—S 13—Judgments inter partes—Effect of—Admissibility in evidence

A judgment in a prior suit relating to a different *Jama* but between the same parties is admissible in evidence, whether or not it constitutes *res judicata* (*Suhrawardy and Cumming, JJ*) SASI MUKHI CHOWDHURANI v SARASWATI SENGUPTA, 65 I C 522

—Ss. 13 and 41—Judgment not inter partes—Findings in—Inadmissible in evidence

Findings arrived at in a judgment in a prior suit not inter partes should not be used against a person in a subsequent suit (*Chatterjee and Panton, JJ*) SATESH CHANDRA MUKERJEE v JOYRAM ROY 65 I C 525.

—Ss. 13 and 41—Judgments not inter partes—Admissibility in evidence

In a suit in ejectment judgments obtained by the plaintiff against a third person who set up the title of the defendant, are admissible in evidence as showing an assertion of title (*Chatterjee and Panton, JJ*) MOHAR ALI SARKAR v MAFI-ZUDDIN SARKAR. 65 I C 699

—S 13—Judgment—Not inter partes—Admissibility of.

A judgment not inter partes in a previous suit is admissible in a subsequent suit to prove the fact

## EVIDENCE ACT (1872), S 17

that the judgment was passed. It is therefore necessarily evidence of the following further facts: who the parties to the dispute were, what the land in dispute was, and who was declared entitled thereto. To this extent and no more the judgment is admissible against even third parties 22 C 523, 29 C, 187 Ref (*Wazir Hasan, A J C*) GHULAM SARWAR KHAN v MAHOMED ALI KHAN (1922) Oudh 98 65 I C 398

—S 13—Judgment not inter partes—Admissibility in evidence

Where the issue is as to the title and ownership of certain property a judgment in a pre-emption suit obtained by the deft against a third person on the strength of a deed of gift alleged to be the source of the defendant's title is admissible in evidence as an instance in which defendant's right under the gift was asserted and enforced (*Daniels and Lyle, A J C*) ANJUMAN-UN-NISA v ASHIQ ALI (1922) Oudh 178 66 I C 222

—S 13—Rent decree—Evidentiary value.

A rent decree is to some extent evidence under S 13 of the Evidence Act as to the landlord having recognised the holding as being in the possession of the tenant sued. It is not conclusive against third parties and does not stand on the same footing as the delivery of possession given by a Civil Court or a decree awarding possession by a Civil Court 57 I C 95, 53 I C, 829 Refd, (*Jwala Prasad, J*) NAND KISHORE SAO v BIKAN SINGH 3 Pat L T 570 (1922) P 557 65 I C 856 23 Or L J 200

—S 17—Admission—Deposition in former suit—Admissibility

The deposition of a witness in a former suit is admissible as an admission in a subsequent suit in which such witness is a defendant and may be relied upon by the Court as a piece of evidence, (*N R Chatterjee and Pearson, JJ*) ALI MAHAM-MADKHAN v. MAHARAJ BEHARI 36 C L J 186; 64 I C 266

—S 17—Admissions—Evidentiary value of

Admissions are always evidence against the party who makes them but they are evidence which varies very much in value according to the circumstances and a Court is quite at liberty to reject them if it is satisfied from other circumstances that they were untrue (*Daniels, J. C*) GOKUL PRASAD v KAILASH NATH 4 U P. L R (O. C.) 19 65 I C 345 (1922) Oudh 55.

—S 17—Admissions—Evidentiary value of

What a party to a litigation has admitted to be true may be presumed to be true and until he rebuts it, the court will take it as established 29 A. 184 Ref (*Wazir Hasan, A J C*) GHULAM SARWAR KHAN v MAHOMED ALI KHAN (1922) Oudh 98 65 I C. 398

—S 17—Admissions—Mistake or imperfect knowledge—Value of

Statements made by a party at a previous proceeding without any definite knowledge of his

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rights and liabilities do not operate as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court, the party can show in a subsequent suit that the statement previously made was untrue (*Dhobley, A J C*) MAHOMED JUSUF v PIR MAHOMED (1922) Nag. 67 65 I C 368

—Ss 17 and 21—Admissions—Statements in will—Evidentiary value of

A recital in a will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest (*St. Lawrence Jenkins*) NALAM PATTABHIRAMA RAO v MANDAVILLI NARAYANA MOORTHY 26 C W N 273 L R 3 P C 29 15 L W 404 (1922) P C 102 (P C)

—S 18—Admissions—Co-defendants—Admission by some when binding on others

Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants 44 C 130, 45 C 159 Ref (*Le Rossignol and Martineau, JJ*) BHIKKA MAL v PURAN MAL 69 I C 35

—S 18—Admissions of insolvent—Evidence it admissible against another insolvent or official assignee *See* (1921) Dig Col 531 LUCHIRAM MOTILAL v RADHA CHARAN PODDAR 49 Cal 98 (1922) Cal 267 66 I C 15

—S 18—Admissions—Value of—Compromise falling through

Parties are often willing to make admissions for the purpose of effecting a compromise to which it would be unfair to hold them if the compromise falls through (*Daniels and Lyle A J C*) KUAR NAGESHAR SAHAI v SHIAM BAHADUR 90 L J 262, (1922) Oudh 231

—S 19—Admissions—Successor-in-interest when bound by admissions of predecessor

An admission made by a person having a reversionary interest in the property at the time is evidence against another person claiming the reversionary interest under a title derived from the former (*N R Chatterjee and Suhrawardy, JJ*) SREEMUTY TARAGONI CHAUDHURANI v CHARU CHANDRA CHAUDHURI 64 I C 334

—S 20—Statement of Muktear—Party when bound

A party to a litigation is not bound by the statements of the muktear of the opposite side who was cross examined by the parties (*Hopkins S. M*) MT SRIMATI AUSANBATI DEBI v RAM JAS 4 U P L R, 9 (Rev.)

—S 21—Admissions—Hindu Reversioners—Admissions made by one when binding on others

A statement made by one reversioner is not admissible against another reversioner since the latter does not derive his interest through the former 22 A 33, 28 M 57 Ref (*Drake Brockman, J C*) GULAB THAKUR v FADALI

68 I C 566

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—S 21 (2)—Admission by agent—Admission in favour of principal by agent—Inadmissible

An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property (*Scott Smith and Martineau, JJ*) MAULA BAKSH v JAFAR ALI KHAN 4 Lah L J 437

—S 24—Confession—Retracted—Confession—Value of, as evidence

It cannot be laid down as an inflexible rule that a confession made by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case the court is in a position to come to the unhesitating conclusion that the confession is true that is to say, usually unless the confession is corroborated by credible independent evidence. A retracted confession should carry practically no weight as against a person other than its maker (*Newbould and Pearson, JJ*) EMPEROR v BISLESWAR DEY, 26 C, W N 1010.

—S 24—Person in authority—Lambardar—Confession induced by threats—Admissibility

A Lambardar is a "person in authority" and a confession which is the result of threats used by him is inadmissible under S 24 (*Scott-Smith and Abdul Raoof, JJ*) MUHAMMADAR v THE CROWN 4 Lah L J 235 (1922) Lah 263

—S 24—Person in authority—Meaning of—Prosecutor—Doubtful circumstances—Onus on prosecution

The words "person in authority" in S 24 include the prosecutor. If in the circumstances of a case it appears to the Court that there is reason to suspect that the confession was obtained by inducement, the prosecution must show that the confession was freely made, otherwise it would not be admissible in evidence against the accused (*Newbould and Suhrawardy, JJ*) ASHUTOSH DUTT v EMPEROR 26 C W N 54

—Ss 25, 27 and 30—Co-accused—Statement by one to police officer that stolen property is with the other—Admissibility

A statement made by an accused to a Police officer, if it does not amount to a confession may nevertheless be used against him—If it amounts to a confession it must be excluded from evidence altogether under S 25 of the Evidence Act, but in either case it can only be used against the person making it—A statement by one accused can only be used against a co-accused if the provisions of S 30 are applicable.

Where in a case of dacoity against three persons, one of them mentioned to the sub-Inspector that stolen property would be found in the house of the others, but on search nothing suspicious was found and then he pointed out a

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*dhpatta* worn by one of the co accused as part of the proceeds of the dacoity, held the statement did not amount to a confession and was inadmissible against the co accused (*Ryves J*)  
 RAMHIT v EMPEROR

20 A L J 178 L R 3 A 50 (1922) A 24  
 65 I C 849 23 Cr L J 193

—§ 27—Confession after discovery of property—Rediscovery—Admissibility of confession

Where property had been dug out by some of the accused and subsequently another suspected person is made to point out the same place, his evidence does not come within S. 27 of the Evidence Act. Once property has been discovered in consequence of information received from a suspected person it cannot be rediscovered in consequence of information received from another suspected person. It is only the information that was given by the first person and which led to the actual discovery which may be proved under the terms of the section (*Scott Smith, J*)  
 BUDHA v EMPEROR 9 P L R 1922 (1922) Lah 315  
 64 I C 502 23 Cr L J 22

—§s. 27 and 30—Confession—Duty of prosecution to adduce independent evidence—Trial for murder

*Per Lyle A J C* Although criminals do at times confess for no apparent reason, they generally do so in some vague hope of escaping from the penalty of their crime when they know or believe there is evidence

*Per Ashworth, A J, C* When an accused person has pointed out the whereabouts of the body of a man who has undoubtedly been murdered and has made a confession which not only is uncontradicted by any of the facts proved in the case but indeed receives corroboration in respect of many points then the confession should be held to be true as implicating the person making it unless he can make out a story to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking part in it (*Kanhaya Lal, J C Lyle and Ashworth A J C*)  
 HINGA v EMPEROR

4 U P L R O C 50 90 L J 190  
 (1922) Oudh 202 68 I C 17 23 Cr L J 481

—§s. 27, 25 and 21—First information by accused admitting guilt—Portions of such information leading to discovery if admissible *See* (1921) DIG COL 533  
 LEGAL REMEMBRANCE v LALIT MOHAN SINGHA ROY  
 49 Cal 167 (1922) Cal. 342.

—§ 30—Confession—Co accused—Admissibility and credibility of

§ 30 of the Evidence Act does not say that the confession referred to therein is relevant but only says that the court may take it into consideration against the co accused. The court might take into consideration such confession with or supplementary to relevant facts which may form the basis of a judgment. 38 C, 569 Ref. As a matter

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of judicial prudence a confession implicating others must be regarded with suspicion (*Hallifax, Pridgeaux and Kotwal, A J C*)  
 SAPKU v EMPEROR (1922) Nag 146 65 I C 561  
 23 Cr L J, 129

—§ 30—Confession—Retracted confession—Evidentiary value of

Where a confession made by an accused person is subsequently retracted by him and he does not implicate himself in the murder though he stated he was one of the conspirators, held the confession could not be taken into account against the co accused for the person making the confession did not intend to implicate himself though he actually did so. As against the person making the confession it was certainly admissible in evidence (*Shadr Lal, C J and Harrison, J*)  
 HAYAT v EMPEROR 4 Lah L J 41  
 (1922) Lah. 119 68 I C 401 23 Cr L J 561

—§ 30—Statement made by one accused against co accused—When admissible *See* EVIDENCE ACT, Ss 25, 27, 30 20 A L J 178.

—§ 32—Bhats books—Admissibility of *See* (1921) DIG COL 536  
 KARTIC CHANDRA CHAKRAVARTY v GOSSAMI PROTAP CHANDRA GIR  
 66 I C 894

—§ 32—Dying declaration—Mode of proof

The rules laid down by Taylor, J in (6 C W.N. 72) should be followed in recording and proving dying declarations—

"Witnesses should not be allowed to prove a dying declaration as it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made and that statement is not the document made by the Magistrate."

The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made' (*Abdul Kadir, J*)  
 KUNJ LAL v. EMPEROR 4 U P L R (Lah) 83.  
 67 I C 577 23 Cr. L J 417.

—§ 32—Dying declaration—Proof by a witness present

A dying declaration was recorded in the presence of a witness, read over to the deceased in the presence of the witness and admitted by the deceased to be correct. If the witness, who heard that statement swears that the written statement correctly reproduces the words used by the deceased, that is sufficient to prove that the deceased did use the words contained in that statement. 36 Cal 659 followed (*Newbould and Suhrawardy, JJ*)  
 EMPEROR v BALARAM DAS 49 Cal 358, (1922) Cal 382

—§ 32—Dying declaration—Signs made in answer to question—Verbal statement.

Where a magistrate went to record the dying declaration of a woman and although she could not speak she in answer to questions put to her pointed out the accused as the assailant. Held that the questions and answers taken together might properly be regarded as verbal statement made by a person as to the cause of her death.

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within the meaning of S 32, Evidence Act and were therefore admissible in evidence (*Newbould and Ghose, JJ*) *EMPEROR v SADHU CHURN DASS*, 49 Cal 600 22 C W N 414 (1922) Cal 409

—S 32—*Gestures of wounded person—Admissibility—Interpretation*

Where a person whose throat had been cut as a result of which death ensued later, made certain gestures in reply to questions put by the police *Held*, the gestures were admissible in evidence 7 All 385 followed. The interpretation of the gesture is for the court alone and the opinion of witnesses as to their meaning is not evidence (*Coutts and Ross, JJ*) *CHANDRIKA RAM KAHAR v EMPEROR* 1 Pat 401

3 Pat L T 771 (1922) P 535

—Ss 32 and 33—*Statements of deceased witnesses—Legitimacy—Mutation proceedings*

Where in mutation proceedings before a Revenue officer authorised to record statements of witnesses on oath, certain statements relating to the legitimacy of a particular person are made, such statements are admissible in a suit in the Civil Court by a party to the mutation case. But those statements are not admissible if the subsequent suit in the civil Court is between persons not parties to the mutation proceedings. (*Daniels, J C and Dalal, A J C.*) *MUMTAZ UN-NISSA BEGAM v WAZIR ALI* 65 I C 308

—Ss 32 (2) and 34—*Account book entries—Corroboration—Death of person making the entries—Effect of* See (1921) Dig Col 536 *MUSSAMMAT RANI v THE FIRM OF BAHADUR MAL BUTI MAL*

4 Lah L J 36 (1922) Lah 119

—S 32 (2)—*Chowkidar's diary—Entries in—Death of a person—Entry made by third person—Admissibility in evidence*

Where entries relating to the deaths of the inhabitants of a place had been made in the diary of a deceased chowkidar not by the chowkidar himself but by some other person, the entries are inadmissible in evidence unless it is proved that it was the duty of that person in the ordinary course of business to make the entries (*Das and Adam, JJ.*) *MUSSAMMAT CHANDRAMA KUER v RAMGAYAN*, (1922) P 111 67 I C 57

—Ss 32 (2) and 67—*Deed—Execution—Proof of—Statement of writer*

S 62 of the Evidence Act does not require any particular kind of proof to establish execution of a document. Where direct evidence of the handwriting or mark of a person is not available indirect evidence may be given and the statement of the writer that the mark was that of the alleged executant is admissible under S 32 (2) of the Evidence Act (*Mitra, O A J, C.*) *MT LAHINI v BALA* 18 N L R 85 (1922) Nag 227

—Ss 32 (2) and (6)—*Family pedigree—Proof of—Books of family chronicles*

Where a family pedigree was sought to be proved by books kept by a family chronicler, *Held* (1) under S 32 (2) they would be admissible as books kept in the ordinary course of business by a professional man or a person whose business it was to keep such a book, (2) it

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would also be admissible under S 32 (6) which enables a family pedigree to be admitted in evidence so long as the members of the family depend on a particular person to keep a record of family events (*Macleod, C J and Shah, J*) *MOHANSINGH UMED RAMOL v DALPATSINGH KANBAJI* 46 Bom 753 (1922) Bom 51

24 Bom L R 289 67 I C 235.

—S 32 (3)—*Deed not inter partes—Recitals of boundaries—Admissibility in evidence. See EVIDENCE ACT Ss 11, 13 AND 32*

68 I C 314

See also 68 I C 329.

—S 32 (5)—*Evidence—Statement as to relationship—Admissibility—Statement as to adoption*

A statement by a deceased person that he was adopted when he was four years old into another family is admissible under S 32 (5) of the Evidence Act to prove its relationship (*Drake Brockman, J C.*) *COLAB THAKUR v FADALI*

68 I C 566.

—S. 32 (5)—*Pedigree filed in court—Proof of—Knowledge of relationship*

Unless it is shown that the person who files a pedigree in court had special means of knowing relationship between the parties, the pedigree cannot be received in evidence and it cannot be accepted as evidence that he had that knowledge. Proof of special source of knowledge is a prerequisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statements contained in it (*Iyle, A J C*) *BHIMMA SINGH v MT SUNDER*

90 L J 186 4 U P L R (O C) 79 (1922) Oudh 218

—S 33—*Criminal trial—Evidence in another case, if can be imported*

The complainants in a criminal case were not examined and instead the deposition of one of the complainants in a prior case in which another accused had been charged with a similar offence was put in evidence. A police constable gave evidence that an attempt was made to produce the witness but she could not be found. *Held*, that the evidence in the former case should not have been admitted as evidence in this case and a further attempt should be made to enforce the attendance of the witness 41 C 601; 39 M 449 Ref (*Kanhaiya Lal, J, C.*) *DWARKA SINGH v EMPEROR* 25 O C 142 (1922) Oudh 254

—S 34—*Scope of*

Mere production of books of accounts without proof is not sufficient to charge a defendant with liability although it may have been shown that they had been regularly kept in the course of business 13 I C 673 and 22 I C 403 followed (*Abdul Raoof and Harrison, JJ*) *ABDUL HAQ v THE FIRM SHIVJI RAMKHEM CHAND*, (1922) Lah 338

—S 35—*Assessment rolls—Entries in—Relevancy of*

Entries in assessment rolls are relevant evidence (*Duckworth and Pratt, JJ*) *MG PO LUN v MA E. MAI*, 1 Bur L J 111,

## EVIDENCE ACT, (1872), S 35

—Ss 35, 13—*Batwara Khasra*—If a record—Admissibility

A *batwara Khasra* is not a record within the meaning of S. 35 and an entry made there in the name of a tenant in possession is not admissible in evidence under S. 35 of the Evidence Act, but under S. 13 it can be put in to show the history of the plot in question before the creation of the tenancy (*Adami, J*) *SADHU SARAN v AMBIKA LAL* 68 I C 676

—Ss 35 and 14—*Confession*—Record of, by Magistrate—Voluntary nature of confession.

Though a magistrate has recorded a certificate at the foot of a confession it is not conclusive and facts which may lead the court to think that the confession was not voluntary can be proved (*Kanhariya Lal, J C and Daniels A J C*) *NAR SINGH v EMPEROR* 25 O. C 229

—S 35—*Death and birth registers*—Entries in—Admissibility of

Where an entry in the register of birth and deaths kept by a deceased village choudidar is not proved to have been made by the choudidar himself, the entry could not be admitted in evidence, 14 O. C 68, 19 I C 528 foll (*Lindsay and Gokul Prasad, JJ*) *SHFO BALAK v GAYA PRASAD* 20 A L J 601 L R 3 A 468 (1922) All 510

—S 35—*Partition papers*—Admissibility of.

Much weight cannot be attached to a partition paper in the absence of detailed information as to the history of the document, when it was prepared, by whom, in whose presence and for what purpose (*Mookerjee and Chotauer, JJ*) *TARA KUMAR GHOSH v KUMAR ARUN CHANDRA SINGH* 36 C L J 389

—Ss. 35, 40 and 44—*Recitals of relevant fact in a judgment not inter partes*—Admissibility in evidence

A recital in a judgment not inter partes of a relevant fact is not admissible in evidence under S. 35 of the Evidence Act

The cases on the subject reviewed and discussed

*Quære*—Whether secondary evidence of admissions of parties to a suit or their predecessors in title can be given by reference to extracts from judgment when the admissions are relevant and the originals contained in the admissions are not forthcoming (*Coults Trotter and Kumaraswami Sastri, JJ*) *TRIPURANA SEETHAPATI RAO DORA v ROKKAM VENKANNA DORA* 45 Mad 332 42 M. L. J. 324 15 L W 316 30 M L T 160 (1922) M W N 147 (1922) Mad 71 66 I C 280

—S 35—*Survey map*—Boundaries shown therein after compromise of parties—Whether conclusive.

Where the parties consent to be bound to regard the boundary line as laid by the survey authorities as conclusive they cannot afterwards question the correctness of the same (*Das and Admi, JJ*) *BABU RAGHUNATH v MAHARAJA SIR RAMASHWAR* (1922) P 87

## EVIDENCE ACT, (1872), S 43.

—S 35—*Survey maps*—*Thak maps*—*Preliminary*—*Rebuttal*

There is a *prima facie* presumption in favour of the accuracy of thak and survey maps and it is for the party who impugns their accuracy to prove his case. Such a map may be shown to be incorrect by the admission of parties or adjudication by a court or by evidence intrinsic or extrinsic to the map in question (*Woodroffe and Cumming, JJ*) *TARAMONI CHAUDHURANI v GOPAL DAS CHAUDHURY* 65 I C 182.

—S. 35—*Thak and survey maps*—Suit for possession of lands included in Permanent settlement—Quinquennial papers—Evidentiary value of. See (1921) DIG. COL 538 *SECRETARY OF STATE FOR INDIA v WAZED ALI KHAN* 65 I C 866

—S 35—*Thak map and survey maps*—Value of as evidence See (1921) DIG. COL 538 *MAHARAJAH OF COOCH BEHAR v RAJA MAHENDRA RANJAN RAI CHAUDHURI* 66 I C 923

—S 35—*Thakbast Khasra*—Preliminary to survey—Entries by Amin—Evidentiary value of

A thakbast khasra prepared by the Amin in connection with the measurement preliminary to the survey of a village is a rough register, statements entered in it have no evidentiary value unless it is proved that the persons adversely affected thereby had notice of it and opportunity to controvert it, but knowingly acquiesced in the statement before the Amin (*Mr Ameer Ali*) *JAGDEO NARAIN SINGH v BALDEO SINGH* 3 Pat. L R 605 (1922) P C 272 36 C L J. 499 49 I A 399 (P C)

—S 36—*Kistwari maps*—Evidentiary value of.

*Kistwari* maps (survey maps) are under S. 36 of the Evidence Act, evidence between the parties *quantum valet*. They are primarily evidence of possession, but evidence of possession is always evidence of title (*Doss and Bucknill, JJ*) *CHAUDHURY NAZIRUL HAQ v ABDUL WAHAB KHAN* 3 Pat. L T 140 64 I C 326

—S 41—Judgments not inter partes—Admissibility in evidence See EVIDENCE ACT Ss 13 AND 41 65 I C 699.

See also 65 I. C 525

—S 41—Judgment in rem—Collateral attack not permissible See (1921) DIG. COLI 539 *RANI HEMANGINI DEBI v SARAT SUNDAR DEBYA* 66 I C. 882

—S 43—*Servient tenement*—Additional burden—Extinguishment of easement—Alteration of structure

Where an additional burden alleged to have been imposed on the servient tenement could be reduced without difficulty to its original limit by the construction or alteration of a structure, the easement is not extinguished, (*Mears, C. J. and Banerji, J*) *RAMESHWAR DAYAL v MAHARAJ CHARAN* 44 A 343 20 A L. J 202 65 I. C 643 (1922) All 28.

## EVIDENCE ACT (1872), S 45

—S, 45—*Opinion of experts—Medical examination and report—Report when admissible*

Where in a criminal case the prosecution tenders in evidence a certificate granted by the Professor of Anatomy in a Medical College as regards the bones submitted to him for examination, the certificate by itself is not admissible in evidence. It must be proved by the person who gave it as a witness in the case, (*Marten and Crump, JJ*) *EMPEROR v AHILYA MANAJI*

24 Bom L R 803

—S 47—*Handwriting—Comparison of—Weight due to—Resemblance of signature—Denial of signature—Onus*

Although it is true that under the Evidence Act comparison of handwriting is legitimate enough and the view of persons competent to express opinions may be in many cases of considerable value, the opinions of those who have not carefully studied the art of caligraphy is not as a rule of very great utility. Indeed so uncertain and inexact is the science of the study of caligraphy that it has been for some years past the tendency to regard evidence even of experts as of somewhat inconclusive character. The mere fact that there is a resemblance between the signature alleged to be false and a signature admitted to be genuine does not carry great weight. If a signature is denied the onus of proving it is on the party relying on its genuineness (*Burkhill, J*) *BATAHU JHA v, PARMESHWAR RAI*

64 I C 234

—Ss 47 and 73—*Handwriting—Comparison of—Mode of proving handwriting* See (1921) DIG. COL 540 *SAROFINI DASI v HARIDAS GHOSH*

66 I C 774

—Ss 58, 63, 65—*Copy of document—Admission without objection—Secondary evidence—Powers of appellate court*

When a document has been admitted in the court of first instance without any objection, the appellate court is not entitled to allow any objection to be taken to its admissibility at the appellate stage, and if the document admitted is a copy, it is not open to the appellate court to consider whether the provisions as to secondary evidence have been complied with (*Coutts and Das, JJ*) *RAMLOCHAN MISRA v PANDIT HARINATH*

3 Pat L T 397 (1922) P 565  
67 I C 628,

—Ss 63 and 65—*Copy admitted in Trial Court without objection—Objections as to admissibility—Not to be allowed in appeal* See EVIDENCE ACT, Ss. 58, 63 AND 65,

3 Pat L T 397,

—S 63—*Secondary evidence—Kinds of—Translation of document in judgment not inter partes*

S. 63 of the Evidence Act is exhaustive of the kinds of secondary evidence admissible under the Act. Where the terms of a document were sought to be proved by a judgment containing a translation thereof in a suit which was not between the same parties or their representatives in interest, *Held* neither the translation of the

## EVIDENCE ACT (1872), S 65

document nor the statement in the judgment was secondary evidence of the contents of the document 26 I C 618 4 L W 331, 42 M L J 324 Ref (*Spencer and Deva Doss, JJ*) *JAGANNAIHA NAIDU v SECRETARY OF STATE FOR INDIA*

43 M L J 37 16 L W 11

31 M L T 46 (H C) (1922) M W N 432  
(1922) Mad 334

—S 63 (5)—*Mortgage—Proof—Illiterate attester*

Where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to be one who has seen the execution of the mortgage within S 63 (5) of the Evidence Act 12 A L J 239 foll (*Gokul Prasad, J.*) *JANKI v RAM KISHORE*

(1922) A 232

66 I C 557

—S 65—*Assertion of loss—If sufficient to let in secondary evidence,*

A mere assertion in an application that a document is lost without any evidence to support it is not a sufficient ground for admitting secondary evidence, (*Hopkins, J M*) *LEKHRAJ v GANESH,*

L R 3 A 539 (Rev.)

—S 65—*Lease deed in the possession of defendants—Failure to produce though summoned—Secondary evidence*

Where a lease deed is in the possession of the defendants, and they failed to produce it though summoned twice to do so, secondary evidence of the same is admissible (*Hopkins, S M. and Freemanille, J M*) *AJUDHIA PRASAD v INDER*

L R 3 A 8 (Rev.)

—S 65—*Promissory note—Secondary evidence—Loss of original not proved—Effect*

In a suit based on a promissory note, secondary evidence of its existence and contents cannot be let in when the original itself has not been proved to be lost (*Broadway and Campbell, JJ*) *RAM SARAN DAS v TULSI RAM,*

(1922) Lah. 417

67 I C 565

—S. 65—*Secondary evidence—Certified copy—Original produced in an old suit—Reliability.*

Where the plaintiff sued for a declaration that certain survey numbers were kept joint at a partition between the ancestors of the parties, relying upon a certified copy of a partition deed passed between the parties, and the copy which was produced showed that the original document was produced in court in a previous suit *Held*, the court could rely on the certified copy as showing the terms of the partition there being no reason to doubt, owing to the lapse of time that the certified copy retained on the file of the previous suit was a correct copy of the original (*MacLeod C J and Shah, J*) *CHUDASAMA KHODUBA v TAKHTASANG*

(1922) Bom 177

—S 65—*Secondary evidence—Lost Bahi—Police report.*

Where a suit is based on a lost *bahi* the loss must be strictly proved and a police Sub Inspector's report is not a sufficient proof of such loss (*Wilberforce, J*) *ASA RAM v SUKHA SINGH,*

4 Lah L J 416

## EVIDENCE ACT (1872), S 65

## —S 65—Secondary evidence—What is—Mortgage document

Secondary evidence of a document is evidence of its contents, and oral evidence as to the terms of a mortgage which have been reduced to writing is not evidence of the contents of the document U B R (1907 1909) II p 13 foll (*Saunders J C*) MAUNG PO DIN v MAUNG PO NYEIN

66 I C 360

## —S 65—Suit on lost bahu—Loss of bahu how proved—Police report

Where a suit is brought on a lost bahu the loss of the original must be strictly proved and the police file of an alleged theft from plaintiff's house and the statement of the thanadar made in another case are inadmissible to prove the loss of bahu. (*Wilberforce, J*) BARU v SUKA SINGH

4 Lah. L J. 418

## —S 65—Suit on mortgage—Secondary—evidence—Admissibility of

Where no reasons are shown for the non-production of the original of a mortgage, a suit on a copy of the document is bound to fail (*Baſſien, J C*) BHAIKON SINGH v HINDU SINGH. (1922) Nag 119 67 I C 237

## —S 65—Unstamped bond—Copy compared with original by court clerk and filed—Loss of bond—Copy if admissible See STAMP ACT, S 35.

3 Lah 282

## —Ss. 66 and 164—Partnership—Accounts—Duty to produce—Non production See (1912) DIG COL 542 PULIN BIHARI ROY v MAHENDRA CHANDRA GHOSAL

67 I C 10,

## —S 68—Attested document—Proof of—Denial of attestation by attester—Oral evidence—Admissibility

Where an attester denies having witnessed the execution of a document, it is open to the parties to let in other oral evidence to show that the attester did as a matter of fact see the execution and was an attesting witness (*N R Chatterjee and Panton, JJ*) SREEMUTY SASHIMUKHI DASI v MON MOHINI DASI.

67 I C 87

## —Ss 68 and 70—Attested document—Proof of—Collateral purpose

The law as laid down in S 68 of the Evidence Act is imperative and does not on the face of it admit of any relaxation except in the cases provided in Ss 69, 70 and 71 of the Evidence Act. This rule is applicable whether the document required by law to be attested is sued on or is tendered in evidence for a collateral purpose. (*Sukrawardy and Cumming, JJ*) SUDHANYA KUMAR SINGHA v GOUR CHANDRA PAL

35 C L J 473 (1922) Cal 160

27 C W N 134 68 I C 86

## —Ss 68 and 70—Attestor—Scribe—Execution of document See (1921) DIG COL 543 PABAN KHAN v BADAL SARDAR

26 C W N 951 66 I C 906

## —S 70—Attested document—Admission of execution—Proof of attestation See (1921) DIG COL 544. ASHARFI LAL v MT NAUNHI

44 A 127. (1922) A. 153 64 I C. 11.

## EVIDENCE ACT (1872), S 76

## —Ss 68 and 70—Mortgage—Execution—Attestation—Proof—Admission of execution—Denial of proper attestation—Procedure.

Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attestors at the time of signing the mortgagee must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation. The admission, qualified as it was, did not entitle the mortgagee to the benefit of S 70 of the Evidence Act.

No admission of execution is effectual under S 70 of the Evidence Act unless it amounts to an acknowledgment of the formal validity of the instrument. The execution of a document means something more than the mere signing by the party. It includes delivery and signing in the presence of witnesses where witnesses are necessary. Where the admission of execution is unqualified it may well be an admission of due execution or a waiver of proof of due execution within the meaning of S 70 of the Evidence Act, (*Richardson and Sukrawardy, JJ*) ARJUN CHANDRA BHADRA v KAILAS CHANDRA DAS

36 C L J 373

## —Ss 70 and 69—Mortgage—Attestation—Proof of—Admission in pleadings—Execution if includes attestation

A mortgage could not be held to be invalid for absence of proof of attestation where there is nothing in the pleadings to show that the plaintiff was put to the proof of attestation 44 B. 405 Ret. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Per *Crumph, J*. The word "execution" in S 70 of the Evidence Act means that the party by affixing his signature or mark has signified his assent to the contents of the document, and if a party admits that he has done this, he admits execution. The admission of execution cannot be taken to mean an admission not only of the signature or mark in taken of assent by him, but also that all the legal formalities connected with the document have been complied with. There is no reason for holding that where a party admits execution within the meaning of S 70 he must necessarily be taken to admit that the document has been attested as required by S 59 of the T P Act (*Shah, A C J, and Crump, J*) JAGANATH NARSINGDAS v RAVJI TULSIRAM

24 Bom L R. 1296

## —S 71—Mortgage—Proof of execution

Where in a mortgage suit it was found that one of the attestors was dead and the other either denied or did not recollect the execution of the document, the execution of the same can be proved by other evidence (*Das and Adam, JJ*) LAKSHMAN SAHU v GOKHUL MAHARANA

1 Pat 154 (1922) P. 415.

## —Ss. 76 and 77—Public documents—Canal Jamabandis—Admissibility of.

The canal jamabandi is a statement of the amount due under S 45 of Act VIII of 1873 from every occupier of land assessed to water rate

## EVIDENCE ACT (1872), S 78.

It contains particulars of the area and of the land in respect of which the rate is due. It is a public document within S 74 of the Evidence Act. The *parchus* distributed to the cultivators are also public documents. If produced in original the jamabandis do not require to be further proved. The contents of the jamabandi could also be proved by the production of certified copies furnished as provided by Ss 76 and 77 of the Evidence Act (*Hopkins, S M and Burn, J M*) *UMRAO SINGH v RAM SINGH*,  
**L R 3 A 386 (Rev) 4 U P L R, (B R) 96**

— — — Ss 78 and 79—Sanction of local Government for prosecution in respect of offence—Proof of sanction. See CR P CODE, S 196  
**36 C L J 180**

— — — S 83—Presumption of accuracy—Rennell's map. See (1921) DIG COL 545 SECRETARY OF STATE FOR INDIA *v* ANANDA MOHAN ROY  
**66 I C 287**

— — — S 90—Copies—Presumption as to—Document more than 30 years old

The presumption as to genuineness of documents more than 30 years old also applies to copies coming from proper custody (*Spencer and Devadoss, JJ*) *JAKKAM REDDI SESHADRI REDDI v SIR S SUBRAMANIA Aiyar*  
**16 L W 839**

— — — S. 90—Presumption under—Copies of document

The presumption under S 90 of the Evidence Act applies to copies of ancient documents, if it is proved that the copy is a true copy (*Sir Walter Schwabe, C J Oldfield and Coutts Trotter, JJ*) *SUBRAMANYA SOMAYAJULU v SEETHAYYA* **16 L W 462 (1922) M W N 614**  
**31 M L T 347 (H C)**

— — — S 91—Deed not produced—Other evidence, if barred

Where it was contended that the plaintiff, not having produced a certain deed, was not entitled to adduce evidence of the transaction and therefore failed to establish his title—*Held*, all that S 91 provides is that when the terms of a contract or of a grant or any other disposition of property, have been reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself. This however refers only to the method of proof of the terms of contract grant or disposition of property it does not exclude other proof of the transaction itself and this being so, the courts are entitled to consider the other evidence adduced in proof of the transaction (*Coutts and Ross, JJ*) *MT MAKHDUMAN v SAYED ALTAH HUSSAIN*  
**(1922) P 222**

— — — S 91—Lease deed—Admission of other evidence to prove tenancy

Where a tenant as a defence to a suit in ejectment by the landlord sets up a permanent tenancy but does not produce the settlement and bandobast papers, the onus is on the tenant to prove the permanent character of the lease and in view of S 91 of the Evidence Act, no evidence other than the Settlement papers was admissible

## EVIDENCE ACT (1872), S 91

to prove the character and terms of the lease (*Miller, C J and Mullick, J*) *BUDHAN TELL v MADANMOHAN LAL*  
**3 Pat L T 485**  
**68 I C 653**

— — — S 91—Money advanced on Hundi—Hundi insufficiently stamped—Inadmissible in evidence—Rights of creditor

In a suit for recovery of money advanced on the security of a Hundi it was found that the Hundi was signed shortly after the money was actually paid. The Hundi was insufficiently stamped and therefore inadmissible under S 35 of the Stamp Act. The plff claimed to recover the money advanced irrespective of the Hundi. *Held* that the loan was made on the security of the Hundi though the Hundi was actually executed later on, and the plff had no cause of action independently of the Hundi. The Hundi was inadmissible in evidence under S 35 of Stamp Act. S 91 of the Evidence Act was a bar to the reception of secondary evidence and the plff's suit was therefore unsustainable. *61 P R 1888, 42 P R 1895, 66 P R 1928 foll 16 I C 83 dis (Chevis and Harrison, JJ)* *CHANDA SINGH v THE AMRITSEAR BANKING COMPANY*  
**2 Lah 330**  
**(1922) Lah, 307 66 I, C 201**

— — — S 91—Mortgage by deposit of title deeds—Writing accompanying deposit unregistered—Effect of—Secondary evidence inadmissible—Mortgage unenforceable—Right to a decree for money. See T P ACT, S 59  
**24 Bom L, R 502**

— — — S 91—Mortgage by deposit of title deeds—Evidence of—Letter relied on held to be a simple mortgage and inadmissible for want of registration—Effect of. See (1921) DIG COL 547 *ETUMALAI CHETTY v BALAKRISHNA MUDALIAR*  
**(1922) Mad 344 66 I C 168.**

— — — S 91—Partition—Unregistered deed—Oral evidence—Scope of section

A partition can be effected orally, but if the parties put it into writing but do not register it even though the properties are worth more than Rs 100, it is wholly inoperative. S 91 of the Evidence Act precludes oral evidence being given in such a case. It is true that relationship such as partnership, landlord and tenant, etc may be proved apart from documents embodying such relationship, but not so the facts and terms of a partition deed (*Duckworth and Pratt, JJ*) *MG PO LUN v MA E MAI*  
**1 Bur L J, 111.**

— — — S 91—Sale deed—Non-registration—Suit for specific performance—Inadmissibility of document. See T P ACT, S 54  
**4 U P L R (L) 59**

— — — S 91—Unregistered sale deed—Property worth less than Rs 100—Delivery of possession—Sale deed admissible in evidence as an agreement to sell. See T P ACT, S, 54  
**18 N L R 8**

— — — Ss 91 and 92—Unstamped receipt—Proof of payment by other evidence

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other evidence being given to prove dis-



**EVIDENCE ACT (1872), S 91**

charge by payment (*Halliday, A J C*) RAM PRASAD *v* NATHU RAM 68 I C 494

—S 91—*Suit on document—Secondary evidence not admissible—Effect*

The language of S 91 of the Evidence Act is clear and definite and wherever the terms of the contract are reduced to writing and that writing is, for any reason, inadmissible in evidence the promisee must lose his remedy, if independently of the document, he has no complete cause of action (*Broadway and Campbell, JJ*) RAM SARAN DAS *v* TULSI RAM (1922) Lah 417 67 I, C 565,

—S 91—*Unregistered lease—Admissibility in evidence—Collateral purpose*

Evidence that a lease was executed, when that lease itself is inadmissible in evidence, does not help a party in the absence of proof of any collateral purpose for which the lease could be used, (*Hopkins, S M and Fremantle, J M*) JASODA NANDAN *v* MT RAM KUAR 4 U P L R (B R) 48 L, R 3 A 537 (Rev)

—S 92—*Agreement to sell—Oral agreement to vary terms—Admissibility*

Where the terms of an agreement to sell land are clear and formal and a certain sum of money was to be paid in four months, evidence of an oral agreement cannot be let in to prove that a big portion of the money was to be paid on the day subsequent to the agreement to sell. (*Madgarkar, A J C*) KHEMCHAND RATANCHAND *v* DHALOMAL 15 S L R 180 67 I, C 19

—Ss 92, 93, and 97—*Contract for sale—Evidence to prove identity of vendees*

Where a vendor agrees to sell land to several named persons and in drawing up the agreement of sale the name of one person is mentioned and without naming the rest the word "others" is used, there is nothing in the Evidence Act to prevent evidence from being let in as to the persons in whose favour the conveyance is to be executed (*Kumaraswami Sastri and Deva Doss, JJ*) VEDA MURTHI MUDALIAR *v* JWALAPURAM RAGHAVACHARLU 42 M L J 475 (1922) M W N 185 15 L W 371 (1922) Mad 100 30 M L T, 177 (H C) 65 I C 973

—S 92—*Contract for sale of goods—Unconditional promise by vendee in writing to pay liquidated damages—Contemporaneous oral agreement to be excused payment on a contingency—Evidence inadmissible* See (1921) Dig COL 548. SUBBAYYAR *v* SUBBARAYALU IYER 68 I C 759

—S 92—*Decree—Oral agreement in discharge of—Evidence if admissible*

Per *Walsh, J* Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible (*Piggott and Walsh, JJ*) LACHMI DAS *v* BABAKALI KAMLI WALA RAM NATH, 44 A 258 20 A L J 65 (1922) All 13 L R 3 A 61 64 I C 990

—S 92—*Deed unregistered and unstamped—Oral evidence—Admissibility*

Where a partition deed entered into between the parties was neither stamped nor registered

**EVIDENCE ACT (1872), S 22**

and the court refused to admit it in evidence but took oral evidence of the terms of the partition

Held that the parties having reduced their agreement into writing could not be allowed to give oral evidence of the contents of that written document or of the verbal terms agreed upon before the document was executed 19 Bom L R 466 applied (*Veais, C J, and Piggott, J*) JAI RAM DAS *v* RAJ NARAIN 20 A L J 777 L R 3 A 533 (1922) All 493

—S 92—*Document in writing—Oral evidence to vary terms of—Sale or mortgage*

It is not permissible to a person, who wishes to impeach a written document of sale, to assume there must have been an oral agreement to recover and to ask the court to believe that there must have been a representation made by the obligee to the obligor that the document would never be enforced as a sale-deed but treated as a mortgage (*Macleod, C J and Shah, J*) BAI ADHAR *v* LALBAAI HIRACHAND 24 Bom L R 239 (1922) Bom, 41 66 I C 865

—Ss 92 and 93—*Extrinsic evidence—Tenancy—Lease—Existence of—Identification of property*

Where there is a dispute as regards the identity and extent of the land leased, the court can look at the correspondence that preceded the lease (*Rafique and Stuart, JJ*) SITAL PRASAD *v* BADRI PRASAD 20 A L J 907 L R 3 A 623,

—S 92—*Mortgage Property mortgaged—Oral evidence as to—Admissibility of* See (1921) Dig COL 549 BEPIN KRISHNA ROY *v* JOGESHWAR ROY 66 I C 345

—S 92—*Partition—Unregistered deed—Oral evidence of factum of partition and nature of parties' possession admissible* See REGN ACT, S 49 64 I C 906

—S 92—*Promissory note—Agreement that money was not to be demanded until settlement of accounts—Admissibility of*

Where a pro note is sought to be enforced according to its tenor, it is not open to the deits to let in evidence an alleged agreement that the pro note was executed only as security against an apprehended loss and that the accounts had to be looked into at a later date so as to ascertain the rights of the parties before the pro note could be enforced (*Lindsay and Stuart, JJ*) SRI RAM *v* FIRM O SOBHA RAM GOPAL RAI 44 A 521 20 A L J 315 L R 3 A 453 4 U P L R (A) 153 (1922) All 213 67 I C 513

—S 92—*Promissory note—Oral evidence as to terms and purposes for which advance was made* See (1921) Dig, COL 550 BA SHEIN *v* EMPEROR (1922) L B 10 64 I C 33

—S 92—*Sale deed—Oral—Evidence—Admissibility as between parties on the same side*

Oral evidence to vary, contradict or add to the terms of a written document is rendered inadmissible under S 92 of the Evidence Act not only between the opposite parties but also as between the parties on one side *inter se*, 10 A, 421, 25 A,

## EVIDENCE ACT (1872), S 92

337 not foll 45 C 320 foll (*Pratt and Duckworth JJ*) MAUNG TUN GYAW *v* MAUNG PO THWE  
1 Bur L J 160

## —S 92—Scope of

Whether the transactions beginning with a sale deed amounted to a mortgage between the plaintiffs and defendants *Held*, if S 92 be applied the proviso 1 to that section would admit the evidence, because it would be a fraud to insist upon a claim made by the appellants to property arising out of such transactions, when the appellants must have known that the plaintiffs were the true owners, or if S 92 does not apply the rules of equity and good conscience come into play (*Macleod C J and Shah, J*) MAHADEO KRISHNA PARKER *v* TUKARAM CHAYE KONDYA

(1922) Bom 256

## —S 92, Proviso (1)—Mistake—Description of property—Reference to earlier deed

Where on a renewal of a mortgage an item of property was misdescribed and there was no property satisfying that description belonging to the mortgagor, reference to the earlier deed of mortgage is permissible to establish the identity of the disputed item (*Lindsay and Gokul Prasad, JJ*) ABDUL HAKIM KHAN *v* RAM GOPAL

44 A 246 20 A, L, J 53 L R 3 A 81  
(1922) A 42 64 I C 961

—S. 92 (2) and (4)—Share lists—Registration—Necessity for—Inadmissible only when lists are meant to be the final deed of partition among the parties *See* REGISTRATION ACT, Ss 17 AND 49  
16 L W 784

—S 92 Prov (2) and (3)—Registered deed—Relinquishment of part of leasehold land—Contemporaneous oral agreement regarding payment by landlord of a certain sum—Admissibility in evidence *See* (1921) DIG COL 551 BADAL RAM *v* JHULAI 44 A 53 (1922) A 165

## —S 92 Proviso 2—Scope

The interlineated words and figures in an ekrarnama were written after it had been signed by the defendant the plaintiff's allegation was that there was an agreement made before the execution of the ekrarnama, which justified the additions to the document which do not alter it in the least but merely explain it *Held* the effect on the document would be as if no alteration had been made, and the plaintiff would be entitled to produce oral evidence of the oral agreement 12 C P L R 33 and 6 N L R 1 followed 44 Cal 154 followed (*Halliday, A J C*) GANGA PRASAD *v* MOTIRAM (1922) Nag 191  
68 I C 268

## —S 92 Prov 3—Scope of—Condition precedent—Proof of—Rate of interest—Evidence as to

Proviso 3 to S 92 of the Evidence Act is intended to embody the rule that when at the time of a written contract being entered into it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not

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been formed and consequently that the written contract has not become binding Until that condition is performed there is in fact no written agreement at all The proviso cannot help a defendant who wishes to prove a separate oral agreement, as to the rate of interest between him and the plff, when the document provides for interest at a specific rate 20 A L J 247 Rel (*Lyle A, J C*) HABIB ALI KHAN *v* LALA RAM NARAYAN 90 L J 773 4 U P L R (O C) 69  
(1922) Oudh 270 68 I C 520.

—S 92, Provisoes 3 and 4—Written agreement—When operative—Party departing from written agreement—Effect of *See* (1921) DIG COL 551 DINA NATH LAW *v* MFTHA RAM NAVALRAI AND CO 64 I C 785

## —S 92—Proviso 3—Written contract—Parol evidence—Admissibility

A person is not permitted to vary the terms of a written contract by proof of a contemporaneous oral agreement Under S. 92 Proviso 3 a contemporaneous oral agreement to the effect that a written contract was to be of no force at all and that it was to impose no obligation at all, until the happening of a certain event may be proved It may be shown that the instrument was not meant to operate until the happening of a given condition, but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event 25 C 401, 42 I C 372 ref (*Ryves and Gokul Prasad, JJ*) ALI JAWAD *v* KULANJAN SINGH

44 A 421 20 A L J 247 L R, 3 A, 205  
(1922) A 262 4 U P L R, (A) 182  
66 I, C, 131

## —S 92 (4)—Landlord and tenant—Creation of tenancy by registered deed—Termination of tenancy—Proof of

Even though a tenancy has been created by a registered instrument the termination of the tenancy can be proved otherwise than by a registered instrument There is no question of varying of modifying the terms of the lease in such a case (*Teunon and Newbould, JJ*) AKHOY KUMAR GOUS *v* ERADATULLA KAZI 64 I C 883.

## —S 92 (4)—Mortgage—Oral agreement as to terms of redemption—Admissibility

Where the parties enter into a contract, they can substitute another in its place and the substituted contract is the one to be looked to, not the one which was first entered into If the law requires that the substituted contract shall be made only in a certain way and in compliance with certain formalities such as writing and registration then unless it is so made, it cannot take effect and the old contract subsists (*Maung Kin, J*) U. KYO *v* MG PAN YO

1 Bur L J 193

## —S 93—Ambiguity—Evidence of conduct

*Obiter* Where a lease is ambiguous, evidence of user under it may be given in order to show the sense in which the parties used the language and their intention in executing the instrument whether the ambiguity is latent or patent (1919) A C, 533 537 Ref. (*Mookerjee and Panton, JJ*) GURU

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PRASANNA BHATTACHARYA v MADHUSUDAN CHOWDHURY  
26 C W N 901  
35 C L J 87 64 I C 824

—Ss 95 and 97—*Ambiguity in deed—Extrinsic evidence—Admissibility*

Where the description of property sold is such that one portion of it applies to the whole of the house but the boundaries given below apply only to a portion of the same and both read together do not apply correctly either to the whole house or to a portion of it, a case of latent ambiguity arises. Extrinsic evidence is admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention was to convey the whole house or only a portion of it (*Wazir Hasan, A J C*). ABDUL GHANI v ASHIQ HUSAIN. (1922) Oudh 182 66 I C 442

—S 96—*Latent ambiguity—Admissibility of evidence*

When an instrument appears on its face to be free from ambiguity, but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things, this is called a latent ambiguity. In such a case extrinsic evidence is admissible to resolve it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties employed the language used applies to a modern as well as an ancient instrument (1919) A C 533, 1906 A C 92, 7 H L C 660 *Ret* (*Mookerjee and Chotzner, JJ*) THE CHAIRMAN SERAIGUNJ MUNICIPALITY v THE CHITTAGONG CO LTD, 36 C L J 242

—S 98—Evidence as to meaning of a term—Term ordinarily ambiguous—Extrinsic evidence of usage if admissible. See (1921) DIG COL 552 RAJA JOTI KUMAR MUKERJEE v JADU NATH BOSE 26 C W N, 1022 64 I C 693

—S. 106 (a)—Burden of proof—Intention—Offence under S 373 I P C—Onus on accused. See PENAL CODE, S 373 35 C L J 451

—S. 108—*Presumption of death—Nature of*

Though a person who has not been heard of for 7 years is presumed to be dead, there is no presumption as to the time of death and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence (*Das and Bucknill, JJ*) MAHANT RAMRUP v. LAL CHAND MARWARI 1 Pat 475 3 Pat, L T 352 (1922) P 243 67 I C 401

—S 108—*Absence for 7 years—Death—Presumption as to*

When a person has not been heard of for 7 years there is a presumption that he is dead. There is no further presumption authorised by the Evidence Act (*Hopkins v M and Burn, J*) MANOHAR LAL v CHUNNI NONIA L R 3 A 393 (Rev)

—S 108—*Death of a person—Presumption as to*

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There is a presumption in favour of continuance of life and it is for the person asserting death to prove it. The death of a person cannot be presumed to have taken place more than 7 years before the date of suit calling the question into controversy 22 Bom L R 771 1 Lah 554 *foli* (*Wilberforce, J*) MUHAMMAD CHIRAGH v ABDUL HUQ 64 I C 468

—S 108—*Presumption of death—No presumption as to date of death—Mahomedan law—Presumption in, how far applicable* See (1921) DIG COL, 553 MAIRAJ FATIMA v, ABDUL WAHID, 43 All 673

—S 110—*Possession—Title—Evidence evenly balanced*

Where there is strong evidence of possession on the part of A opposed by evidence apparently strong also on the part of his opponent B, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with title (*Mookerjee and Chotzner, JJ*) PROMODE KUMAR ROY v MADAN MOHAN LAHA 36 C L J 396

—S 112—*Legitimacy—Presumption*

Before a presumption of legitimacy can arise under S 112 of the Evidence Act, all the facts specified in the section must be proved (*Hallifax A J C*) MAROTI v BHAGI 68 I C 465

—S 112—*Presumption—Parentage—Marriage*

Where plaintiff claims to recover property as the son of B by his lawfully married wife D and deff, denies that D ever gave birth to a child, and sets up that plff is the son of one S the onus of proof is on plaintiff to show that D gave birth to him or to any child before invoking the presumption under S 112 25 A 403 *Ref* (*Mears, C J and Banerji, J*) RAO NAR SINGH RAO v BETI MAHA LAKSHMI RAI 44 A. 470 20 A L J 274 L R 3 A 235 (1922) All 214 66 I C 902

—S. 114—*Accomplice—Corroboration of testimony—Blood marks*

The discovery of blood marks on the person and in the house of the accused as well as his suspicious conduct immediately after the murder were held to be sufficient corroboration of the evidence of the accomplice (*Sir Shadi Lal, C J and Moti Sagar J*) GHULAM HUSSAIN v EMPEROR, 4 Lah L J 405

—S 114—*Accomplice—Testimony of—Weight due to—Presumption*

An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons but the uncorroborated statement of an approver taken at the end of the trial is and must be of no value whatever (*Shadi Lal C J and Wilberforce, J*) SUNDER SINGH v EMPEROR 4 Lah L J 284

—S 114—*Account books—Non production—Effect—Delay in suit*

Where in a suit on a promissory note for a very large amount it was alleged the plaintiffs were professional money lenders, but they produced no account books, held their business must

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have been a small one carried on with practically no capital.

Where the defendant repudiates the signing of the note, but still the suit is brought only much later almost at the expiry of the period of limitation, the transaction has to be looked upon with suspicion (*Sir John Edge*) *DATA RAM JANI v MT BASANT KUNWAR* (1922) P C 378

—S 114—*Document creating obligation produced by obligor—Onus of proof—Shifting of*

Under S 114 (1) of the Evidence Act it is open to the court to presume that if a document creating an obligation is in the hands of the obligor, the obligation is discharged. But in raising such a presumption the court has to take into regard any facts or circumstances indicating that it might have been stolen. The burden shifts as the evidence is developed and when both the parties produce their evidence, the question on whom the initial onus lay ceases to be of much importance (*Kanhaya Lal, J C*) *RAM NATH v RAGGHA SAHI* 25 O C 125 (1922) Oudh 211 68 I C 892

—S 114—*Official acts—Presumption—Objection to jurisdiction*

The presumption is that official acts are legally performed and where the jurisdiction of a settlement officer has not been questioned in the trial court, it must be presumed that he acted regularly and within his jurisdiction (*Coult and Ross, JJ*) *BABU BALGOBIND v RAI BEHARI LAL* (1922) Pat 114 66 I C 471 3 Pat L, T 617

—S 114—*Notice under Bengal Cess Act—No presumption as to compliance with formalities* See *BENGAL CESS ACT* Ss, 5, 41, 52 AND 64 (1922) Pat 167

—S 114—*Presumption—Ambiguous special covenant—Mortgage*, See (1921) DIG COL 554 *BHUP SINGH v LAZIM SINGH*. 65 I C 121

—S 114—*Presumption—Continuance of existing state of things*

Proof of the existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption within logical limits that it existed at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant must obviously vary with each case—always strongest in the beginning, the inference steadily diminishes in force with the lapse of time at a rate proportionate to the quality of permanence belonging to the fact in question until it ceases or perhaps is supplanted by a directly opposite inference. To put the matter shortly, it will be inferred that a given set of facts or set of facts whose existence at a particular time is once established in evidence, continues to exist as long as such facts usually exist. The inference of continuance, whether backwards or forwards, whether upwards or downwards, is an inference of fact and may therefore be rebutted

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(*Mookerjee and Cuming, JJ*) *SECRETARY OF STATE FOR INDIA v UPENDRA NARAIN ROY* 36 C L J 336

—S 114—*Presumption of death*

Where among some relations the evidence on the question who died first is quite evenly balanced, the court is entitled to say the probabilities are in favour of the younger man surviving the elder (*Macleod, C J and Shah, J*) *KULKARNI v LAXMIBAI* (1922) Bom 347

—S 114, Illn (a)—*Stolen article—Possession 40 days later—Inference*

The fact that some 40 days after a dacoity one of the stolen articles was found in the possession of a person, would not lead to the necessary inference that he took part in the dacoity (*Ryves, J*) *RAMHIT v, EMPEROR*

L R 3 A 50 20 A L J, 178  
65 I C 849 23 Cr L J 193 (1922) All 214

—Ss 114, Illn (b) and 133—*Accomplice—Evidence of—Corroboration—Necessity for*

S 133 of the Evidence Act contains the rule of law regarding the testimony of accomplices and S, 114, Illn (b) is merely a guide to assist the court though in a vast majority of cases, prudence requires that there should be corroboration. No hard and fast rule can be laid down to regulate the extent and nature of the corroboration, this being dependant entirely on the circumstances of the case (*Scott Smith and Broadway, JJ.*) *NARAIN DAS v EMPEROR* 3 Lah 144 4 L, L, J 91 (1922) Lah 1 68 I C 113 23 Cr L J 513

—S 114, Illn (b)—*Accomplice—Evidence—Corroboration—Several statements implicating same persons*

In cases where a large number of persons have been arrested by the police and confessions are obtained one after the other, it is likely enough that those confessions should agree. Each man would be likely to name as far as possible those persons who have already been named in the previous confessions. It may, of course, be said that when a man confesses he does not necessarily know the details of the previous confession made by another accused, but it does not necessarily follow that he should be unable to ascertain what persons have been implicated in the previous confessions, from the subordinate police officers concerned with the investigation of the case. Consequently the fact of any particular person having been named in the confession of more than one of the co accused is not a sufficiently reliable corroboration of the statement of the approver, (*Chevis J*) *LALA v EMPEROR* 4 U P L R (Lah) 38, 34 P L R 1922 65 I C 622 23 Cr L J, 158

—S, 114 Illn (b)—*Testimony of accomplice—Corroboration—Necessity for—English and Indian Law*

The law in this country regarding corroboration of an accomplice's evidence does not differ from the English law. Corroboration need not be required in every detail of the crime, otherwise the testimony of the accomplice would not be essential to the case but would be merely con-

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firmatory of other and independent testimony. The corroboration must be by some evidence other than that of an accomplice and therefore one accomplice's evidence is not corroboration of the testimony of another accomplice. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. The nature of the corroboration necessarily varies according to the particular circumstances of the offence charged. It would be dangerous to formulate the kind of evidence which would be regarded as corroborative except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. Corroborative evidence need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. (*Kotwal, A J.C.*) *KISAN RAGHUI CHARAN v. EMPEROR* (1922) Nag 172 67 I. C. 343 : 23 Cr. L. J. 391.

———S. 114 (Illn. e)—*Identification parade—Presumption of regularity of.*

The presumption under S. 114 of the Evidence Act is hardly sufficient to satisfy a court that such precautions have been taken as to render an identification truly valuable. (*Harrison, J.*) *KALLU v. EMPEROR.* 4 Lah. L. J. 448 : (1922) Lah. 31 : 67 I. C. 721 : 23 Cr. L. J. 449 : 4 U. P. L. R. (Lah.) 95.

———S. 114 Illn. (e)—*Judgment silent on point raised in the memo of appeal—Presumption.*

Where an appellate judgment is silent on a point which is specifically mentioned in the grounds of appeal, the inference can be drawn that it was given up. To hold otherwise would be to contravene S. 114, and to presume that the court failed to do its duty. (*Abdul Raoof and Harrison, JJ.*) *ABDUL KARIM v. THAKAR RAM JAGGU RAM.* 68 I. C. 740.

———S. 114 (g)—*Suppression of documents—Presumption.* See (1921) Dig. Col. 555. *KALIKANAND SINGH v. RAJA SHIVANANDAN PD. SINGH* 3 Pat. L. T. 149 : (1922) P. 122.

———S. 114 (Illn. h)—*Non-production of papers by Crown—Adverse inference.*

Where documents relevant to the case are withheld by the Crown, the Court will be justified in drawing an adverse inference against the Crown. (*Mookerjee and Cumming, JJ.*) *SECRETARY OF STATE v. UPENDRA NARAIN ROY.* 36 C. L. J. 336.

Also

36 C. L. J. 346.

———S. 114 (Illn. h)—*Crown—Non-production of material evidence.*

Where the Crown withholds relevant documents in its possession, the Court will draw an inference adverse to it. 40 M. 402 Ref. (*Mookerjee and Chatterjee, JJ.*) *RAJA SREENATH ROY v. SECRETARY OF STATE FOR INDIA* 36 C. L. J. 345.

———S. 115.—*Attestation—Effect of—Not an estoppel.*

## EVIDENCE ACT (1872) S. 115.

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication, any knowledge of the contents of the documents. To operate as estoppel, the signature must be shown by independent evidence to have been meant to involve consent to the transaction. (*Lord Buckmaster.*) *PANDURANG KRISHNAJI v. MARKENDEYA TUKARAM,* 42 M. L. J. 436 : 26 C. W. N. 201 : 18 N. L. R. 1 : 20 A. L. J. 305 : 5 N. L. J. 6 : 15 L. W. 486 : 35 C. L. J. 409 : 30 M. L. T. 249 : 24 Bom. L. R. 557 : 65 I. C. 954 : (1922) P. C. 20 : 49 I. A. 16 (P.C.)

———S. 115—*Estoppel by conduct—Adoption—Representation—Change of position—Prejudice to adoptee—Subsequent denial of adoption.* See LIM, ACT ART, 91 AND 120. 20 A. L. J. 945.

———S. 115—*Estoppel by conduct—Building on land—Knowledge—Improvements—Silence of landlord.*

The estoppel under S. 115 of the Evidence Act may arise by reason of either a declaration, an act or an omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. 20 C. 296 (P. C) Ref.

Where a tenant builds on land leased to him under the impression that he has a permanent lease of the same and the landlord encourages him to do this, the latter is estopped from asserting that the lease was an annual one. The rule of law applicable to the case is this. If a man under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land a Court of equity will compel the landlord to give effect to such promise or expectations. 21 C. W. N. 903; 4 C. W. N. 462; 23 W. R. 399; 29 B. 580. *Ramsden v. Dyson.* (1856) 1 A. C. 129, Rel. (*Miller, C. J. and Mullick, J.*) L. E. RALLI v. A. H. FORBES. 3 Pat. L. T. 467 : (1922) Pat. 209 : 4 U. P. L. R. (Pat.) 43 : (1922) P. 258 : 67 I. C. 744.

———S. 115—*Estoppel by conduct—Description of status of tenants in rent receipts.*

Where in rent receipts given by the agent of the Zemindar the tenants, are described as occupancy tenants, in the absence of evidence to show that the agent had power to confer occupancy rights, the Zemindar is not estopped from assert-

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ing that the tenants had no occupancy rights. (*Burn, S. M.*) *MT. KAMLA v. MISRI LAL.*

L. R. 3 A 517 (Rev).

———S. 115—Hindu reversioner—Alienation by widow—Gift—Widow and reversioner joining in a gift—Subsequent suit to set aside gift See (1921) DIG. COL. 577. *MAHADEO PRASAD SINGH v. MATA PRASAD* 44 A. 44 : (1922) All. 297 (A).

———S. 115—Inconsistent pleas—Suit for rent—Subsequent denial of tenancy

A person who successfully sues another for rent cannot subsequently be heard to impugn that the deft. was a tenant. (*Das and Bucknill, JJ.*) *JITAN MAHTON v. LALA BHAGWAN SAHAI.*

64 I. C. 262,

———S. 115—Inconsistent pleas—Identity of land.

A party who asserted, all along that the lands could be identified, cannot turn round and assert the contrary on appeal after judgment was given against him by the Court below. (*Adam and Ross, JJ.*) *CHULAI MAHTO v. SURENDRA NATH CHATTERJEE.*

1 Pat. 75 : 3 Pat. L. T. 17.  
(1922) P. 224 : 65 I. C. 616 23 Cr. L. J. 152

———S. 115—Estoppel—Minor—Execution of pronote representing himself to be major—Suit on pronote. See (1921) DIG. COL. 557 *JASRAJ BASTIMAL v. SADASHIV MAHADEO.*

46 Bom. 137. 64 I. C. 457

———S. 115—Parties and representatives—Purchaser at execution sale affected by the same rule of estoppel as judgment debtor. See T. P. ACT, S. 41.

26 C. W. N. 436.

———S. 115—Estoppel—Person claiming title under another—Representation of fact—Knowledge.

Where A and B convey property to C making him believe that they are sole owners of the property and C acting on that representation takes the property for consideration, A and B are estopped from asserting the title of a third person to the property even though C has transferred the property to D who was aware of the title of that third person. (*Greaves and Ghose JJ.*) *SARODA PRASAD BANERJEE v. GOSTO BEHARI HAZRA.*

36 C. L. J. 78

———S. 115—Representation—Mistake of fact—Effect of. See T. P. ACT, S. 41.

65 I. C. 477.

———S. 115—Estoppel and Res-judicata—Difference between—Principles underlying. See C. P. CODE, S. 11.

(1922) Pat. 33.

———S. 115—Estoppel—Statement—No prejudice.

A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter to his own detriment his previous position (*Hopkins, S. M. and Burn, J. M.*) *BHAGWAN SINGH v. DAULAT RAM.*

L. R. 3 A. 173 (Rev).

———S. 116—Estoppel—Landlord and tenant—Execution of lease.

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Whatever may have been the nature of a person's possession prior to a lease, once he takes a lease-deed in respect of the land from another, he is thereafter estopped from denying the title of his lessor. (*Rafiq and Stuart, JJ.*) *SITAL PRASAD v. BADRI PRASAD.*

20 A. L. J. 907 :

L. R. 3 A. 623.

———S. 116—Estoppel—Landlord and tenant—Third parties not affected.

Persons not claiming possession of land under the tenant are not estopped from denying the title of the lessor. *Tadman v. Henman* (1893) 2 Q. B. 168 Ref. (*Stuart and Kanhaiya Lal, JJ.*) *MAHARAJA OF JAIPUR v. SURJAN SINGH*

44 All. 671 : 20 A. L. J. 615 : L. R. 3 A. 392 :  
(1922) All. 333.

———S. 116—Landlord and Tenant—Covenant for quiet enjoyment—Eviction by title paramount—Estoppel. See (1921) DIG. COL. 559 *RAM CHANDRA CHATTERJEE v. PRAMATHA NATH CHATTERJI.*

35 C. L. J. 146 (1922) Cal. 237.

———S. 116—Landlord and tenant—Denial of title—Duty to surrender possession.

A tenant in possession cannot, even after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him. Once the relationship of landlord and tenant is established the tenant must surrender possession before he can set up a claim to be the real owner 123 P. R. 1919 foll. (*Broadway, J.*) *ALLAH BAKHSH v. LAL KHAN.*

67 I. C. 269

———S. 116—Landlord and Tenant—Kabuliyat—Binding nature of. See (1921) DIG. COL. 560 *MIDNAPORE ZEMINDARY CO., LTD v. NARESH NARAIN ROY*

49 Cal. 37. 65 I. C. 833 : (1922) Cal. 345.

———S. 116—Landlord and tenant—Payment of rent—Denial of title—Estoppel.

A tenant is not estopped from questioning the title of a landlord from the mere fact that he had paid rent to him as the recorded *Malguzar* 11 C. 519 foll. (*Mitra A. J. C.*) *SETH SAGUN CHAND v. LALA CHHABIBRAM.*

18 N. L. R. 11 :

(1922) Nag. 60.

———S. 116—Landlord and tenant—Suit for declaration by tenant—Maintainability. See SP. REL. ACT, S. 42

4 Lah. L. J. 207.

———S. 118—Examination of witness of tender years—Procedure.

It is of very great importance that when the evidence of a child of tender years is adduced, the Judicial Officer should, for the sake of precaution, ascertain as a preliminary measure, by means of a few simple questions, whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is patent or credit; and it is desirable that something should, at the commencement of the record of the evidence of the witness of this character be entered to show that such a test has been in fact made. It may turn out in the course of the examination at the trial that the test has been a fallacious one and that the evidence which the child gives is not intelligible and in such a case, it is always open to the

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Judicial Officer to say that he cannot accept the evidence which the child is giving. On the other hand there is no obligation imposed by law upon a judge definitely to make on the record any endorsement of his own as to a child's capacity, and when he has clearly relied upon the evidence given, it is idle to suggest that he could have been other than thoroughly satisfied as to the capacity of the child to give intelligible testimony. (*Bucknill, J.*) **PANCHU CHOUDHRY v. EMPEROR.**

3 Pat. L. T. 649 : 66 I. C. 73 :  
23 Cr. L. J. 233

—————**S. 120—Party as witness—Weight to be attached to evidence—Tests of.**

Per *Mookerjee, J.* There is no inflexible rule that if a party, plaintiff or defendant, gives his testimony, he must be disbelieved, because he is a party to the suit, such a rule, if adopted, would nullify the provisions of S 120 of the Indian Evidence Act, which provides that in all civil proceedings the parties to the suit shall be competent witnesses. When a plaintiff has deposed in support of his case, his testimony must be scrutinised in the same manner as that of any other witness; and the court is free to attach to the evidence that amount of weight which it appears to deserve, from his demeanour, deportment under cross examination motives to speak or hide the truth, means of knowledge, powers of memory and other tests by which the value of a statement of a witness can be ascertained if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements (*Mookerjee and Buckland, JJ.*) **JOGENDRA KRISHNA ROY. v. KURPAL HARSHI & Co** 49 Cal 345 : 35 C L. J. 175 : 68 I. C. 993

—————**S. 124—Privileged document—Who is to decide—Statement made to Court of Wards by proprietors—Disclosure**

On a proper construction of S 124 Evidence Act, it is quite clear that it is for the court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the court decides that it was so made, that it has no authority to compel the public officer to produce it, for according to the section the public officer, himself is the sole judge as to whether its disclosure would or would not be in the public interests.

Where a proprietor wants his estate to be taken over for management by the Court of Wards, statements made to the Collector showing financial position, particulars of liability, etc. are privileged communications and their disclosure cannot be compelled. 32 Mad. 62 : 26 Cal. 281 reld. to. (*Rafique and Lindsay, JJ.*) **THE COLLECTOR OF JAUNPUR v. JAMNA PRASAD.**

44 All. 360 : 20 A. L. J. 140 : L. R. 3 A. 134.  
4 U. P. L. R. (A) 50 : (1922) All 37.  
66 I. C. 171.

—————**S. 133—Accomplice—Statement of—Corroboration, necessity for—What is corroboration.**

An approver may be telling the truth and it is quite probable that he himself had a hand in the murder but his statement as to who his accomp-

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lices were must be corroborated by reliable evidence before it can form the basis of a conviction.

The corroboration offered in this case was the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the police investigation. The delay may be due to their reluctance to implicate the accused after they had promised not to give information, but it was obvious that statements obtained after such a long delay must be regarded with suspicion; and these witnesses may possibly be scheming themselves at the expense of innocent men.

Even if these witnesses bear no enmity to the appellants and are related to them, the long delay in making their statements makes their evidence liable to grave suspicion. (*Chevis, C. J. and Le Rossignol, J.*) **FATTA v. EMPEROR.**

2 Lah. L. J. 296 : 67 I. C. 828 (2) :  
23 Cr. L. J. 476

—————**Ss 146, 148 and 152—Impeaching credit of witness—Indecent or scandalous questions—Power of court to disallow.**

A certain lady from whom deft, alleged that he derived title was examined on commission and the plaintiff's pleader cross examined her on the point whether she had not been kept by a stranger. The object of the cross-examination was to show that the lady did not inherit her husband's property on account of her unchastity. The Court disallowed the question without recording any reason. *Held*, that the court below ought to consider, whether having regard to the plaint, the petition, and the issues framed, the question as it stood was relevant, and if not whether the question was allowable having regard to Ss 146, 148 and 152 of the Evidence Act. (*Prideaux, A. J. C.*) **PANDU v. ABDUL KADAR** 5 N. L. J. 138 : 65 I. C. 693 : (1922) Nag. 109.

—————**S. 154—Party called as witness by opposite party—Cross examination—Hostile witness. See (1921) DIG. COL. 561. LUCHI RAM MOTILAL v. RADHA CHARAN PODDAR.**

49 Cal 93 : (1922) Cal. 267 : 66 I. C. 15.

—————**Ss. 155 and 1—Use of Police diary by investigating Officer—Corroboration.**

The investigating police officer when in the witness box was asked about a certain date and the names of certain persons and the court directed him to give the date and the names from the Police diary. This the witness did. Thereupon the defence asked for an inspection of the whole diary. This was not allowed; but the Magistrate offered an inspection of the date and the names in respect of which the witness had refreshed his memory from the diary. This, however, was refused. *Held* that there was nothing illegal in the course adopted by the Magistrate. There is nothing in the law which entitles the defence to an inspection of anything more than that portion of the diary from which the witness refreshed his memory. (*Coutts and Das JJ.*) **LACHMI SINGH v. EMPEROR,**

3 Pat. L. T. 562 : (1922) P. 562 :  
68 I. C. 623 : 23 Cr. L. J. 591.

**EVIDENCE ACT (1872), s. 157.**

—S. 157—*Deposition before committing magistrate—Corroboration—Statement before investigating officer—Admissibility—Cr. P. Code, S. 283.*

The effect of S 288 Cr P Code is to place the deposition of a witness before the committing Magistrate exactly on the same footing as the deposition in the Sessions Court. It is "testimony" within the meaning of S. 157 of the Evidence Act and statements made by the witness before the investigating officer are admissible for the purpose of corroborating such "testimony." It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by the statements made before the investigating officer (*Ayling and Odgers, JJ.*) *VELLIAH KONE In re,*

43 Mad. 766. 43 M. L. J. 222 :  
(1922) M. W. N. 506 : 16 L. W. 239 :  
31 M. L. T. 175 (H. C.)

—S. 157—*Petition—Contents of—Admissibility.*

*Per Sanderson, C. J.*—A petition put in by a client for adjournment on the ground that their pleader could not appear on account of "hartal" is admissible in evidence in proceedings under the Legal Practitioner's Act, under S 157 of the Evidence Act in corroboration of the evidence which the witness had already given at the time when his attention was directed to its contents and when he said the contents were true to his knowledge.

*Per Woodroffe, J.*—The petition is improperly used, for the question by which it was made evidence was a leading one. But this rather goes to the weight of the evidence so elicited than inadmissibility. The petition is evidence of a step taken in the proceedings and would be corroborative in nature. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) *EMPEROR v. RAJANI KANTA BOSE.*

49 Cal. 732 : 26 C. W. N. 589 :  
35 C. L. J. 356.

—S 158 (3)—Previous statements of witnesses not made on oath—witness going back on those statements at the trial—Statements if can be sued against the accused. (1921) DIG. COL. 561 *MALAYA GOUDAN In re.*

42 M. L. J. 278 :  
66 I. C. 326 : (1922) Mad. 303.

—S. 159—Refreshing memory—Police diary—Duty of witness, See (1921) Dig. Col. 562. *HARKHOOD v. EMPEROR.*

65 I. C. 575 :  
23 Cr. L. J. 143.

—Ss. 159 and 160—Refreshing memory—When allowed.

When a written record brings to the mind of a witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine, the witness may be allowed to refresh his memory by looking at the record. (*Newbould and Suhrawardy, JJ.*) *ABDUL SALIM v. EMPEROR.*

49 Cal. 573 : 35 C. L. J. 279 :  
26 C. W. N. 680 : (1922) Cal. 107 : 69 I. C. 145 :  
23 Cr. L. J. 657,

**EXECUTING COURT.**

—S. 165—Suspicion—Not a ground for judicial decision See (1921) DIG. COL. 563 *LUCHIRAM MOTILAL BOID v. RADHA CHARAN PODDAR.* 49 Cal. 93 : (1922) Cal. 267 : 66 I. C. 15.

**EXCESS PROFITS DUTY ACT, Ss 2 and 3—**Income from racing—Money received from non-members liable to tax See (1921) DIG. COL. 563 *CALCUTTA TURF CLUB v. SECRETARY OF STATE.*

48 Cal. 844 : 66 I. C. 473.

—Ss. 4, 5 (b) and 6 (1) (b)—Income Tax Act, S 2 (1)—Capital employed in the business—Meaning of—Money invested in shares in public companies and Government securities—Money lent and advanced. See (1921) DIG. COL. 565 *MARTIN AND CO v. SECRETARY OF STATE.*

67 I. C. 909.

**EXECUTING COURT—Decree—Validity of—When open to question in executing court—Remedy by suit.**

An executing court cannot go behind the decree or enquire into the jurisdiction of the court which passed the decree. 43 M. 675 foll. 44 C 627 not foll. Where after the preliminary decree is passed the mortgagor dies and without bringing on record his legal representative a final decree is passed, the decree is a nullity and its validity can be impeached in a subsequent suit for declaration and injunction. 13 L. W. 290 ; 21 A. 16, 4 Pat. L. J. 240 Ref. (*Ayling and Odgers, JJ.*) *SAMY MUDALIAR v. MUTHIAH CHETTY*

16 L. W. 314 : 43 M. L. J. 293 :  
(1922) M. W. N. 597.

—Decree binding on—No power to go behind decree

The Court executing a decree must take it as it stands. It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree, the reason being that a decree, though it may not be according to law, is binding and conclusive between the parties if not appealed from. (*Broadway, J.*) *RAM DAS v. S. P. NITTO.*

4 U. P. L. R. (Lah) 93 : 67 I. C. 753.

—Duty of—Decree to be executed as it stands.

It is the duty of the executing court to execute the decree as it stands and it is open to the Court to direct something to be done not directed by the decree on the ground that literal compliance with the decree was impossible. An executing court has no right to direct a decree holder build a bund at any point other than that provided by the decree. (*Scott Smith, J.*) *ALI MAHOMED v. JAHAN KHAN.*

65 I. C. 126.

—Duty of—Not to alter or amend decree but to execute it as it stands. See (1921) DIG. COL. 567 *KAKA SINGH v. LACHMAN DAS.*

67 I. C. 940.

—Powers of—Adjustment.

The executing Court is not competent to enlarge, extend or modify the decree even by consent of parties subsequent to the decree unless it is in adjustment of the decree contemplated by O 21, R 2, 16 W. R. 275 ref. to. (*Walmsley and Suhrawardy, JJ.*) *SURADHANI DUTTA v. SITTO SHEIK.*

(1922) Cal. 311,



## EXECUTING COURT.

— Powers of—Decree to be executed as it is See DECREE—EXECUTION. 35 C L J. 339.

— Powers of—Decree to be executed as it stands—Court cannot go behind the decree, See (1921) DIG. COL 567 GUMANIJ DHIRAJ V VISHVANATH I PARBHU. 46 Bom. 243 : (1922) Bom 195 : 69 I C 55.

— Powers of—Mortgage decree—Death of party.

If a decree is passed against a dead person, the executing court can treat it as a nullity. Where a decree for sale is objected to in execution on the ground that it was based on a preliminary decree passed against a dead person, the executing court cannot treat the decree as a nullity, though they it might be a good ground for setting aside the decree, (*Piggott and Walsh, JJ.*) RAM SARUP V. NARAIN DAS. 20 A L J. 1008

— Powers of—Mortgage decree—Execution—Costs claimable in final decree, if can be awarded in execution See C P. CODE, S. 11—EXECUTION PROCEEDINGS 20 A. L. J. 170.

— Powers of—Not to nullify the effect of decree but to give effect to it. See EXECUTION, RENT DECREE 26 C. W. N. 708

— Powers of—Objection to validity of decree—Inquiry into—Objection that decree was void See (1921) DIG. COL 568. BINDHA CHAL V NAWAL RAJ. 64 I. C. 927.

— Power to go into—Validity of decree.  
An executing Court cannot decide whether a particular amendment of a decree is *ultra vires* or otherwise. (*Greaves and B. B. Ghosh, JJ.*) RAJAKOTI KUMAR MUKERJI V. TINCOWRI CHAKRABURTI. (1922) Cal. 136

— Validity of decree—Power to go into—Decree passed without jurisdiction—Power of executing Court to refuse execution. See AGENCY RULES. 16 L. W. 669.

**EXECUTION—Instalment decree—Payments under Appropriation—Barred instalment.**

Where money is payable in instalments under a decree and on default of payment of two consecutive instalments, the decree holder is given the right to sell the property, it would be the duty of the Court when instalments are paid, to appropriate them to the earliest instalment unpaid. The debtor cannot allow such earlier instalments to remain unpaid, unless at the time he makes the payment the instalment was already barred by limitation. (*Macleod, C. J. and Coyajee, J.*) HANMANT TIMAJI DESAI V RAGHAVENDRA RAO. 46 Bom. 848 : 24 Bom. L. R. 410 : (1922) Bom 237. 67 I. C. 847.

— Mesne profits—Decree for, silent as to interest—Power of executing court to award interest at Court rate. See C. P. CODE, S. 2 (12). 20 A. L. J. 343.

— Partition decree—Right of deft. to carry on pending execution.

Where the plff. applies for execution of a partition decree but proposes to drop the execution proceedings on the building which was the

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subject of the partition being burnt down, it is open to the deft. to insist on the execution being carried on and the site being divided and put in possession of the parties according to the decree (*Macleod, C. J. and Coyajee, J.*) CHUNI LAL JAMNADAS V. MUL CHAND HARJIBANDAS 24 Bom. L. R. 440 : 67 I. C. 417.

— Rent decrees—Sale of property under earlier—Subsequent decree if can be executed personally.

Where two compromise decrees for rent were passed against the tenant which provided for sale of the tenure and under the earlier decree the property was sold, and then the decree holder applied to execute the second decree against the person of the debtor

Held in execution proceedings the court cannot go behind the decrees, but if possible give effect to both, the second decree having been passed before the sale, the sale must be deemed to have taken place subject to the second decree, and hence the decree-holder must proceed in the first instance against the property itself (*Woodroffe and Ghose, JJ.*) RATAN LAL BISWAS V. NAFAR CHANDRA PAL. 26 C. W. N. 708

— Right to—Decree for specific performance—Right of deft. to apply for execution. See C. P. CODE S 2 (3) 24 Bom L R, 496,

**EXECUTION PROCEEDINGS—Order in—Notice to parties—Necessity for**

No order to the prejudice of a party can be passed without giving him an opportunity of being heard. (*Jwala Prasad and Bucknill, JJ.*) GOWER CHANDRA ROY V. JANARDHAN PRASAD THAKUR. 68 I. C. 337.

— Payment of decree amount out of court to persons other than decree holder—Application to set aside—Procedure. See C. P. CODE O. 21, R. 1. 20 A. L J 353.

— Failure to plead limitation in the previous application—Effect of.

Where in the course of a previous execution proceeding, it was open to the judgment-debtor to plead limitation, but he failed to do so, he would be precluded from raising the same in a subsequent application which is within time from the prior application 8 Cal. 51, 24 Mad. 669 (old) (*Kanhaya Lal, C. J.*) GANGA DIN V. DIP SINGH. 25 O. C. 13 : (1922) Oudh 117 : 68 I. C. 267.

— Res-judicata—Applicability of C. P. Code, S. 11 Expls. IV and V. See C. P. CODE S. 11 Expl. IV AND V. 3 Pat. L. T. 403.

— Withdrawal of, by decree holder—Effect of—Court not entitled to sell—property of judgment debtor in execution after such withdrawal. See C. P. CODE O. 23, R. 1. 3 Pat. L. T. 445.

**EXECUTION SALE—Completion of—Bids—Knocking down of property—Acceptance of bid by Nazir—Resale of property—Order for—Propriety of.**

An execution sale was held by a Court Nazir who accepted a bid and the deposit of 25 p. of the purchase money. After the property had been

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knocked down another bidder applied to the court which ordered a resale. *Held* that the sale was not concluded when the property was knocked down and the deposit made and the court had a discretion to order a resale. (*Newbould, J.*) *FAZIL MEAH v. PROSANNA KUMAR* 68 I. C. 305.

—Decree—Reversal of—Effect of sale—Purchase by stranger.

A bona fide purchaser who is not the decree-holder, or any person claiming through him, at an auction sale in execution of a valid decree acquires a valid title to the property purchased by him and is not affected by the subsequent reversal or modification of the decree. 14 C 18; 10 A. 166, 26 C. 734, 37 C. 107 foll. (*Broadway and Martineau, JJ.*) *TARA CHAND v. ABDUL AHAD* 67 I. C. 894

—Decree for arrears of rent—Title acquired—Not a new tenancy. See B. T. ACT, S. 159. 37 C. L. J. 292.

—Doctrine of *lis pendens* if applies. See T. P. ACT, S. 52. 3 Pat. L. T. 296.

—Estoppel—Acquiescence in sale without objection—Knowledge—Effect. See ESTOPPEL—EXECUTION SALE. 9 O L. J. 131

—Irregularities in—Effect on auction purchaser—Stranger purchaser.

A bona fide auction purchaser need look only to the decree and order of sale of the executing court and is not bound to inquire further into title. So long as the decree remains valid, the proceedings taken under that decree, so far as they affect third parties in the same position as a bona fide auction purchaser, cannot be impugned. 29 B 435, 435; 10 A. 166 P. C. Rel. (*Le Ros signal and Campbell, JJ.*) *INDAR SAIN v. PRABHU LAL*. 3 Lah. 88 : (1922) Lah. 277 : 66 I. C. 5

—Irregularity—Want of Jurisdiction—Distinction between See (1921) DIG. COL. 572. *PRA MATHA NATH BASU v. BHUBAN MOHAN BASU*. 49 Cal. 45. 64 I. C. 980 : (1922) Cal. 321.

—Legality of—Major debt. treated as minor—Knowledge of proceedings—Estoppel.

One of the debtors who were the judgment-debtors under a decree attained majority after the date of the decree and before proceedings in execution for sale of the property were taken. He was nevertheless represented on the record as a minor and the sale was held with him on the record as a minor. On an application by him to set aside the sale on that ground *Held* that the fact that he knew of the proceedings throughout afforded an answer to the objection, even though the decree holder was aware of his majority. 21 M. 167, 6 L. W. 272; 39 M. 1031 foll. (*Oldfield and Venkatasubba Rao, JJ.*) *RADHAKRISHNA SWAMI NAIDU v. ANNAMALAI CHETTIAR*. 43 M. L. J. 92 : 31 M. L. T. 122 (H. C.) 15 L. W. 643 : (1922) Mad. 301.

—Legality of—Sale without attachment—Not void.

A sale is not to be considered a nullity merely by reason of the absence of an attachment which is intended for the protection of the decree-holder

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or by an irregularity in the attachment. (*Halifax, A, J C*) *HARLAL v. NARAYAN* 18 N. L. R. 152 : 64 I. C. 420.

—Material Irregularity—Absence of attachment of property—Sale held within 30 days of proclamation—Sale not void but only voidable. See C. P. CODE O. 21, R. 90. 68 I. C. 363.

—Property outside suit included in decree by mistake—Sale not a nullity—Setting aside sale—Limitation. See LIM. ACT, ARTS 12 AND 96. 24 Bom. L. R. 423.

—Purchaser—Title of—If subject to equities.

Where the rights of landlord and tenant respecting abatement of rent had been settled by a compromise decree, an auction purchaser of the tenure at a sale for arrears of rent is bound by the same (*Mookerjee Newbould and Pearson, JJ.*) *UDAI KUMAR DAS v. KATYAINI DEBI*. 35 C. L. J. 292. (1922) Cal. 87 : 69 I. C. 126.

—Setting aside—Fraud—Ex parte decree—Stranger purchaser.

An execution sale ought not to be set aside merely because the sale was held in execution of an ex parte decree obtained by fraud where the purchaser is a stranger who was no party to the fraud and was not aware of it at the time of paying the purchase money. (*Teunon and Buckland, JJ.*) *GOPAL PORAI v. SWARNA BEWA*. 64 I. C. 611.

—Setting aside—Irregularity in procedure—Ancestral property sold as non ancestral property—Effect of. See C. P. CODE S. 68 AND SCH. II. L. R. 3 A. 167.

—Setting aside—Necessity for, before purchaser can get refund of the purchase money, See C. P. CODE, O. 21, R. 93

24 Bom. L. R. 308.

—Setting aside—Order by appellate court—Possession taken by purchaser—Resale.

A decree for sale was passed on three mortgages in one suit and in execution all the properties were sold in one lot and purchased by the decree holder himself. Subsequently on an appeal by a representative of the judgment-debtor the High court set aside the sale and directed a resale of the properties in three lots. *Held* that the decree-holder purchaser could not apply to get possession of the properties purchased by him without applying for a resale of the properties separately, (*Walsh and Ryves, JJ.*) *HARBANS NATH TEWARI v. ACHRAJ NATH*. (1922) All. 375. 65 I. C. 16.

—Setting aside—Sale in defiance of injunction—Effect of.

The District Court in execution of a decree fixed a date for the sale of certain properties. Before that date the claimant instituted a suit in the Sub. Court and obtained an injunction restraining the decree holder from selling the property. The District Court refused to stay the sale whereupon the sale was held and the purchase money paid into Court. On an application to set aside the sale. *Held* by the High Court that though the District Court was not personally bound by the order of injunction, yet it should in

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the exercise of its inherent power have directed stay of the sale having regard to the fact that the decree holder was restrained by injunction from executing the decree. In the result the sale was set aside and the money deposited in Court was refunded to the purchaser, (*Miller, C. J. and Mullick, J.*) **MAHARAJ BAHADUR SINGH v. A. H. FORBES.** (1922) Pat. 225 : 3 Pat. L. T. 645.

(1922) P. 382

—Title of purchaser—Encumbrances if removed. See **BENGAL CESS ACT** Ss. 5, 41, 52 AND 64. (1922) Pat. 167.

—Validity of—Purchase by decreeholder at execution sale notwithstanding refusal of leave to bid—Effect of—Sale voidable and not void. See **C. P. CODE**, O. 21 Rr. 72 AND 90.

3 Pat. L. T. 529 (P. C.)

—Validity of—Rent decree—All heirs not impleaded—Effect of.

Where the holder of a decree for rent fails to implead the heirs of the recorded tenant as parties to the execution proceedings, a sale of the holding in execution is invalid as against them and cannot affect their interest (*Greaves and Panton, JJ.*) **ABDUL AZIZ v. AMIR ALI.** 67 I. C. 149.

**EXECUTOR** — Co-executors — Powers of, if exercisable by one, See (1921) Dig. COL. 575 **RANI HEMANGINI DEBI v. SARAT SUNDARI DEBYA.** 66 I. C. 882.

—Contracts by—Liability of—Personal liability.

Upon a contract of borrowing made by an executor he is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator. 7 C. W. N. 104 ; 31 Cal. 353 Ref. In special cases however the estate may be liable. (*Daniels, J. C.*) **BABU ANANT RAM v. NATIONAL BANK OF UPPER INDIA, LTD.** 9 O. L. J. 94 : 66 I. C. 116.

—Indemnity—Delay in filing accounts does not affect right to indemnity—Business—Power of executor to carry on business carried on for indefinite time though not authorised by will—Incurring of debts—Personal liability of executor, See **HINDU WILLS ACT**, S. 216.

35 C. L. J. 46.

—Joint executors—Powers of one—Renewal of debt barred—Validity of. See **PROB. AND ADMN. ACT** S. 92. 42 M. L. J. 559.

—Legatee creating mortgage pending administration—Decree on mortgage—Executor, if entitled to declaration of its invalidity. See **WILL.** 42 M. L. J. 567.

—Liability to render accounts—Retention of assets—Debts—Onus.

Where an executor is sued for accounts, the onus lies on him to prove that he was a creditor of the estate of the deceased testator at the time of his death & that he was consequently entitled to retain the assets or a portion of them towards the debt. (*Mookerjee and Chotzner, JJ.*) **PULNI BEHARY DEY v. SATYA CHARAN DEY.**

36 C. L. J. 367.

**EXECUTION ACT (1908), S. 7.**

—Minor legatee—Deposit of sum in Bank—Breach of trust by executor—Liability of Bank. **Lim. Act, Arts.** 48, 60, 120.

Where in pursuance of the directions of a will, the executors deposited a sum of money in a Bank to accumulate until the minor legatee attained majority, but some time before that event, drew out the amounts :

*Held* in a suit by the legatee against the Bank for the amounts thus drawn out, in the absence of notice, actual or constructive, that the depositors were acting as trustees in the matter, the Bank was not privy to any breach of trust, that the moneys were deposited as executors and as such the Bank was entitled to deal with them.

For purposes of limitation, the suit must be treated as one for conversion in which case Art. 48 would apply or for money had and received for plaintiff's use in which case Art. 62 would apply, but not Arts. 120 or 133. (*Macleod, C. J. and Shah, J.*) **BANK OF BOMBAY v. FAZULBHOY EBRAHIM.** 24 Bom. L. R. 513 : 67 I. C. 761.

—Powers of—Power of Sale given by will—Implied power to mortgage. See **WILL CONSTRUCTION** 43 M. L. J. 551.

**EXECUTOR DE SON TORT**—Suit against—Legal representative as party to suit.

Where an executor *de son tort* takes possession of all the assets of the deceased, a suit for general administration can be filed without joining the legal representatives and in cases where he takes possession of only a part of the assets he can be made accountable for the part he actually took possession of, without joining the legal representatives. But where administration is sought for the entire estate in cases where the executor *de son tort* has taken possession of only a part, the legal representatives would also have to be added, (*Schwabe, C. J. and Coutts Trotter and Kumaraswami Sastri, JJ.*) **ZAMINDAR OF BHADRACHALLAM v. SRI RAJA VENKATADRI APPA ROW.** 43 M. L. J. 486 :

(1922) M. W. N. 532 : (1922) Mad. 457 : 31 M. L. T. 221 (H. C.) : 16 L. W. 369.

**EXTRADITION ACT (XV of 1903) Ss. 7, 9—Extradition—Nepalese subject—Escaping from jail into British India.**

S. 7 of the Extradition Act applies only to extradition offences and an extradition offence is any offence described in the First Schedule of the Act. Absconding from jail is not one of the offences mentioned in that schedule. Therefore S. 7 has no application and a warrant issued to the District Magistrate of the place where the absconder is living to arrest him is illegal and the arrest also is illegal. The procedure for requisitioning the surrender of any person accused of having committed any offence, not necessarily an extradition crime, is laid down in S. 9 of the Act but the requisition in such a case has to be made to the Government of India or to any local Govt. No such requisition having been made in the present case the warrant and arrest were both illegal. (*Jwala Prasad and Ross, JJ.*) **JAIPAL BHAGAT v. EMPEROR.** 1 Pat. 57 :

(1922) P. 442 : 3 Pat. L. T. 786 : 66 I. C. 517 : 23 Cr. L. J. 293.

**EXTRADITION ACT, S. 9.**

—S. 9— Procedure for requisitioning surrender—To whom to be made See *EXTBADITION ACT*, Ss. 7, 9 ETC. 66 I. C. 517.

—S. 15— *Illegal arrest—Powers of High Court.*

Though S 15 of the Extradition Act empowers the Government of India or the Local Govt to stay any proceedings taken under Ch. III, and to direct any warrant to be cancelled and the person arrested to be discharged, that does not necessarily oust the jurisdiction of the High Court to interfere in a case where the arrest is illegal and has not been made under a valid warrant 39 Cal. 273; 7 Bom L. R 463, 41 Cal 400 rel. (*Jwala Prasad and Ross, JJ.*) JAIPAL BHAGAT v. EMPEROR. 1 Pat. 57: (1922) P. 442 3 Pat. L T. 786. 66 I. C. 517: 23 Cr. L J 293.

**FAMILY ARRANGEMENT**—Validity of—Fraud or mistake—Concealment of material fact. See (1921) DIG. COL. 577 SATISH CHANDRA GHOSH v. KALI DAS, 26 C W. N 177: (1922) Cal. 202: 68 I. C 577

**FAMILY SETTLEMENT**—Hindu reversioner—Compromise of disputed claim—Alienation—Distinction between. See (1921) DIG. COL. 578 MUSSAMMAT BHAGWATI KUER v. JAGDAM SAHAY. 6 Pat L. J. 604.

—Consideration—Provisions in terms of invalid wakf deed—Validity See MAHOMEDAN LAW—FAMILY ARRANGEMENT. 49 I A. 153.

—Settlement of disputes—Arrangement acted upon—Parties not entitled to repudiate

Where in pursuance of a settlement of disputes between two limited owners of property and a male reversioner disputing their claim, the latter acquires a substantial benefit by obtaining *praesenti* a large portion of the property in dispute he cannot subsequently turn round and rescind from the settlement. (*Lindsay, J. C.*) JAGESHAR v. BHUSHAN. 24 O. C 5.

—Hindu widow—Relinquishment—Effect of—Posthumous son if bound. See (1921) DIG. COL. 579 KUSUM KUMARI DAS v. DASARATHI SINHA. 67 I. C. 210.

**FATAL ACCIDENTS ACT XIII of 1855**—Death caused by wrongful act—Right of heirs of deceased to sue for damages—Principle of the Act applies even where Act not in force. See TORT. 64 I. C. 311.

—S 1— Damages awarded— Court's power to distribute.

Under Act XIII of 1855 the Court has powers to divide damages claimed and awarded between some only of the parties for whose benefit the claim is made (*Richardson and Suhrawardy JJ.*) SYED SADAQU REZU v. KHOSHMOHINI DAS. (1922) Cal. 317.

**FERRY**—Creation of—Grant—Prescription.

A right to a ferry between two villages can be the subject of a grant from the crown and the grant can be implied from the facts proved. The right cannot be acquired by prescription. 18 C.

**GAMBLING ACT, S 1.**

652 Ref. (*Macleod, C. J. and Coyajee, J.*) SHAMA DURGAJI BHOI v. GANGADHAR NARAYAN 24 Bom. L.R 445 (1922) Bom. 245: 67 I C. 419.

**FISHERY**—Grant of—Rights of grantee to the soil—Grant of soil

A proprietor can lease out a fishery without giving any rights to the soil or the bed upon which the water lies and he can then let out the land subject to the rights of the lessee of the fishery. If, on the other hand, he lets out the land first, he cannot claim the right to the water and fish that come upon the land afterwards The landlord may reserve the right of fishery when letting out the land, but such a reservation is, strictly speaking, a re-grant of the right by the tenant to the landlord (*Mullick and Ross, JJ.*) MRS. HENRY HILL & Co. v. SHEORAJ RAI. 3 Pat L T. 53: 64 I. C. 346: (1922) P. 9.

—Nature of rights—Acquisition—Limitation applicable. See LIM ACT, ART. 144. (1922) Pat 195.

**FRAUDULENT TRANSFER**—Effect of, as between parties—Court's duty in protecting—principles See BENAMI. 36 C L J 491.

**FRUSTRATION**—Doctrine of in contracts. See CONTRACTS—SALE. 26 C. W. N. 573.

**FREEDOM OF RELIGION ACT (XXI of 1850) S. 1**—Conversion to Muhamadanism—Succession to. See (1921) DIG. COL. 581 ASHA BEI v. MA KYAW YIN. (1922) L B 15: 64 I. C 514.

**GAMBLING ACT (III of 1867)**—Discount on odds—If gaming—Implements not actually used—Presumption.

A mere discount on odds does not come within the meaning of commission so as to make it an offence under the Gambling Act.

The presence of implements of gaming, which were not actually being used at the time, does not give rise to a presumption that the house was a common gaming house. (*Ryves, J.*) DURGA PRASAD v. EMPEROR. L. R. 3 A. 201 (Cr)

—Ss 1 and 3— "Public Place" meaning of—Public having access to private land.

When the public have access to a place without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not. Consequently gambling in a private grove frequented by the public on the occasion of a fair is an offence. (*Stuart, J.*) SUKH NANDAN SINGH v. EMPEROR 44 A. 265: 20 A. L. J. 80: L. R. 3 A. 3 (Cr.): 65 I. C. 419: 23 Cr. L. J. 67.

—SS. 1 and 3—Keeping common gaming house—Wagering—Instruments of game—Presence of—Effect of.

Where it is not proved that the instrument of gaming found in a shop were kept or used for the profit or gain of the owner or occupier of the shop whether by way of charge or otherwise the occupier could not be convicted of an offence under S. 3 of the Public Gambling Act. The mere fact that certain articles kept by a person were used as instruments of gaming does not raise a presumption that they were used for his profit,

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or gain (*Gokul Prasad and Stuart, J.*) LACHCHI RAM v. EMPEROR 20 A. L. J. 218 : (1922) A. 61 : 65 I. C. 852 : 23 Cr. L. J. 196

—S. 3—Conviction under—Accused not found at the time of raid—Effect of.

To substantiate a conviction under S. 4 of the Gambling Act it is sufficient if the accused persons were seen on the premises on the entry of the Police in the course of a lawful search though most of them managed to evade arrest at the moment. (*Hallifax, A. J. C.*) UDIRAM v. EMPEROR. 22 Cr. L. J. 508 : 62 I. C. 332.

—Ss. 3, 4, and 18—Cr. P. Code S. 562—Applicability of—Warrant of search and arrest not addressed to individual—Gambling in public place.

Where a Magistrate convicted certain persons under Ss. 3 and 4 of Act III of 1867 but directed their release on their entering into a personal bond for good behaviour for one year. *Hdd.* that the order was illegal inasmuch as S. 562 Cr. P. Code had no application to the case (*Kanhaya Lal, A. J. C.*) EMPEROR v. SHANKAR DAYAL. (1922) Oudh 224 : 25 O. C. 111.

—Ss. 3, and 4—Gambling—Deepavali day—Intention presumption.

It is not unusual for persons to gamble on the occasion of the Deepavali festival by way of a common friendly amusement rather than for the purposes of making any profit or reaping a commission. The presumption raised by the Act is not as strong or can be more easily displaced when the gambling takes place openly on the Deepavali occasion as or than when it takes at other times in a private house (*Kanhaiyal Lal, J. C.*) EMPEROR v. SHANKAR DAYAL. (1922) Oudh 224 : 25 O. C. 111.

—Ss. 3 and 4—Joint trial—Legality.

The joint trial of the keeper of a gambling house and other persons who were found in it is not illegal. (*Brasher, J.*) KHILINDA RAM SACHDER v. EMPEROR. 3 Lah. 359 : 23 Cr. L. J. 621. 68 I. C. 845.

—Ss. 5 and 6—Applicability of—Credible information—Search—Raid of premises by police officer.

To apply S. 6 of the Public Gambling Act, the premises must be entered or searched under the provisions of S. 5 of that Act.

The credible information, which the Police Officer must obtain before he can enter a place must show that the gambling is being carried on for the profit of the owner or occupier, and there ought to be evidence to describe either how the game itself was played, or how a toll, if any, was levied. The mere fact that small sums are set aside for remunerating those who minister to the comfort of the persons assembled, does not show that such payments represent any advantage whatsoever to the person occupying or keeping the premises.

A Police Officer is not at liberty to raid premises merely because a number of persons are collected to gamble there, and a conviction based on such information cannot be sustained. (*Drake-Brockman, J. C.*) NEMICHAND v. EMPEROR. 22 Cr. L. J. 198 : 62 I. C. 322.

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—S. 5—Money on the person of accused—Forfeiture.

S. 5 of the gambling Act authorises only the seizure of money found therein. Money found on search of persons is not authorised to be seized and cannot be forfeited. (*Kotwal, A. J. C.*) CHATURBHUI v. EMPEROR. 23 Cr. L. J. 608 : 68 I. C. 832.

—S. 5—Search—Provisions of Cr. P. Code if applicable

The provisions of Ch. VII of the Cr. P. Code relating to search do not apply to a search conducted under a warrant issued under S. 5 of the Gambling Act, (*Brasher, J.*) KHILINDA RAM SACHDEV v. EMPEROR. 3 Lah. 359 : 23 Cr. L. J. 621 : 68 I. C. 845.

—S. 13—Order for confiscation of money in accused's possession—Legality of.

Under S. 13 of the Gambling Act (III of 1867) it is not open to the Magistrate to make an order for confiscation of the money found in possession of the accused. (*Lindsay, J. C.*) EMPEROR v. BISHAMBHAR DAYAL. 24 O. C. 264.

—S. 13—Public place—Blind alley for removed from public road.

A blind alley removed a considerable distance from a public road and approached only by a circuitous lane is not a public place within the meaning of the section and a conviction for gambling in a public place could not stand (*Abdul Qadir, J.*) MUHAMMED ALI v. EMPEROR. 56 I. C. 672 : 57 I. C. 931 (appld.) : 68 I. C. 848.

—S. 13—Public place—Footpath running through private grove—Offence of gambling.

The answer to the question whether a foot path passing through a grove is a public place depends on nature of the footpath and the nature of the right or permission by whom it is used. If the path is used by the public as of right, it is a public place within S. 13 of the Gambling Act (*Daniels, A. J. C.*) EMPEROR v. LALJI. 25 O. C. 114.

—S. 13—Public place—Meaning of—Situation and surroundings.

A public place must be a place which is either open to the public or is used by the public and the publicity of its situation is not a necessary element of the offence any more than ownership. Where the court below inspected the locality and came to the conclusion that the place was not a public place and was not in the use of the public as such, though it was situated close to two public roads, the conviction under S. 13 cannot be upheld. 31 C. 542 : 20 A. L. J. 80 : 17 A. 166 : 1 A. L. J. 129 Rel. (*Kanhaiya Lal, J. C.*) EMPEROR v. BASHIR. 9 O. L. J. 288 :

4 U. P. L. R. (O. C.) 68 : (1922) Oudh 275 : 68 I. C. 613 : 23 Cr. L. J. 581.

GIFT—Shares in company—Transfer incomplete—Effect.

Where the owner of shares in a company executed a deed purporting to transfer the same to his wife, with the intention of making her owner from that time.

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*Held*, (1) the gift having been intended to take effect by way of transfer, cannot operate by way of trust;

(2) as the shares could be legally transferred only by entry in the books of the company, which was not done, the disposition failed. (*Rankin, J.*) AMARENDRA KRISHNA DUTT v. MONIMUNJARY DEBI. 48 Cal. 986 : 66 I. C. 586.

## GOVERNMENT OF INDIA ACT, S. 79 (1)

—Local Legislature — Power to make law—Scope of power—Competency of courts to question motive of policy, *See* (1921) DIG. COL. 582 GOBERDHONE DAS DEORA v. DOOLICHAND SETHIA. 48 Cal. 955.

—S. 106—Mandamus — Specific Relief Act, S. 45—Income Tax Act, S. 51—Reference by Board of Revenue to the High Court—Jurisdiction to issue mandamus. *See* (1921) DIG. COL. 583 THE CHIEF COMMISSIONER OF INCOME TAX v. THE NORTH ANANTAPUR GOLD MINES.

64 I. C. 682.

—S. 107—High Court—Power to expunge remarks from judgment of inferior Criminal Court—Executive order.

S. 107 of the Government of India Act, empowers the High Court to delete irrelevant remarks from the judgments of inferior Criminal Courts 15 C. W. N. 593, 16 C. W. N. 1105, 17 C. W. N. 238 ref. (*Jwala Prasad, J.*) BIRNARAYAN SINGH v. EMPEROR. (1922) P. 97 : 67 I. C. 195

3 Pat. L. T. 239.

—S. 107—Interlocutory order—Direction for taking accounts in a pending suit—No interference in revision unless irreparable injury will otherwise result. *See* C. P. Code, S. 115

3 Pat. L. T. 63.

—S. 107—Powers of superintendence of High Court—Order refusing sanction.

Although the High Court is vested with very wide powers of superintendence over the proceedings of subordinate courts, these powers are not to be exercised for the purpose of interfering with the order of a subordinate court merely on the ground of error in law or error in fact. In other words the powers of superintendence are not applicable where the only question is whether the decision of the lower court is against the weight of evidence. (*Ghose and Cumming, JJ.*) SARAT CHANDRA MANDAL v. RAMSAHI ROY. 26 C. W. N. 1016 : 36 C. L. J. 265 : 69 I. C. 153 : 23 Gr. L. J. 665

—S. 107—Powers of High Court—Subordinate Court—Revenue Divisional Officer holding enquiry into the conduct of a village Munsif—Revision by High Court. *See* (1921) DIG. COL. 584. PALANIKUMARA CHINNAYA GOUNDER *In re*. (1922) Mad. 337 : 66 I. C. 566.

—S. 107—Rent Controller—If a court—Superintendence—Powers of—Calcutta Rent Act, III of 1920.

The court of the Rent Controller appointed under the Calcutta Rent Act is a court of civil jurisdiction subject to the powers of superintendence conferred by the High Court under S. 107 of the Govt. of India Act and the High Court can

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interfere in revision with his decision. (*Woodroffe and Ghose, JJ.*) ABDUL HUQ v. MAHOMED DIN. 67 I. C. 302.

—S. 107—Subordinate Court—Rent controller—Order of, open to revision by High Court. *See* CALCUTTA RENT ACT, S. 15

26 C. W. N. 845.

—S. 108—Division Court—Meaning of.

Under S. 108 a Division Court must consist of at least two judges. (*Coutts, J.*) RAGHUBAR SINGH v. JETHU MAHTON (1922) Pat. 88 :

1 Pat. 384 : (1922) P. 13 : 3 Pat. L. T. 194 : 65 I. C. 675.

GRANT — Construction — Inam—Berar Inam Rules—Rules governing such grants—Jaghir.

It is not the law that every grant of a Jaghir whatever the circumstances under which it was made or the special conditions attached to it may be is governed absolutely by the Berar Inam Rules. The duty of the court in matters affecting a Jaghir is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which and the reliefs under which the same was granted. (*Hallifax and Pridenax, A. J. C.*) SUBHAN ALI v. IMAMI BEGAM. (1922) Nag. 129 : 65 I. C. 194.

—Construction — Inam—No presumption in favour of grant of both the warams *See* INAM 16 L. W. 102.

—Construction — Jagir to person and his heirs — Nature of estate taken.

Where the grant of a jagir is made to a person and his heirs and there is nothing to control the ordinary meaning of the words, the grantee takes an absolute interest. 15 Bom. 422 foll. (*Das and Adam, JJ.*) GOLAM NABI v. CHOWDHURI BASUDEB DAS. (1922) P. 411 : 1 Pat. 201.

—Construction—Mode of user

Where the terms of the original grant are ambiguous or where they cannot be proved by direct evidence a reference to the mode of user of the lands is legitimate. 16 C. L. J. 322 ; 46 C. 160 Ref (*Mookerjee and Cumming, JJ.*) RANI HEMANTA KUMARI DEBI v. THE MIDNAPORE ZEMINDARI Co. 35 C. L. J. 493.

—Construction — Surrounding circumstances—Extrinsic evidence.

The construction of a grant depends on the interpretation of all the terms of the instrument. Except in cases of ambiguity, extrinsic evidence would not be admissible. Each case must be considered on its own facts 46 I. A. 123 Ref. (*Mookerjee and Choitzner, JJ.*) ABINASH CHANDRA DAS v. MAJUB ALI CHOWDHURY. (1922) Cal. 461 : 36 C. L. J. 196.

—Implied term—When presumed.

A term will not be implied in a grant or contract unless the court is driven to the conclusion that the parties must necessarily have intended that stipulation and in that case only to the limited extent absolutely necessary to carry out what is believed to be their intention. (*Schwabe C. J., Coutts Trotter and Kumaraswami*

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*Sastri, JJ.*) TIRUNEELAKANDAM SERVAI v. RAJA OF RAMNAD 43 M. L. J. 158 : (1922) Mad. 263 : 15 L. W. 556 : 30 M. L. T. 317.

—Maintenance grant—Rights of grantee Rent and profits of estate—Accretion:

Where a Hindu wife is given possession of certain villages under a lease by her husband subject to the payment of rent to him, she has no estate in the villages but only a maintenance grant; and the substance of the grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise which remain the property of the grantor and annexed to his estate. The undisposed of accumulations of the wife cannot follow the "estate" because the title to the estate was never in the wife but always in her husband the grantor. In order that there may be an accretion there must be an estate to which the accumulations may accrete (*Das and Adam, JJ.*) RAMESHWAR - NARAIN SINGH v. RIKNATH KOERI, 67 I. C. 451

**GUARDIAN AND WARD** — Testamentary guardian — Appointment by oral will — No bar to appointment of statutory guardian by Court See **GUARDIAN AND WARDS ACT, S. 7.** (1922) M. W. N. 167.

**GUARDIANS AND WARDS ACT (VIII of 1890)** — Proceedings under — Nature of jurisdiction — Interference.

Proceedings under the Guardians and Wards Act cannot be attacked on the ground of a lack of that formality and precision of procedure which the C. P. Code exacts from a court in India in a trial of a suit properly so called. The exercise of parental jurisdiction in guardianship matters by a District Judge cannot be guided by hard and fast rules, and if the order passed is on the whole a reasonable one, it will not be interfered with on appeal. (*Walsh and Ryves, JJ.*) MT KHUNDI DEVI v. CHOTEY LAL, 44 A. 587 : (1922) All. 338: 20. A. L. J. 468.

—S. 7—Appointment of guardian—Rights of mother—Wishes of relatives.

Where no charge of waste or mismanagement had been proved, the mere desire of the relatives of the minor is not a sufficient reason for depriving the widowed mother of the minor of her recognised claim to be the guardian of her minor child's property. (*Kotwal, A. J. C.*) MT. LAXMI-BAI v. ABDUL KADIR, 68 I. C. 474

—S. 7—Guardian—Appointment by Court—Testamentary guardian—Oral declaration—Sufficiency of.

It is only where there is a written will appointing a guardian that a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court. In the case of an appointment of a guardian by an oral will it is open to the court to ignore this appointment and make statutory appointment of its own if it considers best in the interests of the minor. (*Ayling and Venkatasubba Rao, JJ.*) PARVATI AMMAL v. ELAYAPERUMAL KONAN, 16 L. W. 445 : (1922) M. W. N. 167: 66 I. C. 216: (1922) Mad. 70 (1).

**GUARDIAN AND WARDS ACT, S. 11.**

—S. 7—Minor Shebait—Guardian for debutter properties—If can be appointed.

A minor shebait has no proprietary interest in the debutter properties and hence a guardian of such properties cannot be appointed under S. 7 of the Guardians and Wards Act, 42 I. C. 273 followed. (*Coutts and Das, JJ.*) KILBY v. MT. BAHURIA SHEORATAN KUAR, 3 Pat. L. T. 805 : (1922) P. 527 : 1 Pat. 433.

—Ss. 7 and 17—Husband and wife—Appointment of husband as guardian for wife—Restitution of conjugal right. See (1921) DIG. COL. 586. MUSAMMAT ASI BAI v. GIRDHARI RAM, 67 I. C. 882.

—S. 7—Proceedings—Nature of.

The proceedings under S. 7 of the Guardians and Wards Act are summary. The Judge has to make such enquiry as he thinks necessary to satisfy his mind, and has got unfettered discretion in the number of witnesses to be examined, length of cross examination etc. (*Kincaid, J. C.*) BIBI FATMA v. BAKARSHAH, 66 I. C. 888 : 15 S. L. R. 175

—Ss. 7 (b) (10)—Dispute about guardianship of minor's property—Duty of court.

Once the power of the court is invoked it is its duty as soon as any dispute about the guardianship of the minor's property or any allegation of detriment to the minor's interests resulting from such dispute is properly brought to its notice to right the matters in the interests of the minor and appoint a proper person as his guardian (*Kotwal, A. J. C.*) JIWANDAS v. RAJRANI, 64 I. C. 433.

—S. 8—Court's power to appoint guardian—Stranger as guardian—Minor of four years to be offered in marriage—Guardianship of father. See (1921) DIG. COL. 586. KESHAVALAL MAGANLAL TRIVEDI v. AMBALAL VENIRAM, 46 Bom. 415 : (1922) Bom. 278 : 64 I. C. 576.

—S. 9 (2)—Minor—Appointment of guardian—Jurisdiction—Property of minor in the hands of administratrix.

A guardian can be validly appointed of the property of a minor, in the hands of the administratrix to his father's estate. The appointment of administratrix does not mean that the minor has no property in the estate. 8 B. L. R. 208 relied on. (*Sanderson, C. J. and Mookerjee, J.*) LALIT KUMAR MUKERJEE v. DASARATHI SINGHA, 48 Cal. 802 : 66 I. C. 261.

—Ss. 11, 13 and 48—Refusal to appoint applicant as guardian—Subsequent application for the same purpose—Maintainability—Proceedings under the Act—Nature of.

Where a person's application to be appointed as guardian of a minor is rejected and there is no appeal from that order a subsequent application for the same purpose by him will not be entertained. Proceedings under the Guardians and Wards Act are not intended to be summary. Where a District Judge in appointing a particular person as guardian ignored the procedure laid down in Ss. 11 and 13 and failed to consider whether the guardian was by character and

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capacity a fit person and whether the appointment was for the welfare of the minor, his procedure is materially irregular. (*Kotwal, A. J. C.*)  
GOPALRAO v. SHRAWAN. 68 I. C. 291.

—S. 17 (1 and 2)—*Friend of debtor—Debtor appointed by will, opposed by widow.*

Where the guardian appointed by the testator is a debtor of the estate and specific charges are made against him by the widow which may make it necessary to call the guardian appointed by the will to account, it is advisable not to appoint as guardian any person on terms of friendship with such person. (*Kotwal, A. J. C.*) MT. RAJRANI v. MT. BHAGWANDAS. (1922) Nag. 232

—Ss. 19 and 25—*Application for guardianship by father—Procedure.*

An application by a Hindu father under S. 19 of the Guardians and Wards Act is not competent. The application should be under S. 25 of the Act asking the court to direct the return of the boy to the father. Under the Hindu law the father is the natural guardian of his minor son and he can apply to the court, if his ward leaves or is removed from his custody, for an order for the minor's return, and the court will, if it is of opinion that it will be for the welfare of the ward to return to his guardian, make such an order (*Macleod C. J., and Shah, J.*) BAI TARA v. MOHANLAL LALLUBHAI. 24 Bom. L. R. 779 : (1922) Bom 405 : 68 I. C. 518.

—S. 29—*Lease by court guardian for 7 years—Sanction of court not obtained—Lease in accordance with compromise sanctioned by court—Validity.*

A court guardian granted a lease of the minor's properties for a term of 7 years without obtaining the sanction of the Judge under S. 29 of the Guardians and Wards Act; but the lease was in accordance with a compromise entered into with the sanction of the court. *Held*, as the sanction of the compromise by the court under O. 32, R. 7 C. P. Code signified that the compromise was for the benefit of the minor, which is also what S. 29 of the Guardians and Wards Act signifies, the lease was valid. (*Stephen and Mullick, JJ.*) ABDUR RASHID v. SHEIKH KHANDKAR. 35 C. L. J. 206 : 68 I. C. 997

—Ss. 29 and 30—*Order under—Not appealable.*

An order under S. 30 of the Guardians and Wards Act is not appealable. (*Piggott and Walsh JJ.*) LACHMI PRASAD v. BALDEO DUBE. 20 A. L. J. 390 : 44 A. 458 : L. R. 3 A. 651.

—Ss. 29 and 30—*Transfer without sanction of Court—Sanction obtained under O. 21, R. 83 C. P. Code—Effect of.*

The certificated guardian of a minor sold the property of the minor, which had been attached, with the sanction of the Court under O. 21 R. 83 C. P. Code but without obtaining sanction under S. 29 of the Guardians and Wards Act. Subsequently the certificated guardian sold the property with the sanction of the Court under S. 29 of the Guardians and Wards Act. *Held* that the first sale was voidable at the option of the subsequent transferee but the subsequent transferee can get

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back the property only on his reimbursing the prior transferee whose money had benefited the minor. 3 C. L. J. 260 Ref. Under S. 30 of the Guardians and Wards Act disposal of immovable property by a guardian in contravention of Ss. 28 and 29 is voidable and could be set aside in a proper proceeding. Where therefore a person seeks to avoid it, he is in the position of a person who seeks equity and must do equity.

The sanction obtained under O. 21 R. 83 C. P. C. does not cure the defect arising on account of the want of sanction under S. 29 of Guardians and Wards Act. The scope of an enquiry under S. 29 of the Guardians and Wards Act is entirely distinct from the scope of an enquiry under O. 21, R. 83, C. P. Code. When an application is made under S. 29 of the Guardians and Wards Act to a District Judge to sanction a proposed alienation, the matter to be considered is the benefit of the infant. When an application is made to an execution Court to sanction an intended transfer under O. 21 R. 83 C. P. C. the matter for enquiry is the protection of the execution creditor. Compliance with the provisions of O. 21, R. 83 C. P. Code does not render unnecessary the fulfilment of the requirements of S. 29 of the Guardians and Wards Act in a case which falls within the scope of both these provisions of the law. (*Mookerjee and Cumming, JJ.*) DIJENDRA MOHAN SARMA v. MANORAMA DAS. 36 C. L. J. 326.

—S. 31 (2)—*Sale by guardian—Sanction for—Validity of conditions—Suit by minor to set aside the sale—Onus.*

*Per Spencer, J.*—Sanction of court given under S. 31 of the Guardians and Wards Act will not cure inherent defects that may exist in a sale by a guardian. It is only *prima facie* evidence that the transaction was a good one and the minor may at any future time have it set aside on the ground that it was fraudulent or improper, the burden of proof being in the first instance on the minor.

*Per Ramesam, J.*—The true rule as to the effect of the sanction is that it throws the onus on the minor to show that the alienation was improperly made contrary to the usual rule requiring the purchaser to establish the validity of the alienation or that he acted with due care and caution after making such enquiry as an honest and prudent man would make. It is not necessary for the minor seeking to impeach the transaction to make out fraud on the part of the purchaser.

*Per Spencer, J.*—Where the order granting sanction for a sale by a guardian did not recite the necessity for the same but simply ran thus:—“In the circumstances, the sale of 9 acres in full satisfaction of the mortgage debt is sanctioned” *held*, that the order did not comply with S. 31 (2) of the Act. (*Spencer and Ramesam, JJ.*) NALLAKA VENKATASWAMI v. RUGAM VEERAMMA. 45 Mad. 429 : 42 M. L. J. 333 : 15 L. W. 373 : 65 I. C. 964 : (1922) M. W. N. 357 : (1922) Mad. 135.

—S. 31 (3) (a)—*Bona-fide sale of minor's property—Conditions precedent and subsequent.*

Where the District Judge acting under the Guardians and Wards Act empowers the guardian to sell a property of the minors for an alleged debt of theirs and further directs him to put in the



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bonds after these have been satisfied and so endorsed by the creditor, it does not follow that non-compliance with the latter direction vitiates the sale it actually carried out and the vendee has all along been in possession of the purchased property.

Where the same property is held partly by adult co-sharers and partly by minors, the very fact that the minors' share was sold for a price a little over that for which the shares of adult co-owners was sold goes to indicate the *bona fides* of the sales of the shares of the minors (*Clutton and Richardson, JJ.*) DYAM KHAN v. SARAT CHANDRA DEO. 26 C. W. N. 218.

## —Ss 34, 47 and 48—Appeal—Order directing filing of accounts and payment of money

Where the District Court passes an order under S. 34 of the Guardians and Wards Act directing the guardian to pay into the Court a certain sum of money as being the balance due to him on an examination of accounts, the order is not open to appeal but may be questioned in revision. (*Broadway, J.*) RAM JAS v. CHANI 4 Lah. L. J. 272.

## —Ss. 34 and 37—Direction to guardian to deposit money due to minor—Appeal.

Where a guardian is directed to deposit in the Court the money due to the minor there is no appeal against the order but it may be corrected on revision for proper reason. (*Abdul Raouf, J.*) RADHA KISHEN v. KHUSHI RAM. 67 I C. 309.

## —S. 34—Marriage of minor female—Sanction of court—Application by guardian—Opposition of relatives.

Once a guardian is appointed under the Guardians and Wards Act, any application for the marriage of the minor by the guardian must be considered from the point of view of benefit to the minor, and any relation that might be entitled to be heard on the application will be heard; but such opposition must be considered at its true value and cannot be considered as an absolute bar to the court giving sanction to the marriage (*Macleod, C. J. and Shah, J.*) GANU GOPAL SONAR v. DATTATRAYA LAXMAN POTDAR, 24 Bom. L. R. 845 : (1922) Bom. 335.

## —S. 40—Removal of—Successive applications—Same allegations—Grounds for removal

Where an application for the removal of a duly appointed guardian of the person of a minor has been dismissed and the order of dismissal has been duly confirmed on appeal, a fresh application on the same allegations as before, for removal of the guardian of the minor is not sustainable. The fact that the widowed mother of the minor is living with her newly married husband in the same house as the minor is no ground for her removal from guardianship of her minor son. (*Piggott and Walsh, JJ.*) BHAGWAN DAS v. MANGALIA. 20 A L. J. 959.

## —S. 41 (2) and (3)—Powers of guardian of property—Delivery of property—Summary order.

The power of compelling the guardian to deliver possession of the property can only be exercised in the interests of the minor. These

## GUZERAT TALUKDAR'S ACT, S. 31.

summary powers are meant for his protection. They cannot be invoked by a person claiming adversely to the minor. The remedy for such adverse claimants lies in a regular suit. Until the powers of a guardian of the property cease under S. 41 (2) he cannot be called upon to deliver the property in his possession on behalf of the ward. (*Mitra, A. J. C.*) MT, SITABAI v. SHANKER 18 N. L. R. 184.

## —S 41 (4)—Liability of guardian to render accounts—Liability of guardian's heirs and surety.

A guardian is not relieved of his liability to render accounts unless there is an express order discharging him. *Held*, on the facts there was neither an express nor an implied order discharging the guardian. 25 P. R. 1918, followed. (*Martineau, J.*) JAGAT SINGH v. SUNDAR SINGH. 3 Lah. L. J. 364.

## —Ss 47 and 48—Order appointing guardian—Review.

An order for appointing a guardian of a minor under S. 7 of the Guardians and Wards Act is not open to review, as S. 48 makes such an order final. 143 P. R. 1906 foll. (*Scott-Smith, J.*) MUS-SAMMAT SHARFAN v. MST. BHOLI. 4 Lah. L. J. 274 : (1922) Lah. 395.

## —Ss 47 and 48—Order directing guardian to pay money—Examination of accounts—If appealable. See GUARDIAN AND WARDS ACT Ss. 34, 47 AND 48 4 Lah. L. J. 272.

## GUZERAT TALUKDAR'S ACT (VI of 1888) S. 29 B cl (1) and (2)—Notice under—Necessity for—Decree against Talukdar—Execution

Although a decree had been passed against a Talukdar, which was being executed before S. 29 B was enacted, still notice of the claim is necessary after the notification under S. 29 B, has been issued. 11 Bom. L. R. 1358, 19 Bom. L. R. 855 Ref. (*Macleod, C. J. and Coyajee, J.*) THE TALUKDARI SETTLEMENT OFFICER v. AKUJI ABHOAM. (1922) Bom. 350 : 24 Bom. L. R. 762 : 68 I. C. 487.

—S. 29 B—Sanadia land of talukdar—Mortgagee mortgaging his mortgage rights in the land of pliff—Estate of talukdar taken under management by Taluqdar Settlement officer—Notice to claimants against the talukdar's estate—Mortgagee's heir not notifying his claim—Ejectment of pliffs. See (1921) Dig. COL. 587. HARANBHAI JIVABHAI v. THE COLLECTOR OF KHAIRA (1922) Bom. 200 : 46 Bom. 239 : 64 I. C. 225.

## —S. 31—Talukdar's estate—Meaning of—Vanta lands.

The words "Talukdar's estate" in S. 31 of the Guzerat Talukdar's Act are used in a technical sense limited to the Talukdar's interest in the estate held by him by reason of his status as a talukdar. Where lands situated in a Talukdari village and shown in the government register as Sirkar Udar Jamabandhi, were recently entered as Vanta in the register of Inami Vanta lands

**HABEAS CORPUS.**

kept by the Talukdar they do not cease to be "Talukdar's estate" within the meaning of S. 31 of the Guzerat Talukdar's Act. Vanta tenure is prescription of remote antiquity without any deeds or grants 4 B. 387 Ref. (*Macleod, C. J. and Coyajee, J.*) *SHANKARLAL TAPIDAS v. BAIKHAH AKHTYARKHAN.* (1922) Bom. 342. 24 Bom. L. R. 709. 69 I. C. 102.

**HABEAS CORPUS**—High Court—Power to issue the writ—Arrest under martial Law. See (1921) DIG. COL. 587 *KOCHUNNI, ELAYA NAIR In re* 45 Mad. 14 : (1922) Mad. 215 : 68 I. C. 26. 23 Cr. L. J. 490

—Power of High Court to issue writ—Mofussil places—Persons other than European British subjects. See CR. P. CODE, SS. 456 & 491. 16 L. W. 349.

**Sec EXTRADITION ACT**

**HANDWRITING**—Comparison of—Forgery—Data for arriving at a conclusion

One of the most useful tests in considering a case of forgery is to see whether a clear dissimilarity of habit can be traced through the documents tendered. If there exists such a dissimilarity, then it is difficult to say that the same person wrote them all. The judicial mind has constantly taken advantage of the characteristic peculiarities of individuals when a question has been raised whether their writings have been forged, such peculiarities being most commonly manifested in the formation of an idea or in the mode of spelling particular words. The test is a useful one and there is a reason why we should not apply it here. (*Chatterjee and Panton, JJ.*) *MAKHAN LAL SIRCAR v. GOKUL CHANDRA CHAKRAVARTHI.* 62 I. C. 882.

**HIGH COURT**—Jurisdiction—Contempt of subordinate court—Power of High Court to take action. See CONTEMPT. 24 Bom. L. R. 16

**HIGHWAY**—Dedication—Inference from user—English law—Applicability of.

It is competent to a Court to draw an inference of dedication of a highway to the public from long user. Though the general principles of English Common law as regards highways are applicable to India, the whole of the English Common law should not be bodily imported. (*Wazir Hasan, A. J. C.*) *RAI BAURANG BAHADUR SING v. BABU BADRI NATH.* 4 U. P. L. R. (O. C.) 105 : 90. L. J. 497.

—Obstruction—Right to stop and block public road—Nuisance. See (1921) DIG. COL. 588. *MAHOMED ZAMAN v. MANZUR HASAN.* 43 All. 692.

**HINDU LAW**—Adoption—Agreement to pay annuity—Legality of.

A grant of an annuity as consideration for the agreement to give a boy in adoption is invalid and unenforceable.

*Quere* : Whether the payment of the annuity, if there had been good consideration for it, could be enforced against the sons of the grantor. 6 Bom. L. R. 642 : 7 Bom. L. R. 686 Ref. (*Macleod, C. J. and Coyajee, J.*) *NARAYAN LAXMAN v. GOPAL RAO TRIMBAK.* 24 Bom. L. R. 414 : (1922) Bom. 382 : 67 I. C. 850

**HINDU LAW—Adoption.**

—Adoption—Ceremonies—Giving and taking—Mere acknowledgment insufficient See (1921) DIG. COL. 594. *SRIMATI KRISHNA BHAMINI DASI v. SRIMATI BRAJA MOHINI DASI.* 66 I. C. 38.

—Adoption—Divesting of estate—Estate already vested.

Where a person before his adoption had inherited his father's property in the natural family, or had obtained a portion of the estate on partition his rights in the property of his natural family which had vested in him are not divested by his subsequent adoption into another family. In the case of a Hindu widow she has only a limited power of disposal over the property and has only a life interest in her husband's estate. Consequently, on her remarriage or conversion the property is divested. (*Dhobley A. J. C.*) *MAROTI v. LAXMAN.* 5 N. L. J. 58 : 65 I. C. 362 : (1922) Nag. 16.

—Adoption—Evidence of—Old adoption—Evidence of treatment. See (1921) DIG. COL. 595 *JAGANNATH MARWARI v. CHANDI BIBI.* 67 I. C. 31.

—Adoption—Gift to adopted son—Adoption declared invalid—Persona designata—Gift to. See HINDU LAW—WILL. 24 Bom. L. R. 794.

—Adoption—Proof—Onus—Old adoption—Treatment by family.

Though the onus of proving an adoption is on the person setting it up very slight evidence may be sufficient for this purpose where the alleged adopted son has been treated as such for a long series of years. 31 A. 116, 36 C. 780 Rel. (*Mookerjee and Cuming, JJ.*) *KAILAS CHANDRA NAG v. BIJAY CHANDRA NAG.* 36 C. L. J. 434.

—Adoption—Proof of—No change of name

Where the name of the boy alleged to have been adopted was not changed, where no proof was produced to prove the expenditure of adoption ceremony though the alleged adoptive father kept regular accounts and where no reference was made to the adoption at the time of mutation when the widow's name was substituted for that of her husband held the adoption was not proved. 12 N. L. R. 164 followed. (*Kotwal and Prideaux A. J. C.*) *DEORAO v. MT. ANNAPURNABAI.* (1922) Nag. 185.

—Adoption—Proof of—Widow of immature age—Adoption of son of certificated guardian.

In the case of an adoption by a Hindu widow of immature age, the court is bound to consider all the circumstances surrounding the adoption set up, which she disputes as not having been made by her of her own free will; and this is specially so where the adopted son is the son of the certificated guardian of the widow. The onus would lie on the plaintiff to satisfy the court that all precautions had been taken which were necessary to convince the court that the adoption was made with the free consent of the girl. 7 B. H. C. R. App i, XX Rel. (*Macleod, C. J. and Coyajee, J.*) *GHANSHAMDAS VISHNUDAS v. LAXMIBAI.* 24 Bom. L. R. 726 : (1922) Bom. 219.

**HINDU LAW—Adoption.**

—Adoption — Results of — Rights of adopted son and subsequently born natural son — Sudras See (1921) DIG. COLS. 595, 628 *ARUMILLI PERRAZU v. ARUMILLI SUBBARAYADU*. 3 Pat. L. T. 1 : 30 M. L. T. 1 (P. C.) : (1922) (P. C.) 71.

—Adoption — Rights of adopted son — Postponement of vesting of estate — Validity of.

Where a person is adopted a condition postponing the vesting of the estate in the adopted son beyond two lives in existence is invalid. (*Hallifax A. J. C.*) *KOLHI v. MT CHOTTIBAI*. 68 I. C. 294.

—Adoption — Rights of adopted son — Succession.

An adopted son takes completely the place of a natural son, and is competent to inherit the property of his adoptive mother's ancestors. (*Macleod, C. J. and Shah, J.*) *DATTATRAYA v. GHANGABAI*. 46 Bom. 541 : 24 Bom. L. R. 69 : (1922) Bom. 321

—Adoption — Rights of adopted son.

Under the Hindu law an adoption made by a widow dates back to the death of the adoptive father, 31 M. 75, 21 B. 319 foll. (*Daniels and Lyle, A. J. C.*) *KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD*. 25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh 236

—Adoption — Who can be adopted — Cousin of the same degree.

There is nothing in the Hindu Law to prevent the adoption of a cousin standing in the same degree of relationship to the common ancestor as the person adopting 3 M. 15; 36 M. 353 34 B. 491; 14 M. 459 Ref. (*Drake Brockmann J. C.*) *GULAH THAKUR v. FADALI*. 68 I. C. 566,

—Adoption — Who may be adopted — Daughter's husband.

Under the Hindu law as administered in the Bombay Presidency, the adoption of a daughter's husband is valid. (*Macleod, C. J. and Shah, J.*) *SITABAI NAGESH DESAI v. PARVATIBAI NAGESH*. 24 Bom. L. R. 748 : (1922) Bom. 239.

—Who may be adopted — Eligibility for — Prohibited degrees — Scope of the rule — Sister's son. See (1921) DIG. COL. 593 *BHAU ADGAUDA PATIL v. NARASAGOUA TATYA PATIL*.

46 Bom. 400 : 64 I. C. 614 : (1922) Bom. 300.

—Who may be adopted — Orphan — Custom Dhusars of Gurgaon District — Punjab. See (1921) DIG. COL. 594 *RAM KISHORE v. JAINARAYAN*.

49 Cal. 120 : 42 M. L. J. 80 : 20 A. L. J. 857 : 26 C. W. N. 881 : (1922) (P. C.) 2 : 15 L. W. 144 : (1922) M. W. N. 125 : 30 M. L. T. 144 : 64 I. C. 782 (P. C.)

—Adoption — Who may be adopted — Orphan — Adoptive father if estopped from questioning adoption.

An adoption of an orphan is invalid and the adoptive father himself may dispute its validity. There can be no estoppel where both sides know the full facts. A representation as to a

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matter of law, viz. the validity of an adoption cannot give rise to an estoppel. 11 B. L. R. 291, 395 ; 21 M. L. J. 500, 503 Rel. (*Ayling and Odgers, JJ.*) *RAJAMBAL AMMAL v. SHANMUGA MUDALIAR*. (1922) M. W. N. 481.

—Adoption — Who may be adopted — Married boy.

A married boy cannot be validly adopted among any class of Hindus. 10 B. 80, 13 M. 129 : 32 A. 247 : 35 A. 263 Rel. (*Chevis, J.*) *HIRA v. HARDAT SINGH*. 47 P. L. R. (1922) 68 I. C. 763.

—Validity — Widow — Existence of son adopted by husband — Second adoption invalid. See (1921) DIG. COL. 597. *BHAU ADGAUDA PATIL v. NARASAGOUA TATYA PATIL*. 46 Bom. 400 : (1922) Bom. 300 : 64 I. C. 614.

—Who may adopt — Minor widow — Capacity to take. See (1921) DIG. COL. 590 *PARVATAVA NEMAPPA HAVALDAR v. FAKIRNAIK*. 46 Bom. 307 : 64 I. C. 899 : (1922) Bom. 105.

—Adoption — Who may adopt — Widow's power — Maharatta school — Consent of co-parceners of deceased husband unnecessary — Authority to adopt — Direction by husband — Second adoption — Deed — Construction — Partition — Division in status. See (1921) DIG. COL. 591. *YADAO v. NAMDEO*. 49 Cal. 1 : 26 C. W. N. 393 : L. R. 3 P. C. 41 : 15 L. W. 565 : 20 A. L. J. 481 : 24 Bom. L. R. 609 : 42 M. L. J. 219 : 30 M. L. T. 53 : (1922) (P. C.) 216 : 64 I. C. 536 (P. C.)

—Adoption — Widow — Co-widows — Preferential right of senior widow — Sudras — Implied prohibition — Living away from husband — Adoption by junior widow.

In the absence of any direction from the husband, the senior widow has under the Hindu Law the preferential right to adopt. 27 Cal. 351; 39 Mad 772 ; 2 L. W. 24 foll. 5 Bom. H. C. R., 181, 48 Cal. 582 Ref.

The above rule applies to Sudras also.

The senior widow does not forfeit her preferential right to adopt, from the mere fact of her having lived apart from her husband, in the absence of any proof of adultery or misconduct on her part.

The proper course for a junior widow would be to ask the senior widow to get the consent of the male sapindas to perform the adoption and to perform it herself and only if the senior widow was unwilling to perform it herself, it would be for the junior widow to ask her to agree to the adoption ceremony, being performed by herself.

*Per Ramesam, J.* — From the mere fact that the husband and wife were living apart for a long time, a prohibition against the wife's right to adopt cannot be implied, 23 Bom. 789 Foll. 8 Bom. 9 Dist. (*Spencer and Ramesam, JJ.*) *MUTHUSAMI NAICKEN v. PULA VARATAL*. 45 Mad. 266 : 42 M. L. J. 101 : (1922) M. W. N. 53 : 30 M. L. T. 60 (H. C.) : (1922) Mad. 106 : 15 L. W. 40 : 66 I. C. 504.

—Adoption — Widow — Daughter-in-law — Consent of father-in-law — Sufficiency of — Consent by will.

**HINDU LAW—Adoption.**

Under Hindu Law the daughter-in-law can adopt only with the consent of her father-in-law. Such consent is operative only during his life and a will is of no avail. (*Macleod, C. J. and Shah, J.*) *DATTATRAYA v. GANGABAI*, 46 Bom. 541 : 24 Bom. L. R. 69 : (1922) Bom. 321 :

——— **Adoption—Widow—Limits of her power**  
**—Extinction of joint family—Vesting of property in coparcener's widow.**

The widow of a deceased coparcener of a joint Hindu family cannot in the absence of specific authority make an adoption subsequent to the death of the coparcener who survived her husband especially when the estate has vested in the widows of the surviving coparcener. 44 B 483 ; 26 B. 526. 48 I. A. 513 ; 14 B. 463 Ref. (*Shah, A. C. J. and Crump, J.*) *SHIVBASAPPA A. NILANA* 24 Bom. L. R. 1162

——— **Adoption—Widow—Limits of her power**  
**—Widow inheriting as gotraja sapinda.**

In the Bombay Presidency a Hindu widow succeeding to an estate not her husband's but as a gotraja sapinda of the last male holder cannot make a valid adoption. The decision in 32 B. 499 is still good law and has not been affected by the decision in 48 I. A. 513. (*Macleod, C. J. and Shah, J.*) *YEKNATH NARAYAN KULKARNI v. LAXMIBAI KESHO GOPAL*, 24 Bom. L. R. 836 : (1922) Bom. 347.

——— **Adoption—Widow—Not competent to**  
**impeach adoption made by husband.**

A widow is bound by the act of her husband in making an adoption and she must accept all the implications of an adoption by him, valid or invalid. 23 Bom. L. R. 1272 foll. (*Macleod, C. J. and Coyajee, J.*) *CHIMABAI MALGAUDA PATIL v. MALLAPPA PAYAPPA*, 24 Bom. L. R. 489 : (1922) Bom. 397. 67 I. C. 656.

——— **Adoption—Widow—Power of—Vesting of estate—Divesting.**

Where the daughter-in-law succeeds as a Gotraja Sapinda of the last male owner in the absence of any nearer heir, she cannot adopt to her husband so as to affect the devolution of the estate inherited by her as a Gotraja Sapinda. (*Macleod, C. J. and Shah, J.*) *DATTATRAYA v. GANGABAI*, 46 Bom. 541 : 24 Bom. L. R. 69 : (1922) Bom. 321.

**APPLICABILITY OF.**

——— **Applicability of — Aboriginal tribes — Kacharies.**

The Aborigines (Kacharies) of Assam are governed by the Dayabaga Law. (*N. R. Chatterjee and Pearson, JJ.*) *NEARAM KACHARI v. ARDARAM KACHARI*, 35 C. L. J. 34 : 64 I. C. 145.

——— **Applicability—Sub-school of Hindu Law**  
**—Jaiswar Sub-division of Katarcaste—Residence—Domicile.**

In view of the decision of the Privy Council in 48 C. 30 (P. C.) a Hindu residing in a particular province of India is *prima facie* subject to the doctrines of Hindu law recognised in that province. The Jaiswar Sub-division of the Kalar

**HINDU LAW—Applicability.**

caste residing in the Central Provinces is governed by the Benares school of Hindu Law, having originally migrated from Oudh. In determining a person's domicile, the place where his property is situate is not conclusive (*Kotwal and Prideaux A. J. C.*) *GOVIND v. RADHABAI KALAR* 68 I. C. 325.

——— **Applicability of—Berar.**

The lex loci of Berar and the Maharashtra is the Mitakshara interpreted by the Mayukha. (*Prideaux, A. J. C.*) *GOVINDA v. DOOMI* 5 N. L. J. 187 : 65 I. C. 671.

——— **Applicability of—Brahmos — Whether**  
**Hindus—Declaration under Act III of 1872.**

A man by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say, something further than mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under Act III of 1879 is effective only for the purposes of the Act and does not involve a renunciation of the Hindu religion. (*Greaves, J.*) *JNANENDRA NATH ROY IN THE GOOD OF*, 26 C. W. N. 799

——— **Applicability of—Convert to Muhammadanism—Labbaik of Coimbatore—Custom, proof of.**

Labbaik of Coimbatore who are Hindu converts to Muhammadanism are *prima facie* governed by Mahomedan Law in matters of succession and the Hindu law rule excluding women from succession except in specified cases does not apply to the Labbaik. The evidence in the case was held not sufficient to support the plea of a special custom to that effect (*Sir Lawrence Jenkins*) *MAHOMED IBRAHIM ROWTHER v. SHAIK IBRAHIM ROWTHER*, 45 Mad. 308 : 43 M. L. J. 69 : (1922) M. W. N. 470 : 36 C. L. J. 64 : 24 Bom. L. R. 944. (1922) P. C. 59 : 30 M. L. T. 85 : 15 L. W. 354 : 67 I. C. 115 : L. R. 3 P. C. 149 : 26 C. W. N. 793 : 49 I. A. 119 (P. C.)

——— **Applicability of—Custom of succession.**

In matters of succession the courts are bound to apply the ordinary Hindu law in the absence of proof of a custom to the contrary. (*Shadi Lal, C. J. and Le Rossignal, J.*) *DALIPA v. DALLU*, 4 Lah. L. J. 336.

——— **Applicability of—Cutchi Memons—Joint family—Succession and inheritance.**

The application of the rules of Hindu law by custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. 16 Bom. L. R. 244 41 B. 181. Ref. (*Shah, A. J. C. and Pratt, J.*) *HAJI OSMAN HAJI ISMAIL v. HAROON SALLEH MAHOMED*, 24 Bom. L. R. 978 : 68 I. C. 862.

——— **Applicability of—Cutchi Memons—Law of joint family and inheritance—Partition—Will.**

Held, on a review of the decided cases, that Cutchi Memons settled in the Madras Presidency are governed by the Hindu law in matters of inheritance and succession. The Hindu law relating to the joint family and the inability of a member of that family to make a will equally apply to Cutchi Memons. (*Kumaraswami Sastri,*

**HINDU LAW—Applicability.**

J.) SIDDICK HAJEE ABOO BUCKER SAIT v. EBRAHIM HAJEE ABOOBUCKER SAIT.

31 M. L. T. 183 (H. C.)

——— *Applicability of—Dayanandis—Arya Samaj.*

Dayanandis are Hindus forming a sect of the Arya Samajists. They believe in the supremacy of the Vedas. (*Coutts and Adams, JJ.*) MT. SURAJ JOTE KUER v. MT. ATTAR KUMARI.

13 Pat. L. T. 551 : (1922) Pat. 235 : P. 378 : 67 I. C. 550

——— *Applicability of—Gonds—Guardianship of property—Mother—Brother.*

Gonds are not Hindus and the onus of proving that a Gond family has accepted the Hindu Law and is governed by it rests on the party alleging it. Consequently in the absence of proof of any special custom the question of guardianship among Gonds must be decided according to justice, equity and good conscience. As regards the properties of a minor, Gond, his brother is a preferential guardian to his mother though as regards the person of the minor, the mother is next to the father the natural guardian (*Halifax, A. J. C.*) KOLHU v. BELSING

17 N. L. R. 183 : 66 I. C. 303 : (1922) Nag. 201.

——— *Applicability of—Halai Memons—Bombay.*

The Halai Memons of Bombay, unlike those of Kathiawar, are governed by Mahomedan law in matters of succession 21 Bom. L. R. 85 foll. (*Marten and Fawcett, JJ.*) SIR MAHOMED YASUF v. HAR GOVINDAS JIVAN.

24 Bom. L. R. 753 : (1922) Bom. 392.

**DEBTS.**

——— *Debts—Antecedent debt—Liability for—After born sons.*

Where a mortgage of family property executed by a Hindu father before the birth of any son is renewed by another mortgage after the birth of a son, the latter mortgage is binding as an antecedent debt on the son's share of the family property. (*Batten and Kotwal, A. J. C.*) SHEO NARAIN v. NATHU.

5 N. L. J. 114 : 65 I. C. 786 : (1922) Nag. 1

——— *Debts—Antecedent debt, meaning of—Invalid mortgage not a good consideration for later sale. See HINDU LAW—JOINT FAMILY. CHET RAM v. RAM SINGH.*

44 All. 368 : 43 M. L. J. 98 : 27 C. W. N. 150 :

24 Bom. L. R. 1231 : (1922) P. C. 247 :

4 U. P. L. R. (P. C.) 64 : 67 I. C. 569 :

16 L. W. 89 : (1922) M. W. N. 455 :

31 M. L. T. 50 (P. C.) 49 I. A. 228 (P. C.) :

3 Pat. L. T. 363 (P. C.) : L. R. 3 P. C. 141 :

3 P. L. R. (P. C.) 1922.

——— *Debts—Antecedent debt—Money required for satisfying decree for pre-emption—If one.*

A pre-emption decree merely gives an option of acquiring certain property at a certain price. The decree-holder is under no obligation to acquire the property unless he chooses. Money required for such a purpose is not an antecedent debt.

**HINDU VAW—Debts.**

*Per Walsh, J.* :—There must be a real dissociation in fact to give effect to the doctrine of antecedency. (*Piggott and Walsh, JJ.*) CHATUR BHUJ v. GOBIND RAM

4 U. P. L. R. 43 (A) : 67 I. C. 668.

——— *Debts—Antecedent debt—Mortgage debts.*

The doctrine of antecedency applies where the debt is one incurred in substance and reality antecedently to the mortgage whether or not the debt so incurred was secured by a charge on the family property. Where the debt is one incurred by the heads of all the branches of a joint Hindu family the whole family property can be made liable including the interests of all the sons and grandsons. 6 Pat. L. J. 526, 42 M. 713 foll. (*Miller, C. J. and Bucknill, J.*) HARI PRASAD SINGHA v. SANRENDRA MOHAN SINHA.

3 Pat. L. T. 709 : (1922) P. 450 : 66 I. C. 945.

——— *Debts—Antecedent debt—Mortgage debt if can be so regarded—Son's liability*

Under the Hindu law a mortgage debt contracted by the father on the security of the family properties is not an antecedent debt for which the son would be liable. 39 A. 437 : 41 A. 235 : 41 A. 529 : 5 P. L. J. 120 : 15 N. L. R. 88 : 16 N. L. R. 64 Rel. (*Prideaux, A. J. C.*) BALOO v. GODAWARIBAI.

5 N. L. J. 238 : (1922) Nag. 136 : 66 I. C. 257.

——— *Debts—Antecedent debts—Mortgage by father—Son's liability.*

The son's share of the family property is not liable to satisfy a mortgage created by the father unless it is shown that the mortgage was created to discharge an obligation antecedently incurred by the father and the obligation was incurred wholly apart from the ownership of the joint estate 39 A. 437, 51 A. 235 : 6 P. L. J. 72 foll. (*Scott-Smith and Abdul Qadir, JJ.*) LAKHU MAL v. BISHEN DAS.

3 Lah. 74 : 66 I. C. 403 : (1922) Lah. 291.

——— *Debts—Antecedent debts—Mortgage—Necessity.*

Where the evidence shows that a mortgage executed by a Hindu father was in order to discharge certain prior mortgages and the prior mortgages had themselves been incurred for legal necessity, then the mortgage can be enforced against the whole family property including the interest of the son. The prohibition in *Sahu Ramchandra v. Bhup Singh* 39 A. 437 (P. C.) does not apply to such a case (*Rafiq and Piggott, JJ.*) RANJIT SINGH v. GANGA SAHAI.

L. R. 3 A. 328 : (1922) All. 291.

——— *Debts—Antecedent debt—Personal liability under mortgage—Alienation by father.*

To justify an alienation of joint family property by a father on the ground of antecedent debt, there must be not only antecedency in time but also true dissociation in fact. In the absence of proof of such a debt, the sons are not precluded from impeaching the alienation. The personal liability of a Hindu father executing a usufructuary mortgage, in case of dispossession of the mortgagee, does not constitute a debt which can be treated as antecedent 39 A. 437 : 31 A. 170 : 21

## HINDU LAW—Debts.

O. C. 200, 23 O. C. 204 ref. (*Daniels, J. C.*) *MUSAMMAT MANZURAN BIBI v. JANKI PRASAD*.  
9 O. L. J. 35 : (1922) Oudh 50 : 66 I. C. 930

— *Debts—Antecedent debt—Prior mortgage—Discharge of—Son not born at the time—Rights of.*

A prior mortgage executed by a Hindu father is an "antecedent debt" to discharge which he could alienate the family property. If the son was not born at the date of the prior mortgage he could not question the necessity for the same, when seeking to set aside the alienation 39 A. 437 (P. C.) : 33 A. 283 Ref. (*Piggott and Walsh, JJ*) *SURAJ PRASAD v. MAKHAN LAL*

44 A. 332 : 20 A. L. J. 236 : (1922) A. 51  
66 I. C. 134.

— *Debts—Antecedent debts—Promissory note—Deposit of title deeds—Personal covenant—Liability of ancestral property for debts of father.*

Where moneys are advanced to a Hindu father, and a promote is taken for the amounts advanced and subsequently the title deeds of properties are deposited as collateral security, in a suit by the creditor to enforce the debt. *Held*, that the promissory note debt remained a simple money debt, though subsequently secured by a deposit of title deeds, and that being dissociated in fact from the mortgage, it constituted an antecedent debt for which the whole of the family properties were liable including the shares of the sons.

Per *Spencer J.* The personal covenant contained in an earlier mortgage and subsisting at the time of a later mortgage cannot constitute an "antecedent debt" in a legal sense. A personal covenant given by a father at the time of entering into a mortgage does not constitute an antecedent debt. 39 A. 437 : 44 A. 368 Rel. 60 I. C. 177 diss.

Per *Devadoss, J.* A personal covenant in a prior mortgage can be an antecedent debt in respect of a subsequent mortgage of the same properties 39 A. 437 : 44 A. 368 : 21 C. W. N. 957 Rel. (*Spencer and Devadoss, JJ.*) *VADAMALAI PILLAI v. SUBRAMANIA CHETTIAR*, 16 L. W. 936.

— *Debts—Antecedent debt—What is—Test.*

To make a debt, which is in fact antecedent in point of time, not antecedent in the sense of the ruling in *Sahu Ram's* case 39 A. 437 (P. C.), it must be found that there was an understanding between the creditor and the debtor at the time of the loan that it will be secured later by a mortgage of the joint estate. The true test is whether the payment of the advance and the transfer securing its payment are a single transaction 9 N. L. R. 71 : 14 N. L. R. 41 Rel. (*Kotwal and Prideaux, A. J. C.*) *PANDURANG v. KESHORAO*.

64 I. C. 718.

— *Debts—Antecedent debts—What are—Prior mortgage when an antecedent debt.*

*Held*, by the Full Bench (*Dawson Miller, C. J. dissente*) that when the consideration for a mortgage executed by a Mitakshara father is a debt in substance and in reality incurred antecedently to the mortgage it is enforceable against the father and his sons, provided that the loan was not raised for an illegal purpose, even though no legal necessity for the loan is established and

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even though the mortgage debt was incurred on the security of joint family property or the object of the mortgage was to raise a loan to pay such a debt.

5 P. L. J. 120 and 6 P. L. J. 72. over ruled.

41 A. 235, dissented from. 42 Mad. 711, followed. 39 A. 437, 25 A. 407 : 6 M. I. A. 393 : 31 A. 176, 1 A. 575 : 13 C. 21 and 2 P. L. T. 147, Referred to. (*Dawson Miller, C. J., Jwala Prasad Das, Adams and Bucknill, JJ*) *MATHURA MISRA v. RAJKUMAR MISRA*. 6 Pat. L. J. 526 (F. B.)

— *Debts—Father—Father's debt contracted while estate under the Court of Wards—Son's pious obligation.*

Where a Hindu contracted debts while his estate was under the Court of Wards and he was incompetent to contract, his son is under no pious obligation to pay off the debt. A bond executed in lieu of the debt is not enforceable against the son. (*Rafique and Lindsay, JJ*) *CHAUBEY BALDEO PRASAD v. BINDESHRI PRASAD*

44 A. 388 : 20 A. L. J. 241 : (1922) All. 215 :  
66 I. C. 128

— *Debts—Father—Mortgage debt—Son's liability.*

In the absence of proof of legal necessity or of an antecedent debt to discharge which a mortgage by a Hindu father was executed, the court, would not enforce the mortgage against the son's share of the property on the ground of their pious obligation to pay their father's debt 52 I. C. 108 not foll. 65 I. C. 950, 22 O. C. 84 : 31 A. 176 Rel. (*Dalal, A. J. C.*) *GAJADHAR BAKHSH SINGH v. BAIJNATH*

20 A. L. J. 208 :  
(1922) All. 50 : 65 I. C. 967

— *Debts—Father—Son's liability.*

A Hindu son is bound by a charge on ancestral property created by his father before his birth (*Coults and Ross, JJ.*) *RAMCHANDRA PRASAD v. MAHABIR PRASAD SINGH*. 64 I. C. 247.

— *Debts—Father—Renewal of time barred debts—Son's liability.*

It is competent to a Hindu father to execute a fresh bond in lieu of time-barred debts contracted by him and the sons would be under a pious obligation to pay off the bond after the father's death. The Hindu law does not recognise any rule as to the extinction of claims by the efflux of time. 6 M. 293 foll. (*Gokul Prasad and Stuart, J.*) *RAMKISHAN RAI v. CHHEDI RAI*.

44 All. 628 : 20 A. L. J. 577 : (1922) All. 402.  
68 I. C. 235.

— *Debts—Father—Son's liability—Pious obligation*

The existence of a pious obligation does not validate a mortgage or alienation which is otherwise invalid. (*Kannarya Lal, J. C.*) *RAM AUTAR v. BENI SINGH*. 25 O. C. 89.

(1922) Oudh 135 : 68 I. C. 196

— *Debts—Grandfather's debts—Liability of grandsons—Debt of granduncle accepted by grandfather.*

Where the grandfather of the defendants had along with other adult members of the joint family mortgaged the joint family property in

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favour of the plaintiff and it was found that the mortgages had been executed in renewal of an earlier mortgage which in its turn was executed, to satisfy a debt of the grandfather's brother. *Held*, in a suit to enforce the mortgage, that the grandfather of the defendants having accepted the debts of his brother as a debt payable by the joint family, the grandsons were liable for the mortgage (*Piggott and Sulaiman, JJ.*) *RAM RATAN MISIR v. KAPIL DEO SINGH.*

L. R. 3 A. 541.

—Debts—Liability for—Ancestral or self-acquired property *See* (1921) DIG. COL. 602 *SHEIKH KAROO v. RAMESHWAR SAO.*

3 Pat. L. T. 43.

—Debts—Liability of grandson during son's life—Doctrine of pious obligation. *See* HINDU LAW JOINT FAMILY.

3 Pat. L. T. 363 (P. C.)

—Debts—Liability of sons—Antecedent debt *See* (1921) DIG. COL. 603, *SHEIK ABDUL RAHMAN v. SHIB LAL SAHU.* 6 Pat. L. J. 650 (1922) Pat. 81 : 4 U. P. L. R. (Pat.) 13 : (1922) P. 252.

—Debts—Liability for—Son's liability for father's simple money debt—Life-time of father—Declaratory suit *See* (1921) DIG. COL. 603 *SHEODAN SINGH v. BHAGWAN SINGH.* (1922) All. 323 64 I. C. 75

—Debts—Manager—Liability of junior members.

There is no presumption that a debt contracted by the manager of a Hindu family was contracted for the benefit of the family. In each case it must be proved that the debt for which all the members of the family are sought to be made liable was incurred for the benefit of the family. 174 P. L. R. 1916 Ref. (*Abdul Raoof and Harrison JJ.*) *MELA MAL v. GORI*

3 Lah. 288 : (1922) Lah. 200 : 66 I. C. 485.

—Debts—Nature of—Antecedent debts—Mortgage—Necessity. *See* (1921) DIG. COL. 599 *BHUP KUAR v. BALBIR SAHAI*

44 A. 190 : 64 I. C. 885 : (1922) All. 342.

—Debts—Nature of—Family debts—Coparcener incurring debts on behalf of family—Manager and other members how far liable. *See* (1921) DIG. COL. 601 *OBILISSETTI VENKATA KRISHNAYYA v. SUBBIAH.* 68 I. C. 462.

—Debts—Necessity—Expenses of criminal case—Purchase of war bonds—Trade debts.

Debts incurred by the manager in defending himself against a criminal charge are payable by the family. A sum of Rs. 32,000 is not an unreasonable expenditure in the case of a respectable family. Debts incurred for purchasing war bonds and thus assuring a steady income to the family are also binding on the family. 4 Pat. L. J. 653 Ref. (*Kotval and Prideaux, JJ.*) *NUMBAJI v. KISAN LAL.* 65 I. C. 668.

—Debts—Necessity—Marriage expenses of male members of joint family.

Under the Hindu Law the marriage expenses of the male members of a joint Hindu family is a

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necessity and debts contracted to meet such expenses would be binding on his family, 37 Mad. 273, 32 All. 675 ; 32 Bom 81 foll (*Das and Adams, JJ.*) *DEBI LAL SAH v. NAND KISHORE GIR.* 1 Pat. 266 : (1922) P. 22 : 3 Pat. L. T. 759 : 65 I. C. 315.

—Debts—Son's liability—Father's debts—Pious obligation

A money decree against a Hindu father for a debt neither illegal nor immoral whether incurred for family purposes or not, may be enforced in his life time by the execution sale of the entire coparcenary property and is binding on the sons. In order to absolve a Hindu son from liability for his father's debts it is not enough to prove that the father was a man of extravagant and vicious habits but there must be some definite connection established between the debt and the expenditure. (*Abdul Raoof and Moti Sagar, JJ.*) *RAM RATTAN v. BASANT RAI.* 2 Lah. 263 : 3 Lah. L. J. 563 : 64 I. C. 121.

—Debts—Son's liability—Decree debt.

The onus of proving that a decree obtained on a debt contracted by a Hindu father cannot be executed against the entire family property including the son's share on the ground that the debt was non-existent or illegal is on the son, and he having failed to discharge it the joint property was liable 16 Mad. 99 foll (*Abdul Raoof and Moti Sagar, JJ.*) *RAM RATTAN v. BASANT RAI.* 2 Lah. 263 : 3 Lah. L. J. 563 : 64 I. C. 121.

—Debts—Son's liability—Decree against father—Liability of entire family estate.

Where there is a simple money decree against a Hindu father which is not shown to have been on the basis of a debt tainted with illegality or immorality, the decree can be executed against the father and the father's interest in the family property can be attached and sold 39 A. 237 dist ; 15 A. L. J. 147 foll. (*Stuart and Sulaiman, JJ.*) *KALYAN SINGH v. DHARAM SINGH.*

20 A. L. J. 721 : L. R. 3 A. 492 : (1922) A. 489 : 68 I. C. 794.

—Debts—Son's liability—Mortgage—Personal remedy.

In the absence of proof of necessity the sons of a Hindu are not liable for a mortgage debt contracted by their father. The remedy of the creditor on the basis of the pious obligation of the sons is not co-extensive with his remedy on a binding security. Where the sons are sought to be made liable on the personal obligation contained in the mortgage executed by their father, the suit must be brought within six years from the due date under the bond. 31 A. 176 foll. 39 A. 437 ref. (*Lindsay, J. C.*) *RAM CHHATTAR v. RAM LAL.* 24 O. C. 395 : 65 I. C. 950.

—Debts—Son's liability for father's debts—Remedies of creditor.

So long as a Hindu family remains undivided a creditor can proceed against the interest of the sons in the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. 4 M. 1 ; 41 M. 136 ; 140 ; 38 M. L. J. 402 : 39 A. 437 ; 43 M. L. J. 98

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Ref. (*Spencer and Deva Doss, JJ*) KURUKUNDI  
SAMA RAO v. FIRM OF MARWADI VANNAPI VAJINJI.  
43 M. L. J. 745 : (1922) M. W. N. 708

———*Debts—Son's liability—Mortgage invalid—Pious obligation to pay debt.*

The liability of a son or grandson to pay the debt of his ancestor, which is not tainted with immorality or was not taken for illegal purposes, cannot however be enforced so long as the original debtor is alive and is capable of paying his debts.

During the life-time of the father apart from any question of family benefit or necessity the liability of a son to pay a debt due by his father is only contingent. The existence of that liability contingent or vested, has been utilised to build up the doctrine of antecedent debt to validate a mortgage or sale effected by the father to pay such debt, and in many cases, a creditor has been allowed to recover a debt due by the father from the entire family property, if not tainted with immorality, as if the liability were concurrent 44 A. 126, 39 A. 237 Ref

If the attempt to enforce a mortgage on the theory of pious obligation fails, the right to attach the family property during the life time of the father on the strength of that pious obligation can be still less recognised because if no pious obligation exists, it must be as insufficient to support the one as to support the other.

The doctrine of antecedent debt, resting as it does on the theory of pious obligation, is only intended for the protection of third parties who may have acquired rights in good faith in the family property, and if a vendee cannot invoke it for validating a sale effected in lieu of an invalid antecedent mortgage in his own favour, it is still less open to a creditor, whose mortgage has been declared to be invalid, to recover the debt, represented by that mortgage, while the mortgagor is alive, from the shares of his sons, who have been exempted from liability out of the very property, the mortgage of which has been declared to be unenforceable. The debt for the payment of which this liability is sought to be enforced is in no sense an antecedent debt. It is the very debt for the repayment of which the mortgage was made; and if the doctrine of pious obligation cannot be invoked to support the mortgage, it can hardly be invoked during the father's life-time to enforce the liability of the family property other than the interest of the debtor for its repayment. (*Stuart and Kanhaiya Lal, JJ.*) KISHAN SINGH v. CHEJU SINGH  
L. R. 3 A. 609.

———*Debts—Son's liability—Pious obligation.*

It is well-established that under the Hindu Law, subject to certain limited exceptions, the whole of the undivided estate of a joint family is liable in the hands of the sons for the debts of the father unless the debts are taken for illegal or immoral purposes. There is a pious obligation on the sons to pay such debts. Where the father is alive, the obligation is only contingent, for the father may discharge the same in his life-time or there may be ample personal estate belonging to the father available out of which the debts might be

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discharged or no joint family property left from which their satisfaction might be possible.

It makes no difference in principle whether the property passed out by foreclosure or sale. (*Kanhaya Lal, J. C.*) BINDESHARI SINGH v. AUDESH PRASAD SINGH.  
25 O. C. 16 :  
(1922) Oudh 85 : 68 I. C. 283.

**Gifts.**

———*Absolute estate—Gift by husband to wife—Words empowering alienation.*

Where a Hindu husband makes a gift of land to his wife, he can use words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership including the power to alienate. In such a case it is not necessary that the power to alienate should be given by express declaration. 30 A 84, 30 M. L. T. 149 Ref (*Lord Buckmaster*) RAMACHANDRA RAO v. RAMACHANDRA RAO.  
45 Mad 320 :  
43 M. L. J. 78 : (1922) P. C. 80 :  
24 Bom. L. R. 963 : 16 L. W. 1 :  
(1922) M. W. N. 359 : 20 A. L. J. 684 :  
26 C. W. N. 713 : 30 M. L. T. 154 :  
35 C. L. J. 545 : L. R. 3 P. C. 158 :  
67 I. C. 408 : 49 I. A. 129 (P. C.)

———*Gift—Construction—Defeasance clause—Effect of—Transferee from donee—Position of.*

A clause in a deed of gift that the donor was to become entitled to the properties gifted on the happening of a specified contingency is not invalid or opposed to Hindu Law. A Hindu who had been sentenced to transportation for life made a gift of his properties to a relation of his subject to a condition that the donee should hand over the properties to the donor in case he returned to his native village after the termination of his sentence. The donee alienated the properties gifted to strangers who had notice of the terms of the gift. The donor subsequently returned and sued for possession. *Held*, that he was entitled to recover the properties from the alienees who could not be said to be *bona fide* purchasers. (*Krishnan and Venkatasubba Rao, JJ.*) VENKATA RAMA AYYAR v. AYYASAMI AYYAR  
43 M. L. J. 340 : 16 L. W. 552

———*Gift—Construction—Gift to adopted son—Adoption declared invalid—Persona designata*  
*See HINDU LAW, WILL, CONSTRUCTION.*

24 Bom. L. R. 794.

———*Gift—Daughter in-law—Absolute estate—Bahamah wajib—Meaning of.*

*Held* on a construction of the gift that the estate conferred on the widowed daughter-in-law was on absolute estate and that the words "bahamah wajib" occurring in the deed of gift meant "with all rights" (*Stuart J.*) ABHEE SINGH v. HIMT.  
4 U. P. L. R. (A.) 36 :  
65 I. C. 633.

———*Gift—Delivery of possession if necessary*

Under the Hindu law, delivery of possession of immovable property is not essential to the validity of a gift thereof. 77 A. 169 : 25 A. 358 foll. (*Ryves and Gokul Prasad, JJ.*) DEBI SINGH v. BANSIDAR.  
(1922) All. 44 : 66 I. C. 480.



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———Gift—Delivery of possession—Registration. See (1921) DIG COL. 507, JAGANNATH MARWARI v. CHANDI BIBI. 67 I. C. 31.

———Gift—Father—Power to give reasonable portion of family property to daughter. See HINDU LAW, JOINT FAMILY, FATHER.

30 M. L. T. 255 (P. C.)

———Gift—Female donee—Absolute estate. See (1921) DIG COL. 607 DHANPAT RAI v. BADRI DAS. 65 I. C. 455

———Gift—Female donee—Absolute estate—Malik. See HINDU LAW WILL, CONSTRUCTION 42 M. L. J. 335. (P. C.)

———Gift—Female donee—Annuity—Putra-pautradi Krame—Effect of.

A series of life-estates in tail male is repugnant to Hindu Law and Courts will give to the expression "*putra pautradi Krame*" occurring in a gift of an annuity to a Hindu lady, its usual technical meaning so that the annuity will be perpetual and on the death of the lady, her son would take an absolute estate (*Teunon and Newbould, JJ.*) RAJENDRA MOHAN MOULIK v. UPENDRA NATH GUHA. 61 I. C. 518

———Gift—Oral gift—Proof of.

The onus of proving an oral gift is upon the person setting it up. (*Das and Adami, JJ.*) RAMESHWAR NARAIN SINGH v. RIKNATH KOERI. 67 I. C. 451

———Gift—Unborn person—Validity—Creation of annuity.

A grant of an annuity is a right of property and as it is an incorporeal right, the test of validity in each case is, whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corrody and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence. If there is such a transfer there is no room for the application of the rule in the *Tagore case* as to the invalidity of a gift to an unborn person. 13 C. L. J. 85; 39 C. 87 Ref. (*Mookerjee and Chotzner JJ.*) JATINDRA MOHAN MONDAL v. GHANASHYAM CHOWDHURY 36 C. L. J. 428.

## Guardianship.

———Guardianship—Alienation—Legal necessity.

Where the mother as guardian alienated certain property but only a portion of the consideration for the alienation of the property was for legal necessity, *Held* on the paying back to the vendee that part of consideration which was for legal necessity the plaintiffs would be entitled to get back their share in the property alienated (*Gokul Prasad J.*) LAKHRAM SINGH v. SHEO PRASAD (1922) All. 316

———Guardianship—Minor—Acts of the guardian how far binding.

A Hindu minor is bound by all acts of his guardian done bona fide and for the benefit of the minor's estate. (*Drake Brockman, J. C.*) MANGULAL v. MR. NANNAL 5 N. L. J. 1: (1922) Nag. 104; 67 I. C. 808

## HINDU LAW—Impartible estate

———Guardianship—Mitakshara family—Adult co-parceners—Testamentary guardian.

It is not competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners, to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. 41 M. 561 and other cases followed. Consequently it is not open to a father to appoint a testamentary guardian for the properties in the hands of his minor sons in super-session of the mother (*Kotwal, A. J. C.*) JIWANDAS v. RAJRANI. 64 I. C. 433.

## Impartible Estates.

———Impartible estate—Jagir—Saranjam—Family custom.

Whether a particular estate is impartible or is subject to the ordinary Hindu Law of inheritance must be decided according to the circumstances of each case and the evidence given in it. A saranjam in the Bombay Presidency is ordinarily impartible and it descends to the eldest representative of the last holder. This special feature of a saranjam estate should not necessarily be made applicable to a jagir village in Berar, especially when the jagir in question is a grant of the village itself and not merely of the revenue. (*Dhobley, A. J. C.*) KRISHNA RAO v. NILKANTH. 5 N. L. J. 25: (1922) Nag. 52.

———Impartible estate—Evidence of—Origin of the estate—Subsequent dealings—Partition of estate.

An estate may be the family property of a joint undivided family and yet be impartible. Where the family in question was an ancient and noble one the property had been granted in ancient times by the Moghul Emperor for services, the permanent settlement had been made with the Raja for the time being to the exclusion of his brothers, the repeated succession of the eldest son to the estate though there were many sons left: *Held* that the estate was impartible and the succession to it went to the eldest male descendant in the senior branch. The mere fact that separate estates have been formed by the division of one entire estate, is not a circumstance which decides the issue in favour of partibility. The impartibility of the estate does not destroy its nature as joint family property or render it the separate property of the last holder unless there was something equivalent to partition. (*Das and Admi, JJ.*) DWARKA PRASAD v. JAI BARHAM. (1922) P. 322. 67. I. C. 686.

———Impartible estate—Succession by survivorship—Application for personal decree—Succession certificate if necessary.

Where a person succeeded to an impartible estate by survivorship and applied for a decree under O. 34, R. 6 of the C. P. Code against another, a succession certificate need not be obtained as a condition precedent to the main maintainability of the application. Case law as to succession in impartible estates considered. (*Das and Adami, JJ.*) SHIVA PRASAD SINGH v. BENI MADHAB CHOWDHURY. 1 Pat. 387 (1922) P. 529.

———Impartible estate—Succession—Primo-geniture—Custom—Family custom—Evidence—

## HINDU LAW—Inheritance

Rajput family—Migration. *See* (1921) DIG COL 610 RANA SHEONATH SINGH *v.* BADAN SINGH.

48 Cal. 997 : 20 A. L. J. 443 : 26 C. W. N. 226 : (1922) P. C. 146 : 64 I. C. 194 (F. C.)

## Inheritance.

———Inheritance—Bandhus—Mother's brother's son—Mother's sister's son.

Under the Mitakshara school of Hindu Law a mother's sister's son and a mother's brother's son are entitled to succeed equally to the property of the propertus. They are both *atmabandhus*, and it is difficult to find any legitimate ground of preference between them (*Macleod, C. J. and Shah, J.*) RAJEPPA RANAPPA *v.* GANGAPPA JOTAPPA. 24 Bom. L. R. 789 : (1922) Bom. 420

———Inheritance—Bandhus—Sister's son—Wife's sister.

Under the Bengal School of Hindu Law a sister's son is an heir unless there is a custom to the contrary.

A wife's sister cannot be an heir under the Hindu Law but she can be an heir if a custom to that effect is proved. (*N. R. Chatterjee, and Pearson, JJ.*) NEARAM KACHARI *v.* ARDARAM KACHARI. 35 C. L. J. 34 : 64 I. C. 145.

———Inheritance—Bandhus—Sister's daughter—Son's daughter's son—Priority—Bombay School.

According to Hindu law, among bandhus, the son's daughter's son is entitled to succeed in preference to the sister's daughter.

Per *Macleod, C. J.*—Though it may be thought that the Bombay High Court in deciding that all male bandhus should be preferred to female bandhus without regard to propinquity has gone too far, still there is no authority for the proposition that bandhus of different sex but of equal propinquity should take equally.

Per *Shah, J.* : The list of bandhus given in the Mitakshara is merely illustrative and not exhaustive ; nor does the list necessarily indicate any thing more than this that the *atma bandhus* have to be preferred to pitri bandhus and that the pitri bandhus are to be preferred to the matri bandhus.

Among bandhus, a sister's daughter is entitled to preference over the sister's son's son for the purposes of inheritance.

In the Bombay Presidency a sister would be preferred to a son's daughter.

Though Balambhatti is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination (*Macleod, C. J. and Shah, J.*) DATATRAYA BHIMRAO SARNIS *v.* GANGABAI GANESHBHAT. 44 Bom. 541 : 24 Bom. L. R. 69 : (1922) Bom. 321.

———Inheritance—Bandhus—Step sister's step-son—Not an heir—Mitakshara.

The stepson of a step-sister of the deceased is not his heir under the Mitakshara School of Hindu Law. 6 C. 119 ; 22 C. 339 ; 42 C. 384 ; 8 M. 107 ; 37 M. 286 ; 18 M. 168 ; 2 B. 388 ; 16 M. 716 ; 23 M. I. (P. C.) 12 M. I. A. 448 ; 43 C. 944 ; Ref. (*Spencer and Ramesam, JJ.*) C. SAMINATHA CHETTY *v.* ANGAMMAL. 45 Mad. 257 :

42 M. L. J. 4 : 15 L. W. 48 : 30 M. L. T. 242 (1922) Mad. 46 : 65 I. C. 736.

## HINDU LAW—Inheritance.

## INHERITANCE—Exclusion from

———Inheritance—Exclusion from—Congenital blindness—Rule of obsolete

The rule of Hindu Law excluding a congenitally blind Hindu from inheritance is not obsolete. Texts and cases reviewed, (*Sir Walter Schwabe C. J., Oliphant and Coutts Trotter, JJ.*) PUDIAYA NADAN *v.* PAVANASA NADAN. 43 M. L. J. 596 : 16 L. W. 563 ; 31 M. L. T. 320 (H. C.) ; (1922) M. W. N. 693 (F. B.)

———Inheritance—Exclusion from—Grounds of—Dumbness—Adoption of son *See* (1921) DIG COL 618 BHARAMAPPAGANDA *v.* UJJANGAUDA.

46 Bom. 455 : (1922) Bom. 173 : 65 I. C. 216.

———Inheritance—Exclusion from—Insanity.

Insanity as a ground of exclusion from inheritance under the Hindu Law, need not be congenital 43 Mad. 464 ref. Insanity at the time when the succession opens is sufficient to disqualify and under the Mitakshara Law a person who is at the time insane is not entitled to share upon a partition in a joint family ; if he is not entitled to share he is not entitled to demand partition 8 Cal. 149 ; 8 Cal. 919 : 10 Cal. 639 38 All. 117 ref to. (*Prideaux, A. J. C.*) VITHOBA *v.* WAMAN. 18 N. L. R. 80 : (1922) Nag. 161 : 68 I. C. 111.

———Inheritance—Exclusion from—Grounds of—Party to murder—Descendants of—Rights of

Under the Hindu Law a person who has been a party to a murder is prevented from succeeding to the estate of the person murdered on the principal that no one shall be allowed to benefit by his own wrongful act. It is compatible with justice, equity and good conscience that the exclusion of a murderer from the inheritance of the man whom he had murdered must be taken to include his direct lineal descendants also 41 P. R. 1906 foll. 15 W. R. 70, 17 C. W. N. 341, 27 Mad. 591 31 Mad. 100 ref. (*Broadway and Abdul Qadir, JJ.*) HAR BHAGWAN *v.* HUKAM SINGH.

3 Lah. 242 : 4 Lah. L. J. 245 : (1922) Lah. 243 : 68 I. C. 769.

## Order of Inheritance.

———Inheritance—Son—Mother and father—Preference.

Under the Mitakshara law the mother is a preferential heir to the father in the case of succession to the property of their son. (*Ashworth, A. J. C.*) SUBEDAR SINAH *v.* BAIKHAM SINGH.

90 L. J. 435 : (1922) Ondh 277

———Inheritance—Order of—Posthumous son

—Right of. *See* 1921 DIG. COL. 612 KUSUM KUMARI DASI *v.* DASARATHI SINHA. 67 I. C. 210.

———Inheritance—Illegitimate son—Adulterous union—Offspring of—No rights—Marriage—Abandonment—Proof.

For an illegitimate son, among Sudras, to succeed to the property of his putative father, he must show that the union between his parents was continuous and lawful. The offspring of an adulterous or incestuous connection cannot inherit 33 M. 366 : 1 B. 97 foll. The mere fact that a husband leaves his wife and goes abroad for a

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long time and on his return does not take back his wife from the company of a stranger with whom she had contracted a *churi* marriage and had long been living, does not constitute an abandonment of the wife nor does it effect a severance of the marriage tie. The illegitimate offspring of the *churi* marriage cannot inherit. (*Dhobley, A J. C.*) *SHEONANDAN SINGH v PRAN SINGH.*

18 N. L. B. 115 : 64 I. C. 897

———*Inheritance—Illegitimate son—Survivorship—Other castes—Distinction—Succession certificate—Necessity.*

Illegitimate sons in the three higher classes never take by inheritance but are only entitled to maintenance from the estate of their father. An illegitimate son of a Sudra takes his father's property by survivorship and consequently no succession certificate is necessary to enable him to recover his debts. 18 C. 151 Ref. (*Pradeaux, A J. C.*) *GANULAL v KASHIRAM* 68 I. C. 417

———*Inheritance—Illegitimate son—Sudras—Kunbis—Maharattas.*

Maharatta Kunbis of the Central Provinces are Sudras and an illegitimate son of a kunbi would get a half share of what he would have got of his father's property had he been legitimate (*Pradeaux, A J. C.*) *GOPAL RAO v. SITARAM RAO.*

64 I. C. 863

———*Inheritance—Order of succession—Illegitimate son—Collateral succession. See (1921) DIG. COL. 612* *ZIPRU CHINDHU v. BOMTYA DAGADU.*

46 Bom. 424 : (1922) Bom. 176.  
64 I. C. 975

———*Inheritance—Order of—Daughter's son—Right of representation—Daughter's son's son.*

On the death of a Hindu dying intestate leaving a daughter's son and a daughters' son's son, the former succeeds to the estate to the exclusion of the latter. 27 M. 382 Ref.

To constitute a severance in status, a declaration of intention by a member of a joint Hindu family must be absolutely unequivocal. 35 All. 81. 24 M. L. J. 345 and 33 M. L. J. 746 Ref. (*Napier and Odgers, JJ.*) *KRISHNASWAMI BATTAR v SREENIVASA BATTAR.*

42 M. L. J. 124 :  
30 M. L. T. (H. C.) 168 : (1922) Mad. 341

———*Inheritance—Order of succession—Bandhus—Maternal uncle—Father's sister's grandson—Preference. See (1921) DIG. COL. 615.* *VEDACHALA MUDALIAR v RANGANATHAM*

24 Bom. L. R. 649 : 30 M. L. T. 198.  
4 U. P. L. R. (P. C.) 13 : 26 C. W. N. 159  
(1922) P. C. 33 : 64 I. C. 402 (P. C.)

———*Inheritance—Order of—Brothers—Consanguine brother preferred to uterine brother.*

Under the Hindu law, a brother by the same father though by different mothers is entitled to succeed in preference to a brother by the same mother but by different fathers.

For the purpose of inheritance sons of the same father are brothers; and there is a distinction made between sons by different mothers. But the sons of the same mother by a different father though born of the same womb belong to a different family and as such are entirely outside the category of the class of heirs under the heading of

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"brothers" (*Macleod, C. J., and Shah, J.*) *EKOBA PARASHRAM v. KASHI RAM TOTA RAM*  
46 Bom. 716 : 24 Bom. L. R. 229 : (1922) Bom. 27.  
66 I. C. 341.

———*Inheritance—Order—Widow of predeceased son—Nephew—Preference—Custom.*

Neither under Hindu Law nor under the custom of the Punjab is the widow of a predeceased son a preferential heir to the nephew of the last male owner. (*Broadway and Molt Sagar, JJ.*) *CHINT RAM v. SHIB DEVI.*

4 Lah. L. J. 10 :  
(1922) Lah. 207.

———*Inheritance—Order of—Half blood and full blood*

Where the parties are governed by Hindu Law the brother and nephews of the whole blood exclude those of the half blood in the absence of proof of a custom to the contrary. (*Broadway and Abdul Qadir, JJ.*) *HAR BHUGWAN v. HUKAM SINGH.*

3 Lah. 242 : 4 Lah. L. J. 245 :  
(1922) Lah. 243 : 68 I. C. 769.

———*Inheritance—Sudra ascetic.*

As a Sudra cannot enter the order of Yathi or Sanyasi, devolution of property left by a deceased Sudra who has purported to become an ascetic and renounced the world is regulated by the ordinary law of inheritance in the absence of proof of any general or special usage to the contrary.

22 Mad. 302 followed (*Macleod and Kanga, JJ.*) *MAHANT NARASINH DAS GURU SITARAM DAS v. KHANDE RAO VINAYAK JOSHI.*

(1922) Bom. 295.

———*Inheritance—Sanyasis—Guru and chela Initiation—Kaka guru—Rights of.*

As regards succession to a mahant, in the presence of a lawfully appointed *chela* the guru is not a preferable heir. If the preliminary ceremonies of initiation of a person as *chela* are done by one mahant and the *viyaja homa* by another after the death of the former mahant the position of the latter is stronger than that of an ordinary *acharya guru* and he succeeds to the *chela* in the absence of nearer claimants. A *kakaguru* is one standing in the line of spiritual relationship in a position analogous to that of the nearest male agnate in a case of ordinary succession to the estate of a deceased Hindu. (*Rafiq and Piggotti, JJ.*) *SWARTH GIR v. JAGANNATH.*

L. R. 3 A. 583.

———*Interest—Damdupat—Rule of—Not applicable to decree. See INTEREST—DAMDUPAT.*

65 I. C. 275.

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———*Joint family—Acquisitions—Money spent on litigation as a result of which property was obtained*

In the absence of anything to show that property acquired as a result of a litigation by a member of a joint Hindu family was thrown into the common stock, it does not become joint family property merely by reason of the fact that the funds of the joint family were spent in the litigation. (*Phillips and Devadoss, JJ.*) *CHELASAMI ATCHAMMA v. CHELASAMI VENKATA SUBBAYYA.*

16 L. W. 268 : (1922) M. W. N. 487 :  
(1922) Mad. 423.

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———*Joint Family—Acquisitions—When joint family property—Nucleus—Existence of.*

The mere existence of a family nucleus will not impress the acquisitions of a member of the family with the character of joint family property unless it is shown that the acquisitions could have been made from the income derived from that nucleus. Consequently where a member of a joint Hindu family obtained partition with his brothers properties worth 200 rupees and was allotted debts to the extent of Rs. 500 and he subsequently acquired as *Dubash* (agent) of certain big commercial men, *Held*, that the acquisitions were his own self-acquisitions and that the nucleus did not impress them with the character of joint family property. 27 M. L. J. 677, 33 A. 677 *Rel*; 35 A. 564; 27 M. 228; 2 Lah. 40 *Rel*, (*Spencer and Devadoss, JJ*) *VADAMALAI PILLAI v. SUBRAMANIA CHETTIAR*. 16 L. W. 936.

———*Joint family—Alienation by coparcener—No benefit or necessity—Alienation how far binding. See* (1921) DIG. COL. 619 *MUNSHI LAL v. SOHAN LAL*. 66 I. C. 881.

———*Joint family—Alienation, consent of coparcener—Estoppel by conduct.*

Though a lease of joint family property was actually executed by two out of three brothers still it was found that the other brother was acting in concert and in the same interest with the executants on the lease. *Held* that the brother who did not join in the lease was estopped from disputing the validity of the lease. (*Fremantle, J. M.*) *RAJA RAM SINGH v. RAMI KEWAY*. L. R. 3 A. 81. (Rev); 65 I. C. 577.

———*Joint family—Alienation—Co parceners—Alienation by some of their share—Subsequent donee from all the co parceners—Right of. See* (1921) DIG. COL. 619 *RAGHUBAR PANDE v. GOKUL PRASAD PATAK*. 65 I. C. 107.

———*Joint Family—Alienation—Co-parceners—Invalidity*

Where a co-parcener creates a mortgage over joint family properties on his own account the mortgage is invalid even as regards his own share in the family property (*Das and Adam, JJ*) *DEBI LAL SAH v. NANDKISHORE GIR*. 1 Pat. 266; (1922) P. 22. 3 Pat. L. T. 759; 65 I. C. 315.

———*Joint family—Alienation—Co parcener—Rights of alienee from—Suit to set aside alienation.*

A purchaser from a member of a joint Hindu family has only an equity as against the other members to work out his interest by a suit for a general partition. In cases where possession of the property is claimed by a co-parcener on the ground of the invalidity of the alienation as against him, the court must decree possession and simply declare the right of the purchaser to a partition. The purchaser is not in such a case entitled to a partition either of the specific items conveyed or of the joint family property generally. (*Kumara-swami Sastri and Deva Doss, JJ*) *SUBBA GOUNDAN v. KRISHNAMACHARI*. 45 Mad. 449; 42 M. L. J. 372; 30 M. L. T. 217; 15 L. W. 537; (1922) M. W. N. 269; (1922) Mad. 112. 68 I. C. 889.

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———*Joint Family—Alienation—Power of co-parcener—Berar.*

The law of the *Mitakshara* is to be interpreted in Berar in the same manner as in Bombay and according to that law a co parcener has power to sell his share in the joint family property without the consent of his co owners. (*Viscount Cave*) *SYED KASAM v. JORAWAR SINGH*. 43 M. L. J. 676; 31 M. L. T. 46 (P. C.); 16 L. W. 223; 5 N. L. J. 209; (1922) P. C. 353. 18 N. L. R. 127; 68 I. C. 573; 27 C. W. N. 179. 49 I. A. 358 (P. C.)

———*Joint Family—Alienation—Father—After born son—Right to set aside alienation—Another son born after suit but before decree if bound by result of the suit.*

A mortgage of joint family property was made by a Hindu father without the consent of his only son who shortly after brought a suit for a declaration that the mortgage was not binding on the family property. Prior to the decision of this suit, another son was born.

*Held*, in proceedings by the mortgagees to enforce their rights under the mortgage that as the alienation was made by the father without the consent of the son then alive, who also promptly challenged it, the after-born son was also entitled to contest the validity of the mortgage; also that his interests were quite separate from those of his elder brother and hence he was not bound by the decision in the prior suit. (*Rafiq and Lindsay, JJ.*) *BHUP KUAR v. BALBIR SAHAL*. 44 A. 190. 19 A. L. J. 978; 64 I. C. 885; (1922) All 342.

———*Joint family—Alienation—Father—Ancestral property—Son's suit to recover. See* (1921) DIG. COL. 625 *LACHHMAN SHUKUL v. RAM KISHORE*. 64 I. C. 220.

———*Joint family—Alienation by father—Consideration—Major portion of, binding—Effect on transfer.*

Where a large portion of the consideration amount is borrowed for legal necessity the transfer by the manager of a joint Hindu Family cannot be said to be void and the transaction, can be upheld if the transferee offers to pay up the non-binding portion of the debt. 36 I. C. 57 foll. (*Dalal, A. J. C.*) *GAJADHAR BAKHSH SINGH v. BAJNATH*. 20 A. L. J. 208; (1922) A. 50; 65 I. C. 967.

———*Joint family—Alienation—Father—Necessity—Proof of. See* (1921) DIG. COL. 621 *LAIK SHAH v. DINA NATH*. 3 Lah. L. J. 491.

———*Joint family—Alienation by father—Legal necessity—Son's right to impeach.*

In the absence of a finding that a father has been recklessly extravagant, or wantonly wasting his property, the vendee of the property from the father is not required to prove that the previous debts were contracted for necessary purposes, he has only to prove their existence. The son cannot impeach such a sale. (*Martineau J.*) *JAGAT SINGH v. GANDA SINGH* (1922) Lah. 301; 69 I. C. 47.

———*Joint family—Alienation—Father—Recital as self acquisition—Antecedent debt—Justifying necessity.*

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Where a father transfers property describing it as his self-acquisition and it is found that the recital was incorrect but that there was necessity justifying, the alienation can be upheld. 34 A. 296 P. C. dist. 28 I. C. 365 Ref. (*Spencer and Devadass, JJ.*) VADAMALAI PILLAI v SUBRAMANIA CHETTIAR. 16 L. W. 936

—Joint family—Alienation—Father—Setting aside of alienation in sons' suit for partition—Son if bound to pay *pro rata* consideration—Pious obligation See (1921) DIG. COL. 621. SREENIVASA AIYENGAR v KUPPUSWAMI AIYENGAR 64 I. C. 698.

—Joint family—Alienation—Father—Suit by sons to set aside

In a suit by a Hindu son to set aside alienations of joint family property by his father, if it is found that the sales are not valid and binding on the family the plaintiff would be entitled to a decree that his rights as coparcener are not affected by the alienation. The decree in favour of the plaintiff should not be made conditional on his refunding his share of the purchase money. 39 A. 43, 30 A. 352-53 P. R. 1901 ref. 11 C. 396 not foll. (*Le Rossignol and Campbell, JJ.*) BADAM v. MADHO RAM. 2 Lah. 338 (1922) Lah. 241: 66 I. C. 19.

—Joint family—Alienations—Father—Son's suit to set aside—Form of relief.

A Hindu son is entitled to set aside an alienation by his father of ancestral property which has not been effected for the payment of an antecedent debt or for any family necessity 53 P. R. 1901; 28 A. 328, 39 A. 485 Ref. In a suit for possession of the properties so alienated the son as not bound to refund the purchase money but can claim possession of the property. 11 C. 396; 32 I. C. 891 Ref. (*Broadway and Martineau, JJ.*) KALI CHARAN v. JAGGU. 67 I. C. 89.

—Joint Family—Alienation—Consent of reversioner to one sale—Presumption.

Consent of presumptive reversioners to a later sale of property by the widow does not preclude the reversioners who are alive when the reversion falls in, though they may be the sons of the reversioners, from disputing the want of legal necessity for the prior sale of the property by the widow. (*Macleod, C. J. and Shah, JJ.*) TUKARAM v. GANPAT. (1922) Bom. 346.

—Joint family—Alienation—Father—Sale for necessity—Sons not entitled to pre-empt. See PRE-EMPTION, RIGHT OF. 67 I. C. 76.

—Joint family—Alienation by father—Right of sons born and unborn to set aside—Cause of action—Starting point of limitation See LJM. ACT. ART. 126. 9 O. L. J. 45. See also. 24 O. C. 330.

—Joint Family—Alienation—Gift subject to mortgage—Donee if can impeach mortgage for want of legal necessity

If donee of joint family property subject to an antecedent mortgage cannot question the necessity for or propriety of the mortgage. 11 N. L. R. 1 Ref. (*Prideaux, A. J. C.*) NARAYAN v. SHANKERLAL. 68 I. C. 508.

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—Joint family—Alienation—Invalid mortgage if good consideration for later sale—Antecedent debt—Liability of grandsons.

A mortgage of joint family property which is invalid on that date, cannot become a just and legal consideration for a later sale, on the principle of antecedent debt. The antecedency should be one not only in time but in fact. Case law referred to.

The doctrine of pious obligation cannot be invoked against grandsons when the sons are alive. (*Lord Shaw*) CHET RAM v. RAM SINGH.

44 All. 368: 43 M. L. J. 98: L. R. 3 P. C. 141: 27 C. W. N. 150. 24 Bom. L. R. 1231: 16 L. W. 89: 31 M. L. T. 50 (P. C.) (1922) M. W. N. 455: 4 U. P. L. R. (P. C.) 64: (1922) P. C. 247: 3 P. L. R. (P. C.) (1922): 67 I. C. 569: 3 Pat. L. T. 363. 49 I. A. 238 (P. C.).

—Joint Family—Alienation—Necessity—Burden of proof on purchaser.

In a suit by the junior members of a joint Hindu family to contest a sale by the manager, the burden of proving that the sale was justified by necessity is on the purchaser. 8 A. L. J. 1022 Ref. (*Rafiq and Stuart, JJ.*) RAM SARUP SINGH v. RAM SARAN SINGH. 20 A. L. J. 935.

—Joint Family—Alienation—Manager—Necessity—Test of.

Where a portion of the consideration for sale of ancestral property by the manager of a joint family is found to be binding on the family, the question is not whether the consideration, which was taken for legal necessity, formed the bulk of the consideration, but whether the portion, which was not taken for legal necessity, was such a small portion as might reasonably be left out of account. It is not always possible for the manager of a joint Hindu family to sell property exactly for the amount for which the legal necessity might exist. He might be able to raise a loan by a mortgage, but it might not always be possible for him to find a mortgagee willing to take a mortgage of the property for the amount required unless the security given leaves a sufficient margin to cover the principal and interest that might eventually fall due on that transaction. In many cases the sale of a portion might be out of question and fails to command either a purchaser or its proper value. (*Lindsay and Kanhaiya Lal, JJ.*) JAI NARAIN PANDE v. BHAGWAN PANDE.

44 All. 683: L. R. 3 A. 427: 20 A. L. J. 621: (1922) All. 321.

—Joint family—Alienation—Manager—Necessity or benefit—Absence of—Mortgage how far enforceable—Liability of sons

The liability in respect of antecedent debts applies only to sons and grandsons. A mortgage executed by the adult members of a joint family as security for an antecedent debt not incurred for the necessary purposes of the family nor for its benefit, is not binding on the co-parceners and is enforceable neither against the family estate, nor against the undivided shares of the mortgagors. (*Das and Adami, JJ.*) MATHURA MISRA v. RAJKUMAR MISRA. 6 Pat. L. J. 526.

—Joint family—Alienation—Manager—Necessity—Consent.

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The law is that the head of a joint family cannot mortgage the joint family property without consultation with, and consent of, other members but where legal necessity is proved it is unnecessary to prove consent, because this will be implied in the case. (*Coutts and Ross, JJ*) **KAMNA PRASAD v. NATHURI NARAYAN SINGH.**

66 I. C. 149 : (1922) Pat. 136. 3 Pat. L. T. 401 (1922) P. 347.

———**Joint family—Alienation—Manager and others, difference between—Suit to recover property—Decree, form of.**

In the case of an alienation not binding on a joint Hindu family, while the manager can sue to recover the whole entire property on behalf of the family, individual members can maintain the suit only in respect of their own shares.

Where an alienation was made by an adult brother and the mother on behalf of her minor sons, and suit is brought by one of the latter to have it set aside, the proper decree to be passed is for possession of his share of the property on payment of his share of the consideration, if any, which is found binding. (*Daniels, A. J. C.*) **MAHESH DAT v. RAM ASRE**

90 L. J. 138 : 4 U. P. L. R. (O. C.) 38 : (1922) Oudh 114. 67 I. C. 814.

———**Joint family—Alienation—Manager—Powers of—Benefit—Necessity—Acquisition of other property—Benefit to the estate—Renewal of private debts—Mala fides—Onus. See (1921) DIG. COL. 624** **KALIKA NAND SINGH v. SHIVA NANDAN PD. SINGH.**

3 Pat. L. T. 149 : (1922) P. 122.

———**Joint family—Alienation—Mortgage by manager—Necessity—Onus**

In the absence of evidence tending to shake confidence in the transactions themselves or in the conduct and case of the manager or of the creditor, the onus is shifted back on to the sons or members of the family who wish to repudiate a mortgage by the manager, though the initial onus is on the creditor to prove necessity. As a matter of business and common sense courts will decline to take judicial notice of the fact that fathers of joint Hindu families or managers or kartas as the case may be, where the father is dead are necessarily and chiefly occupied in going out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong and of which they are respected heads. On the contrary, the presumption must be in their favour viz., that inasmuch as their own interests are indissolubly interwoven with the interests, and the affections, of the other members, the borrowing is to assist and benefit the joint family.

Though the onus of proof to support a mortgage of family property is on the creditor, the question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains in the decision of each particular case, as to whether having regard to the transactions, which have been established by evidence, the onus still remains where it was or whether, on the other hand it has been made to shift. In each particular case

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whether the onus has been shifted or not, becomes a mixed question of fact and law or rather a question of the due application of recognised principles to the varying circumstances of each case. 31 A. 176, 39 A. 37; 43 I. A. 24; Kel. (*Walsh and Ryves, JJ.*) **PEARE LAL v. SUNDER SINGH.**

20 A. L. J. 658 L. R. 3 A. 593 : (1922) All. 436 68 I. C. 805.

———**Joint family—Alienation by manager—Setting aside—Major portion of the consideration binding—No misconduct—Form of decree**

Where in a suit by a minor to set aside an alienation of joint family property by his father it is found that out of the recited consideration of 500 rupees only Rs 320 was paid for necessity and the balance was not so paid, on a question arising as to the proper form of decree to be passed in the case, *Held*, that as the value of the properties had appreciated considerably and as there was no misconduct on the part of the purchaser, the properties should be sold and the proceeds distributed in the shares to which the parties were entitled. (*Sir Waller Schwabe, C. J.*) **KUTTUVA MEENATCHI AIYAR v. DARMIAH RANGA CHARLU.**

16 L. W. 595. (1922) M. W. N. 719.

———**Joint family—Alienation—Necessity—Antecedent debt.**

It is open to the sons to impeach an alienation by their father on the ground that there was no legal necessity for the alienation of their shares in the joint family property and on the ground that no portion of the debt was an antecedent debt binding on them. The sons are not merely confined to the plea that the debts of the father were incurred for immoral or illegal purposes. (*Kotwal and Prideaux, A. J. C.*) **DHUDABAI v. NARAYAN.**

5 N. L. J. 73 : 66 I. C. 239 : (1922) Nag. 28.

———**Joint family—Alienation—Necessity—Antecedent debt—Exorbitant rate of interest—Liability of other members—Adult member joining in execution—Presumption of necessity—Setting aside alienation—Equities.**

An alienation of joint family property effected by the concerted action of all the members of the joint family who had attained majority at the time raises a presumption in favour of such alienation having been made for real family necessity. Where the rate of interest specified in a mortgage is high and there is, in addition, a provision for a penalty on non-payment of interest punctually, the provision for compound interest and the penalty might be regarded as improvident and therefore not binding on the minor members of the joint family. The existence of an antecedent debt of the father does not justify his alienating the whole of the family property at a sum considerably less than the market value.

Where in a suit by the sons to avoid an alienation, the debt was partly for binding necessity, the plaintiffs are bound to discharge the binding portion of the debt before obtaining possession of the property alienated. (*Piggott and Walsh, JJ.*) **GOVIND DASS v. RAM CHARAN LONIA.**

4 U. P. L. R. 25 (A.) : 68 I. C. 307.

———**Joint family—Alienation—Necessity—Benefit—Test of—Minor coparceners if bound by**

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the sale. *See* (1921) DIG. COL. 618. NAGINDAS MANEKHLAL *v.* M. HOMED YUSUF.

46 Bom. 312 : 64 I. C. 923 : (1922) Bom. 122

**—Joint family—Alienation—Necessity—Enquiry**

The burden of making out a necessity for an alienation by a person with a qualified power of disposition like a Hindu father, is upon the alienor. (*Dhobley, A. J. C.*) JAIRAM *v.* VENKATA RAO.

5 N. L. J. 66 : 65 I. C. 658 : (1922) Nag. 101

**—Joint family—Alienation—Necessity as regards rate of interest—Plea necessary.**

To support a mortgage by the karta of a Hindu family, the plaintiff mortgagee has to prove not only the necessity for the loan but also the necessity to borrow at the rate stipulated. The onus as regards the latter is however discharged if the defendant does not specifically raise the plea that the rate of interest was not justified by legal necessity; for the facts necessary to prove legal necessity for the mortgage may be entirely different from the facts necessary to prove that there was necessity to borrow money at such and such a rate.

Where no such plea was raised in the trial court, it cannot be allowed to be raised in appeal (*Miller C. J. and Adams, J.*) AINTHU GOPE *v.* KHAKHAR SAHU 3 Pat L. T. 367 : (1922) P. 356  
67 I. C. 790.

**—Joint family—Alienation—Necessity—Recitals—Adult members joining in alienation—Effect of.**

Where a sale deed of joint family property executed by the heads of all the branches of the family mentions the purpose for which the sale was made, there is no room for raising any presumption with regard to the necessity for the transaction from the fact that all the members joined in its execution. The Court has merely to see whether the purpose recited is one which is recognised as valid under the Hindu Law 8 B. 602 ref. (*Daniels, A. J. C.*) MUSSAMMAT MANZURAN BIBI *v.* JANKI PRASAD. 9 O. L. J. 35 : (1922) Oudh 50 : 66 I. C. 930.

**—Joint Family—Alienation—Necessity—High rate of interest.**

As regards the rate of interest necessary or proper in a mortgage by the manager of a joint Hindu family no hard and fast rule can be laid down. The question in such a case is "what is a reasonable rate of interest" and a finding as to the reasonable rate of interest is really one of fact. Even if it is a matter of discretion the High Court would not interfere in second appeal with the discretion of the court below. (*Lindsay and Gokul Prasad, J.J.*) BINDESHRI PRASAD *v.* JAG PRASAD RAI. L. R. 3 A. 498 : (1922) A. 335.

**—Joint family—Alienation—Mortgage by members—Legal necessity—Personal decree.**

Where a mortgage is executed by some members of a joint family but the creditor seeks to enforce the mortgage debt against the mortgagor personally and not against the mortgaged property, the question of necessity does not arise, in the absence of fraud, undue influence or other

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circumstances which would invalidate the contract. The defendants who entered into the covenant are clearly personally liable and the other defendants are only liable to the extent of the assets of the executors who are dead which have come into their hands. A personal decree could be passed against the sons and grandsons of the deceased executors who had been impleaded on the ground of pious obligation 41 A. 571; 19 O. C. 159 : 39 A. 437 Rel. (*Daniels and Lyle, A. J. C.*) MAHRAJ PRAG DIN *v.* BHAGWATI SAHAI, 66 I. C. 687.

**—Joint family—Alienation—Necessity—Recitals, evidentiary value of.**

Recitals in a deed of alienation as regards the purposes for which the money was borrowed may not be sufficient to prove those purposes as regards third parties. But the recital is clear evidence of the representation made to the creditor and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recitals coupled with the circumstances will be sufficient evidence to support the deed. (*Daniels, A. J. C.*) RAM SARAN *v.* DAWAN SINGH. 24 O. C. 386 : 66 I. C. 36

**—Joint family—Alienation—Necessity—Representation by father or manager—Necessity for enquiry—Recitals**

The representations of the borrower are not merely evidence, but may in particular circumstances be sufficient to shift the onus from the lender to the person impeaching the debt or alienation.

Something more than mere representations of the borrower is necessary to constitute reasonable inquiry on the part of the lender especially where other avenues of inquiry were open to the borrower 6 M. I. A. 393; 35 M. 108 foll. (*Halsfax, A. J. C.*) GANBA *v.* SHRI VISHWESHWAR MAHADEO DEOSTHAN OF NAGPUR. 64 I. C. 268 (N.)

**—Joint family—Alienation—Right to set aside—Members subsequently born.**

Where a Hindu father executes a mortgage over family property at a time when he had no son, it is not competent to the sons who are subsequently born to challenge the alienation. The subsequently born sons, take the estate as they find it at their birth and cannot impeach prior alienations by the father. (*Dhobley, A. J. C.*) JAIRAM *v.* VENKATA RAO. 5 N. L. J. 66 : 65 I. C. 658 : (1922) Nag. 101.

**—Joint family—Alienation—Setting aside—Mesne profits—Liability for.**

In the case of a sale by a father or managing member of a joint Hindu family for alleged necessity, the sale would be good till avoided because it is open to the other co-parceners to affirm the transaction. Consequently in a suit by a co-parcener to set aside the alienation the plaintiff will not be entitled to mesne profits before the suit in the absence of a repudiation of the sale before that date. (*Kumaraswami Sastri and Devadoss, J.J.*) SUBBA GOUNDAN *v.* KRISHNAMACHARI.

45 Mad. 449 : 42 M. L. J. 372 : 30 M. L. T. 217 : 15 L. W. 537 : (1922) M. W. N. 269 : (1922) Mad. 112 : 68 I. C. 489.

## HINDU LAW—Joint Family.

—Joint family—Alienation—Suit to set aside—Cause of action—Members subsequently born.

The cause of action for a suit for setting aside an alienation of joint family property accrues to the members on the date of the alienation or the alienee's taking possession. Members subsequently born into the family do not get a fresh cause of action on their birth. 24 O. C. 330, 61 I. C. 801 ref. (*Dalai, A. J. C.*) SHEOAMBAR KHAN v. RATIPAL SINGH. 65 I. C. 404.

—Joint family—Ancestral property—Onus of proof See (1921) DIG COL. 624 NIBARAN CHANDRA MUKERJEE v. NIRUPAMA DEBI. 26 C. W. N. 517.

—Joint family—Business not of the joint family Minor not liable—Others liable if parties to contract

If it were the law that some members of a joint family could escape from liability to perform contract, entered into by them on the ground that their contracts were not such as would bind the joint family and that they had no property other than that which was the property of the joint family, it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras.

But the minor's interest in the joint property of the family will not be affected by any decree against the other members in transactions which are in the course of any family business (*Sir John Edge.*) SADASIYA MUDALIAR v. HAJEE FAKER MAHOMED SAIT. (1922) P. C. 397

—Joint family—Decree against family property—Liability of individual members.

Where there is a decree against the joint family property, including the separate property of a certain member of the joint family, it follows that when that member quits the family all of his property that remains liable for the satisfaction of the decree is (1) his share in the joint family (2) his separate property such as it was up to the date when he quitted the family. Separate property acquired after he quitted the family is not, and never could have been joint family property. (*Le Rossignol and Campbell, J.J.*) GOKUL CHAND v. FIRM OF HUKAM CHAND NATHUMAL.

3 Lah. 14 : 65 I. C. 731 : (1922) Lah. 84.

—Joint family—Father—Compromise affecting family property found invalid—After born sons—Rights of.

Where a Hindu father entered into a compromise as a result of which the family lost certain sums of money, and this compromise was subsequently declared invalid in a suit brought by a son, and the family still remaining joint two more sons were born :

Held, they two were entitled to benefit by the declaration of the invalidity of the compromise.

## HINDU LAW—Joint Family.

(Lord Buckmaster) VENKATA RAO v. TULJA RAM RAO.

45 Mad. 298 : 43 M. L. J. 298 :  
26 C. W. N. 646 : 36 C. L. J. 319 :  
(1922) M. W. N. 392 : L. R. 3 P. C. 125 :  
4 U. P. L. R. (P. C.) 33 : (1922) P. C. 69 :  
20 A. L. J. 833 : 24 Bom. L. R. 1191 : 49 I. A. 91.  
30 M. L. T. 272 (P. C.)

—Joint family—Father—Decree against—Execution against sons

It is competent to the holder of a simple money decree against a Hindu father to attach and bring to sale in execution the whole family property including the son's shares therein, unless the debt whereon the decree was obtained was tainted with immorality or illegality. (*Piggott and Walsh, J.J.*) MOHAN LAL v. BALA PRASAD.

44 All. 649 : L. R. 3 A. 515 : (1922) All. 310.

—Joint family—Father—Decree against—Mortgage—Foreclosure—Son's right to challenge the decree

Where the sons bring a suit for a declaration that a foreclosure decree passed against their father is not binding on them on the ground they were not made parties to the foreclosure suit, and it is not shown that the mortgage debt was either illegal or immoral, the sons' suit is not sustainable. The mere fact that in the foreclosure suit the father was not described as the manager of the joint family did not make the decree any the less binding on his sons, in the absence of proof that the father acted in a way prejudicial to the interests of the family (*Kanhaiyalal, J. C.*) BHAGWATI PRASAD v. KALLU RAM. 25 O. C. 256.

—Father—Insolvency—Sons' share vests in Official Assignee—Remedy of sons. See PRES. T. INS. ACT, S. 17. 3 Lah. 329.

—Joint family—Father—Powers of—Gift in favour of daughter.

A Hindu father has the power under the Mitakshara law of making within reasonable limits, gifts of moveable property to a daughter. What is reasonable in the circumstances of a case, is a question of fact. (*Mr Amner Ali.*) RAMALINGA ANNAVI v. NARAYANA ANNAVI.

45 Mad. 489 : 43 M. L. J. 428 :  
(1922) M. W. N. 399 : 26 C. W. N. 929 :  
16 L. W. 639 : (1922) P. C. 201 : 20 A. L. J. 839 :  
24 Bom. L. R. 1209 : 68 I. C. 451 : 30 M. L. T. 255 :  
49 I. A. 168 (P. C.)

—Joint family—Manager—Decree against—Ex parte decree—Defences open not raised—Decree resjudicata against junior members. See C. P. CODE, S. 11. 43 P. L. R. 1922.

—Joint family—Manager—Contract for sale of land—Existence of minor members—Specific performance.

The relation of the manager of a joint Hindu family to a minor member of the family is not the same as that of a guardian to his ward. 12 N. L. R. 12 foll. Where a contract is made by the manager of a joint Hindu family acting on behalf of the family including its minor members to sell immoveable property, it is open to the purchaser to claim specific performance of the contract against the whole family including the minors. 39 Cal. 232, 35 All. 499 : 30 Cal. 539 dist.



## HINDU LAW—Joint Family.

2 Pat. L. J. 513 foll. (*Hallifax, A J C.*) THAKUR HARGOVIND *v.* MEHTAB SINGH. 18 N. L. R. 67 : (1922) Nag. 193 : 68 I. C. 346

—Joint family—Manager—Decree against—When binding on other members.

A decree passed against the manager of a joint family as representing the family, provided it be in respect of a debt contracted by him for family necessities or for the family business may be executed against the whole co-parcenary property. 26 A. 383 P. C. Rel. But it must be shown that the manager was sued in a representative capacity. (*Abdul Raoof and Harison JJ.*) MELA MAL *v.* GORI. 66 I. C. 485 : 3 Lah. 288 : (1922) Lah. 200.

—Joint family—Manager—Insolvency—Official Assignee—Extent of properties vesting in. See PRES. T. INS. ACT, Ss. 7. 30 AND 52.

16 L. W. 559.

—Joint family—Manager—Bond in the name of—Presumption.

The presumption is that a bond in the name of the managing member of a joint Mitakshara family is joint family property and it is for those who assert the contrary to make good their case. Proof that some of the members of the family had some private transaction does not prove that the particular bond in question was the private property of the member in whose name it was held. (*Viscount Cave.*) BANDHU RAM *v.* CHINTAMAN SINGH. 26 C. W. N. 406.

3 Pat. L. T. 295 : 20 A. L. J. 495 : (1922) P. C. 215 : 66 I. C. 402. (P. C.)

—Joint family—Manager—Liability to account—Trust relationship. See (1921) DIG. COLS. 628, 595. ARUMILLI PERRAZU *v.* ARUMILLI SUBBARAYADU. 3 Pat. L. T. 1 : 30 M. L. T. 1 (P. C.) : (1922) P. C. 71.

—Joint family—Manager—Negotiable instrument—Liability of other members of the family.

The manager of a joint Hindu family is not its agent but represents the family in all dealings with outsiders and on a negotiable instrument drawn by the manager, the other members of the family would be liable even though he did not sign the instrument. 46 C. 663 dist. 23 M. 597 foll. (*Piggott and Walsh, JJ.*) KRISHNANAND NATH KHARE *v.* RAJA RAM. 44 All. 393 : 20 A. L. J. 233 : L. R. 3 A 239 : (1922) All. 116 : 66 I. C. 150

—Joint family—Manager—Liability of, in partition suits. See HINDU LAW—PARTITION. 42 M. L. J. 570.

—Joint family—Manager—Powers of—Starting of a new trade—Ancestral trade—Liability of minor members.

The distinction between an ancestral business and one started after the death of the ancestor, as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business with the benefits and obligations. In the other, they rest

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ultimately on contractual arrangements between the parties. It is not competent to the Karta to impose on a minor coparcener the risks and liabilities of a new business started by himself : consequently a creditor of the new business cannot make the minor's share of the family properties or in the ancestral business liable for the debts of the new business. (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNADHA BANERJI. 43 M. L. J. 41 : 20 A. L. J. 409 : 24 Bom. L. R. 700 : 49 Cal. 560 : (1922) P. C. 237 : 16 L. W. 536 :

30 M. L. T. 228 : (1922) M. W. N. 364 : 26 C. W. N. 364 : 35 C. L. J. 498 : L. R. 3 P. C. 133 : 67 I. C. 124 : 49 I. A. 108

—Joint family—Manager—Representative in suits. See C. P. CODE, O. 32, R. 3.

9 O. L. J. 141.

—Joint family—Manager—Right to start new business—Liability to interest.

As between the members of a joint family *inter se*, whatever may be the powers of the manager as regards the minor members of the family, there is no authority for holding that he can start a new venture without the concurrence of the adult co-parceners, at least there must be evidence of acquiescence.

The immunity of a manager to account for past transactions does not entitle him to enter into illegal transactions and use joint family property for the purpose. It will be gross misconduct sufficient to entitle the others to require the manager to suffer the loss personally and to put back any money that he may have taken out of the family for such transactions.

When the manager is made to account for moneys expended by him, there is no general rule that he should pay interest on the sum to be made good. (*Spencer and Kumaraswamy Sastry, JJ.*) TADI BULLI TAMIREDDI *v.* GANGIREDDY.

45 Mad. 281 : 42 M. L. J. 570 : 30 M. L. T. (H. C.) 323 : 16 L. W. 55 : (1922) Mad. 236.

—Joint family—Manager—Representation in suits—Promissory note—Suit on—Parties. See (1921) DIG. COL. 630. RAMNATH DWARKANATH *v.* RAM RAO BALKRISHNA. (1922) Bom. 281 : 46 Bom. 358 : 64 I. C. 966.

—Joint family—Manager—Representation in suit. See (1921) DIG. COL. 630. SHEIK ABDUL RAHMAN *v.* SHIB LAL SAHU. 6 Pat. L. J. 650 : (1922) Pat. 81 : 4 U.P.L.R. (Pat) 33 : (1922) P. 252

—Joint family—Manager—Right to sue for a debt due to the family

The managing member of a joint Hindu family can maintain a suit for a debt due to the joint family.

35 Mad. 685 : 36 All. 383 : Relied on. (*Krishnan, J.*) SUBRAMANIA GURUKAL *v.* RAMAKRISHNA AIYAR. 15 L. W. 31 : (1922) Mad. 407.

—Joint family—Manager—Who can be—Minority of members—Guardianship. See (1921) DIG. COL. 631 GOBINDSAHAI *v.* BAL KAUR. 4 U. P. L. R. (Lah.) 1.

**HINDU LAW—Joint Family.****—Joint family—Presumption—Disunion in status—Proof.**

In the case of a Hindu Mitakshara family, there is no doubt a presumption of jointness and any one who pleads disruption must prove it. Failure to prove when exactly disruption took place, does not conclusively show that no partition took place at all.

The circumstances under which separation may be deduced are all set out in Trevelyan on Hindu Law, p. 349.

*Held* on the facts, absence of commensality, separate transactions, separate entry of shares in revenue records and other similar circumstances, clearly indicate separation in status. (*Coutts and Ross, JJ.*) *TARA PRASAD JHA BALISEY v. MAYA DEBYA.* (1922) Pat 91. 4 U. P. L. R. (Pat.) 18. 65 I. C. 687 : (1922) P. 30.

**—Joint family—Presumption of jointness—Separate living and dealing**

Where two Hindu brothers have long been living separately and dealing with their individual acquisitions separately and without reference to the other, the presumption as to jointness in a Hindu family loses much of its force. (*Dhobley A. J. C.*) *LAXMAN BHAT v. BANABAI.*

64 I. C. 906.

**—Joint family—Presumption—Jointness—Father and only son**

There is an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his son, 18 A 176 ; 23 O. C. 1 Rel. (*Daniels and Lyle, A. J. C.*) *MT. PARBATI v. SAIED MAHOMED HADI.*

9 O. L. J. 304 : 68 I. C. 534

**—Joint family—Presumption—Property**

Where members are living jointly and acquire properties, the presumption is they were acquired for the benefit of the family. The onus is on the party who denies jointness to rebut the presumption. (*Greaves and Cumming, JJ.*) *SOSHI KUMAR SARKHEL v. CHANDRA KUMAR CHAUDHURI.*

35 C. L. J. 348 : 68 I. C. 322.

**—Joint family—Representation—How far one member bound by acts of another—Question of fact.**

The question whether one member of a Hindu joint family is bound by the action of another member is a question of fact, to be decided in each case. In the absence of anything to show that the action was against his interests, he will ordinarily be bound (*Fremantle, J. M.*) *HARI v. BIJAI BAHADUR.*

L. R. 3 All. 15 Rev.

**—Joint family—Representation in suits—Other members if necessary parties.**

The tendency of modern decisions especially those of the Judicial Committee is in favour of recognition of the representative character of the manager of a joint Hindu family governed by the Mitakshara law, though the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions, (*Mookerjee and Chotzner, JJ.*) *KALIPADA DAS v. RAJA SATI PRASAD.*

36 C. L. J. 234 : (1922) Cal. 468.

**HINDU LAW—Joint Family.****—Joint family—Rights of junior members—Mortgage for defending criminal case—Validity**

The rule of Hindu Law which makes the acts of the manager binding on the family is wide enough to authorise any member of the family to deal with the family property, provided the act is done in times of distress and for family necessity.

Where some junior members were charged with offences in connection with family property and the manager then being in jail, the junior members raised a loan by a mortgage :

*Held*, the mortgage was for a family purpose and was binding. The defence of a member of a joint family is regarded among the Hindus as a pious and necessary act to remove the stigma of disgrace consequent on a conviction. (*Jwala Prasad and Ross, JJ.*) *DHANUKDHARI SINGH v. RAMBIRICH SINGH.* 1 Pat 171. (1922) P. 553.

**—Joint family—Self acquisition—Burden of proof—Existence of nucleus.**

Where the existence of a nucleus of ancestral property is admitted the onus of proving that any of the family properties is the self acquisition of a particular member lies on him (*Mr Amcer Ali*) *RAJANGAM AIYAR v. RAJANGAM AIYAR.*

31 M. L. T. 136 (P. C.) : 16 L. W. 615 : (1922) P. C. 266 : 4 U. P. L. R. (P. C.) 85 : 69 I. C. 123. (P. C.)

**—Joint family—Self acquisition—Fees for officiating as priest—Nature of.**

Fees obtained by officiating as priests are the self-acquisitions of the member to whom they are paid (*Coutts and Ross, JJ.*) *TARA PRASAD JHA BALISEY v. MAYA DEBYA.*

(1922) Pat. 91. 4 U. P. L. R. (Pat.) 18 : (1922) P. 30. 65 I. C. 687.

**—Joint family—Self acquisition—Gift of—Ancestral property.**

In the absence of any express limitation or condition to the contrary all property obtained by gift or devise becomes self acquired property in the hands of the donee or devisee. Consequently any property obtained by virtue of a gift from the father, grand-father or great grand-father would be self acquired property in the hands of the donee if it was not ancestral property in the hands of the donor or was acquired by him without any detriment to the joint estate. 26 B. 445 ; 33 A. 665 Rel. (*Kanhaya Lal, J. C.*) *KANHAI LAL v. RAM RATAN.* 25 O. C. 80 : (1922) Oudh 138 : 68 I. C. 217.

**—Joint family—Suit by member for possession from another—Mesne profits.**

Where a member of a joint Hindu family sues for the recovery of family property from another member claiming to hold it adversely, the plff. is entitled to a decree for joint possession of an undivided share but not to mesne profits (*Daniels, A. J. C.*) *GOKUL PRASAD v. KAILASH NATH.*

4 U. P. L. R. (O. C.) 19 : 65 I. C. 345 : (1922) Oudh 55.

**—Joint family—Trade—Partnership—Proof of—Onus.**

An arrangement alleged to have been made with a Hindu joint family, owning a family business to take in as partner the person through

**HINDU LAW—Limited Owner.**

whom the plaintiff claimed to have a share in the family properties, must be proved by the plaintiff.

*Held*, on the facts that no such arrangements had been proved (*Sir Lawrence Jenkins*) **NALAM PATTABHIRAMA RAO v. MANDAVILLI NARAYANA-MOORTHY.** 26 C. W. N. 273 : L. R. 3 P. C. 29 : 15 L. W. 404 : (1922) P. C. 102 (P. C.)

**Limited Owner.**

—*Limited owner—Alienation—Long lease*  
—*Death of limited owner—Rights of reversioner*  
—*Option to avoid.*

In the case of an alienation by a limited owner not justified by necessity, the reversioner may treat the alienation which purports to extend beyond the life of the limited owner as a nullity and he may sue for possession at any time within 12 years of the death of the limited owner without first seeking to set aside the transfer in favour of the deft. In other words if he elects to treat the transfer as a nullity after the death of the limited owner he may do so and there is nothing left in such a case to be set aside and he may sue for possession and is entitled to obtain possession. All that is necessary for the reversioner is to exercise his option and he may do so by merely bringing a suit to claim possession. From the moment the reversioner exercises his option there is nothing left in the transfer.

There are more ways than one by which a tenancy may determine. The limited owner has no power to grant a tenancy beyond her own life as against the reversioner and once the reversioner elects to treat the interest granted to the tenant as an interest extending only for the life-time of the grantor then in such a case it terminates upon the death of the grantor and there is nothing more to be done to terminate the tenancy. (*Miller, C. J. and Mullick, J.*) **RAGHUBAR SINGH v. JETHU MAHTON.** (1922) Pat. 353.

—*Limited owner—Compromise—Alienation—Distinction between.* See (1921) DIG. COL. **MUSST, BHAGWATI KUER v. JAGDAM SAHAY** 6 Pat. L. J. 604

—*Limited owner—Compromise—Effect on reversioner.*

Where a Hindu lady in possession of her father's estate as limited owner compromises a suit instituted by the next reversioner without raising any defence and even before a guardian-ad-litem of her minor son was appointed, and as a result of that compromise gives away half of the estate absolutely to the plff. in the suit, the compromise can in no sense be said to be a settlement of a *bona fide* family suit and it is not binding on the ultimate reversioner. (*Ryves and Gokul Prasad, JJ.*) **NARAIN SINGH v. RAJKUMAR SINGH.** 44 A. 428 : L. R. 3 A. 229 : 20 A. L. J. 251 : (1922) All. 217 : 66 I. C. 62.

—*Limited owner—Execution of decree—Invalid surrender.*

Where a surrender by a limited owner in favour of the reversioner is found fictitious or ineffectual her life interest could be sold in execution of a decree against her. (*Gokul Prasad and Stuart JJ.*) **BRUP SINGH v. JHAMMAN SINGH.** 4 U. P. L. R. 21 (A) : 65 I. C. 724 : (1922) All. 169.

**HINDU LAW—Maintenance.****Maintenance.**

—*Maintenance—Basis of.*

The husband's will indicating his wish is a good basis for determining the amount of maintenance. 5 I. A. 55 followed. (*Coutts and Ross, JJ.*) **SRIMATI SABITRI THAKURAIN v. FREDRIC AMMIE SAVE** (1922) P. 38.

—*Maintenance—Claim under will—Liability of step-son.*

Where a Hindu lady claims maintenance under the will of her deceased husband, she can enforce the claim against the son as well as the step-son. 16 C. 758 dist. (*Mookerjee and Chotzner, JJ.*) **PULIN BEHARI DEY v. SATYA CHARAN DEY.** 36 C. L. J. 367.

—*Maintenance—Concubine—Rights of—Agreement by widow—Consideration.*

Under the Hindu Law a concubine who had lived up to the time of his death with a Hindu is entitled to maintenance from his estate in the hands of his widow. This right however does not extend to the case of an adulterous connection. 10 Bom H. C. R. 331 : 26 Bom. 163 referred.

If the widow agrees to maintain a woman whose connection with her husband was being adulterous, it is a promise unsupported by consideration. (*Daniels, A. J. C.*) **MUSSAMMAT CHANDRA KUNWAR v. MUSSAMMAT RUKMIN.** 25 O. C. 145 : 9 O. L. J. 60 (1922) Oudh 27 : 66 I. C. 86.

—*Maintenance—Custom—Illegitimate children of Mahomedan concubine of Hindu father—Right to maintenance from legitimate sons.* See **CUSTOM, MAINTENANCE.** 2 Lah. 243.

—*Maintenance—Husband's liability—Future maintenance.*

A provision for the future maintenance of his wife by a husband is not illegal under the Hindu Law. (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) **MADAM PILLAI v. BADRAKALI AMMAL.** 45 Mad. 612 : 42 M. L. J. 410 : 15 L. W. 464 : 30 M. L. T. 274 : (1922) M. W. N. 345 : (1922) Mad. 311 : 68 I. C. 687. (F. B.)

—*Maintenance—Rate of—Circumstances to be considered in fixing* See (1921) DIG. COL. 636 **SRIMATI KRISHNA BHAMINI DASI v. SRIMATI BRAJA MOHINI DASI.** 66 I. C. 38.

—*Maintenance—Residence—Concubine of deceased coparcener.*

The concubine of a deceased coparcener has no right of residence in the family house though she may have a right to be maintained out of the assets of the deceased coparcener. 26 B. 163 : 12 B. H. C. R. 229 Ref. (*Battan, J. C.*) **LALA BEHARI LAL v. MT. ACHRAJ KUNWAR.** 68 I. C. 394. (1)

—*Maintenance—Residence—Widow—Family house—Disagreement.*

A Hindu widow and her mother-in-law were ordered to reside in the same family house, with liberty to the former to apply, so that in future if the family disagreements became so acute that it really would not be desirable that she and her mother-in-law should be living under the same roof it should be possible for her to come to the

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Court and ask that residence should be provided elsewhere for her mother-in-law. (*Macleod, C. J. and Shah, J.*) *LAKSHMIBAI NARAYAN RANGO v. NARBADABAI RANGO.* 24 Bom. L. R. 235 (1922) Bom. 28

——— *Maintenance—Right to Avasudha Stri—Concubine—Continuous keeping.*

A continuously kept concubine of a deceased Hindu is entitled to claim maintenance from his estate, even though she had, prior to her cohabitation with the deceased, been living with another and had several children 10 B. H. C. R. 381; 12 Bom. H. C. R. 229, 12 B. 26; 26 B. 163 Ref. (*Shah, A. C. J. and Crump, J.*) *BAI MONGHIBAI v. BAI NAGUBAI.* 24 Bom. L. R. 1009

——— *Maintenance—Right to—Co-parcener in joint family—Partition.* See (1921) DIG. COL. 636. *BHUPAL TAVANAPPA KASTURI v. TAVANAPPA GANGARAM KASTURI.* 46 Bom. 435; 64 I. C. 568. (1922) Bom. 292

——— *Maintenance—Widow—Allotment of large properties—Nature of estate*

Where on a partition between surviving brothers, properties are allotted to their predeceased brother's widow corresponding to the share which that brother would have taken had he lived at the date of partition, it must be taken that the widow was intended to take a limited estate in the properties allowed to her with reversion on her death to the donors or their heirs. 34 A. 234; 6 M. I. A. 1 Ref. (*Piggott and Walsh JJ.*) *JHABBU LAL v. JWALA PRASAD* 4 U. P. L. R. (A.) 106; (1922) All. 531; 66 I. C. 986.

——— *Maintenance—Wife—Refusal to live with husband—Leprosy.*

Under the Hindu law a wife is entitled to get maintenance from her husband when she declines to live with him on account of his being a leper 5 B. H. C. R. 209 Rel. (*Spencer and Venkatasubba Rao, JJ.*) *SHEENAPPAYA v. RAJAMMA* 45 Mad. 812; 43 M. L. J. 174; 16 L. W. 139; (1922) M. W. N. 459; (1922) Mad. 399; 31 M. L. T. 412 (H. C.)

——— *Maintenance—Widow—Rights of—Charge on husband's estate—Bonafide purchaser for value.*

The right of a Hindu widow to a charge on her husband's estate in respect of her maintenance may be lost by a transfer made for legal necessity or for a purpose binding upon the family. In that case the question of notice to the purchaser is immaterial. Even a transferee who takes with a notice of the claim would hold it free from it. Where the property is limited the transferee is bound to enquire whether there is any claim for maintenance or residence, and his failure to do so would be notice of the claim. 2 B. 494 Rel. (*Abdul Raof and Martineau, JJ.*) *BHAGAT RAM v. MT. SAHIB DEVI.* 3 Lah. 55; (1922) Lah. 273; 67 I. C. 848.

**Marriage.**

——— *Marriage—Daughter—Guardianship for purposes of marriage—Father and mother—Validity of marriage.*

**HINDU LAW—Minor.**

Although a Hindu father is the proper person to give his daughter in marriage the rule is now firmly established that a marriage, which is duly solemnised and is otherwise valid is not rendered void because it was brought about without the consent of the guardian in marriage or even in contravention of an express order of the Court.

20 P. R. 1916 foll. (*Shadi Lal, C. J.*) *GAJJA NAND v. EMPEROR.* 2 Lah. 288; 8 P. L. R. (1922): 1922 Lah. 139; 64 I. C. 500; 23 Cr. L. J. 20.

——— *Marriage—Eligibility for—Vaishya male and daughter of Sudra woman.*

According to Hindu Law, the marriage between a Vaishya male and the illegitimate daughter of a Vaishya born of a Sudra woman is valid. (*Macleod, C. J., and Shah, J.*) *BAI GULAB v. JIVANLAL HARILAL.* 24 Bom. L. R. 5; (1922) Bom. 32; 65 I. C. 602.

——— *Marriage—Minor—Right to repudiate on attaining majority—Restitution of conjugal rights.*

Under the Hindu law a marriage once performed cannot be dissolved for any reasons whatever, even though the parties were minors and a Hindu wife cannot repudiate her marriage as soon as she comes of age or before consummation takes place merely on the ground that the marriage has been performed during her minority. If the girl purports to repudiate the marriage it is not a sufficient ground for refusing a decree for restitution of conjugal rights. (*Abdul Raof and Moti Sagar, JJ.*) *MUNSHI v. MT. BHAGWANI.* 13 P. L. R. 1922; (1922) Lah. 79; 64 I. C. 356.

——— *Marriage—Sub-castes of Sudras—Validity.*

A marriage between a Kayastha and a Tanti both of whom are Sudras though of different sub-castes, is valid under Hindu Law—Case law referred to. (*Sanderson, C. J. and Richardson, J.*) *BISWANATH DAS GHOSE v. SHORASHIBALA DAS.* 48 Cal. 926; 66 I. C. 590.

——— *Marriage—Widow's right to arrange daughter's marriage—Consent of uncle.*

Under the Hindu Law, the mother is, after the father, the guardian of her minor daughter, and her right to select a husband for her daughter is not fettered by any necessity to consult or obtain the consent of the girl's paternal uncle. (*Abdul Raof and Martineau, JJ.*) *MT. JIWANTI v. MULA RAM.* 3 Lah. 29; (1922) Lah. 112; 67 I. C. 253.

**Minority.**

——— *Minor—Debts contracted by guardian—Charge—Necessity—Enquiry.*

A creditor of a Hindu minor is not bound to see to the application of the money. If a person dealing with the manager of a family or with the guardian of a minor, does make inquiries and act honestly, the real existence of an alleged and reasonable necessity is sufficient to validate the debt and he is not bound to see to the application of the money. (*Kanhaya Lal and Sultaiman, JJ.*) *RAGHUBANS UHADHYA v. INDERJIT SINGH.* 20 A. L. J. 886; 1 R. 3. A. 470.

——— *Minor—Trade—Guardian or manager—Not empowered to start a new trade so as to bind minor or his interest in family property—*

**HINDU LAW—Partition**

Distinction between new trade and ancestral business. *See* HINDU LAW—JOINT FAMILY MANAGER. 30 M. L. T. 228 (P. C.)

**Partition.**

———Partition—Account—Manager—Liability to account. *See* (1921) DIG. COL. 639. NIBARAN CHANDRA MUKERJEE *v.* NIRUPAMA DEBI. 26 C. W. N. 517.

———Partition—Accounts—Manager—Negligence—Proof of. *See* (1921) DIG. COL. 639 GULABCHAND CHHOTIRAM MARWADI *v.* RAMNATH CHHOTIRAM MARWADI 46 Bom. 327 : (1922) Bom. 119 : 64 I. C. 995.

**———Partition—Agreement to an arbitrator to effect a partition—Effect of**

It is settled law in the case of a joint Hindu family governed by the Mitakshara law, that a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of h's intention to hold his share separately even though no actual division takes place : and the commencement of a suit for partition is sufficient to effect a severance in interest even before decree. 11 M. 1 A. 75 : 5 I. A. 228 : 43 C. 1031 : 39 A 496 foll. An agreement among all the joint holders to constitute a particular person to partition the joint property coupled with an undertaking to accept whatever partition he might make, is quite sufficient to effect a severance in interest and to put an end to survivorship on the death of one of them. (*Viscount Cave*) SYED KASAM *v.* JORAWAR SINGH.

31 M. L. J. 46 (P. C.) : 16 L. W. 223 : 5 N. L. J. 209 : (1922) P. C. 353 : 18 N. L. R. 127 : 68 I. C. 573 : 49 I. A. 358.

**———Partition—Bengal school—Mother's share—Nature of.**

The share obtained by a mother in Bengal on partition among her sons is in lieu of her right to maintenance; it is covered out of the sons' shares and on her death becomes part of the shares out of which it came. (*Rankin, J.*) SHASHI BHUSAN SHAW *v.* HARI NARAIN SHAW. 48 Cal. 1059 : 66 I. C. 705.

**———Partition—Common property set apart at prior partition—Subsequent suit for partition—Maintainability of.**

It is an unabrogated rule of Hindu law that a common way or a road of ingress and egress reserved as common property between the various sharers at a previous partition cannot be the subject of a partition. The expression "common way" referred to in Mitakshara ch. I. S. IV. p. 16 and 25 is not confined to "common ways" existing prior to partition and is applicable to common passages created for the first time and reserved by agreement between the parties at the time of the partition 36 B 379, 382 Ref.

*Per Crump, J.* : Where there has been a complete partition under a decree of court and under that decree a passage is reserved for common use between the sharers, a fresh suit for partition of the common passage does not lie. (*Shah, A. C. J. and Crump, J.*) SHANTARAM BALKRISHNA *v.* WAMAN GOPAL WADEKAR. 24 Bom. L. R. 1029 : 68 I. C. 682.

**HINDU LAW—Partition.****———Partition decree—Infant son.**

Where the estate had not been partitioned though the decree in favour of an infant son against father for partition has been made, *Held* : the decree declaring certain alienation by father void cannot reasonably be intended as a decree to put the plaintiff into physical possession of that which still remains one undivided half of the whole. It only means that he has been excluded from his proper share of the property jointly held and that he is entitled to possession for the purpose of securing his position. (*Lord Buckmaster.*) NARAIN DAS *v.* ABINASH CHANDER.

L. R. 3 (P. C.) 129 : (1922) P. C. 347 : 31 M. L. T. 217 (P. C.) : 16 L. W. 780 : (1922) M. W. N. 791 : 4 U. P. L. R. (P. C.) 111.

**———Partition—Effect of—Son's liability for father's debts.**

If the sons in a joint Hindu family effect a bona fide partition at a time anterior to the date when their father's debt is contracted, their responsibility is different and the father's creditor cannot then proceed against their divided shares. 22 M. 519 ; 41 M. 138, 40 M. L. J. 473 Ref. (*Spencer and Devadoss, J.J.*) KURUKUNDI SAMA RAO *v.* FIRM OF MARWADI VANAPPI VAJINJI. (1922) M. W. N. 708 : 43 M. L. J. 745.

**———Partition—Evidence of—Acquisition of property in the name of several members—Transfer of property inter se**

It is by no means an unusual thing for members of a joint family when acquiring landed property by purchase to cause to be specified in their documents of title the shares which they would respectively take upon a partition. Where this is not done the ordinary inference from the document on the face of it would be that the vendees are taking in equal shares and the members of the family may well think it convenient that such a presumption where it is not in accordance with the facts, should be rebutted by a specification of shares ; no clear inference in favour of separation or the break up of the joint family can be drawn from a transaction of this sort. It is quite conceivable that a deed of transfer might be executed as between members of a joint family merely in order that there might be clear evidence in existence as to their respective rights in the event of any future difference or separation. (*Piggott and Walsh, J.J.*) MT JAIRAJI *v.* BHAGWAT PRASAD PANDE. L. R. 3 A. 154 : 65 I. C. 844.

**———Partition—Evidence of—Admissions in litigation—Effect of.**

A definition of shares in revenue papers is not, standing alone, sufficient evidence of a separation between the members of a Hindu family. But where in addition to the entry in the Revenue records, there is the clear admission of the plaintiffs in a suit to contest an alienation that they and their brothers owned the land in equal shares there is sufficient evidence of partition. 18 A 176 ; 42 A 368 Ref (*Martineau, J.*) DATA RAM *v.* BADLU.

4 U. P. L. R. (L.) 62 : 67 I. C. 148.

———Partition—Evidence—Presumption of jointness. *See* (1921) DIG. COL. 642 GOBIND SAHAI *v.* BALKAUR. 4 U. P. L. R. (Lah.) 1.

## HINDU LAW—Partition.

———*Partition—Evidence of—Separation of possession—Property excluded from partition.*

There is no presumption that certain properties were excluded from partition in a joint family and the burden of proof is on the person who alleges such exclusion. Separate possession of certain properties is not conclusive evidence of partition and must be interpreted in the light of all the other circumstances of the case (*Mookerjee and Cuming, JJ.*) *KAILAS CHANDRA NAG v. BIJAY CHANDRA NAG.* 36 C. L. J. 434.

———*Partition—Grandson—Right against grandfather.*

Under the Hindu Law grandsons are entitled to bring a suit for partition against their grandfather 5 A. 430, 38 Cal. 111 foll. 16 Bom. 29 not foll. (*Das and Adams, JJ.*) *DIGAMBAR MAHTON v. DANRAJ MAHTON.* 1 Pat. 361 : 3 Pat. L. T. 238 (1922) P. 96 : 67 I. C. 156.

———*Partition—Intention—to separate Effect—Advance of money—Liability of other members.*

Although at the time of the advance of money the subject-matter of dispute, the family had expressed the intention to separate, and in the eyes of the law, they were no longer members of a joint Hindu family, yet if there had been no partition of the joint property, the onus would be upon the defendants to show that the advance made to their father, was made after the actual division of that property so that they would no longer be liable for such advance. (*Macleod, C. J. and Kanga, J.*) *MOTI CHAND RAOH RAMCHAND v. MANECKCHAND GOJAR.* (1922) Bom. 147.

———*Partition—Manager's liability to account*

Where an account has to be taken with a view to make a partition of joint family properties, the account is merely an enquiry into the existing assets and the head of the family cannot in general be called upon to defend the propriety of his past transactions except in cases of fraud misappropriation or gross reckless waste. The manager being the accounting party has to file an account as to the properties available for partition but the other members are not bound to accept it. The enquiry directed by the court should be conducted in the usual manner to find out what the property consists of. The manager should be directed to file his accounts and the other members given opportunity to verify the same. The mere fact that account books were not kept would not in the absence of evidence to show that the accounts produced are false in any particular render him liable. (*Spencer, and Kumaraswami Sastry, JJ.*) *TADA BULLI TAMMIREDDI v. TADA BULLI GANGIREDDI.* 45 Mad. 281. [42 M. L. J. 570 : 30 M. L. T. 323 (H. C.) : 16 L. W. 55 : (1922) Mad. 236]

———*Partition—Minors—Agreement to remain united.*

The absence of contractual capacity in minors does not mean that a ter a partition in a Hindu family minors have no option but to remain divided. In all such cases it is the duty of the guardian to make as good and beneficial arrangement as he possibly can. An arrangement fair in method and result will bind the minor's

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estate. (*Rankin, J.*) *SHASHI BHUSAN SHAW v. HARI NARAIN SHAW.* 48 Cal. 1059 : 66 I. C. 705.

———*Partition—Mother—Rights of—Maintenance.*

Under the Hindu law it is only in the event of a partition among her sons that a mother becomes entitled to a share in lieu of her maintenance. 16 C. 758, 31 C. 262 Rel. (*Mookerjee and Chotzner, JJ.*) *JADU NATH SIKKAR v. HARAN CHANDRA SARKAR.* 36 C. L. J. 217.

———*Partition—Mother's share—Stridhanam received from father—Deduction of.* See (1921) DIG. COL. 644 *JEOGBANDHU PAL v. RAJENDRA NATH CHATTERJEE.* 66 I. C. 121.

———*Partition—Partial partition—Alienees from coparceners—Rights of—Suit for general partition.*

*Per Macleod, C. J.* There may be cases in which one co-parcener purports to convey his interest in a particular item of family property to a stranger, while the other co-parcener (taking the simplest case of two co-parceners) sells his interest in the same property to another stranger. In such a case a suit might lie by one stranger against the other for partition of that item of the family property which had been wholly disposed of by the persons who were entitled to it. But such an action between strangers should only be allowed in the very plainest of cases, when it has been proved that the whole of the family interest in the property has been disposed of either by joint action between the members of the family or by separate action against which no dispute has been raised.

*Per Coyajee, J.* The purchaser of an unascertained share in a joint family property cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included and all necessary parties joined. In a suit of that nature the Court, in making the partition, would endeavour to give effect to the alienation and "So to marshal the family property amongst the co-parceners as to allot that portion of the family estate or so much of it as may be just" to the purchaser.

A purchaser from a coparcener of his share of an item of joint family property can work out his rights only by a suit for general partition. (*Macleod, C. J. and Coyajee, J.*) *ISHRAPPA v. KRISHNA PUTTA.* 24 Bom. L. R. 428 : (1922) Bom. 413 : 67 I. C. 833.

———*Partition—Partial partition—Competency of members to enter into.*

It is open to the members of a joint Hindu family to make a division and severance of interest in respect of a part of the joint estate whilst retaining their state as a joint family and holding the rest as the properties of a joint undivided family. 11 M. I. A. 75 P. C. Rel. (*Mt. Ammeer, Ali*) *RAMALINGA ANNAVI v. NARAYANA ANNAVI.* 43 M. L. J. 428 : 30 M. L. T. 255 (P. C.) : 68 I. C. 451 : 45 Mad. 489 : (1922) M. W. N. 399 : 26 C. W. N. 929 : 16 L. W. 639 : (1922) P. C. 201 : 20 A. L. J. 889 : 24 Bom. L. R. 1209 : 49 I. A. 168. (F. C.)

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———*Partition—Partial partition—Presumption—Onus.*

When a partial partition of the property of a joint Hindu family is admitted the presumption is that there was a complete partition and the onus is on the party alleging that it was not a complete one to prove it 7 Bom H. Cr. 153; 121 P. R. 1918 rel. (*Scott Smith and Abdul Raoof, JJ.*) *KISHEN CHAND v. BEHARI MAL*

2 Lah. L. J. 570; 68 I. C. 297.

———*Partition—Partial partition—Presumption—Rebuttal—Evidence—Ambiguous Statements of members in prior litigation—Effect of.*

There is no doubt a presumption that where there is a partition in a family, there is a total partition and not merely a partial partition, but this is a presumption which can be rebutted and the circumstances in each case will show how much importance is to be attached to the presumption and what amount of evidence would be necessary to rebut it. Where a partition was effected between a father and his sons for a special reason *namely* that his sons by his first wife were not getting on well with him and his second wife, there is no separation as between the father and his sons by his second wife especially when the latter were minors at the time. The recital in the partition that there was a decision into six shares of the family properties was only made for the purpose of fixing and ascertaining the shares of the outgoing coparceners and did not effect a severance between the father and his sons by his second wife. An incorrect recital in a suit filed by members of a Hindu family against strangers that they were divided does not amount to a declaration of intention to divide 35 A. 80; 43 C 1031 Rel. (*Phillips and Devadoss, JJ.*) *CHELASANI ATCHAMMA v. CHELASANI VENKATASUBBAYYA*

16 L. W. 268;

(1922) M. W. N. 487; (1922) Mad. 423.

———*Partition—Right to—Insanity—Bar to claim for partition* See HINDU LAW, SUCCESSION

18 N. L. R. 80

———*Partition—Right to—Stranger purchaser of a coparcener's share, See* (1921) DIG. COL. 645

*DHULABHAI DABHAI v. LALA DHULA*

46 Bom. 28; 64 I. C. 115; (1922) Bom. 137.

———*Partition—Separation in status—Separateness.*

The mere fact that coparceners are messing separately does not mean that the possession of one coparcener of the joint family property is adverse to the other coparceners. 33 C. L. J. 344 Rel. (*Greaves and Pantan, JJ.*) *HEMANGINI DAS v. SITAL MONDAL*

67 I. C. 300

———*Partition—Shares—Jyeshthabagam—Provision for marriage expenses of coparcener.*

The award of *jyeshthabagam* is not authorised by Hindu law as administered in this Presidency 39 M. L. J., 382 and 8 L. W. 400 coll.

The rule of Hindu Law authorising the making of provision at partition for subsequent marriages applies to the brothers who are parties to the division and does not extend to persons who are not in the same degree of relationship as those who have been married at the family expense. 38

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Mad. 556. 40 Mad. 632 and 31 Bom. 54 rel. (*Schwabe, C. J. and Ayling, Coutts Trotter, Kumaraswami Sastri and Deva Doss, JJ.*) *YERUKOLA v. YERUKOLA*.

45 Mad. 648. 42 M. L. J. 507; 30 M. T. 279 H. C. 15 L. W. 595; (1922) M. W. N. 215; (1922) Mad. 150. (F. B.)

———*Partition—Shares—Custom—Patanbhaga—Moopu Mori. See* (1921) DIG. COL. 646.

*PALANIAPPA CHETTIAR v. ALAGAN CHETTI.*

30 M. L. T. 208. 26 C. W. N. 417; 15 L. W. 521; 4 U P L R. (P. C.) 21; (1922) P. C. 228; 64 I. C. 439. (P. C.)

———*Partition—Suit for—Mesne profits Right of coparcener—Accounts—Manager—Liability of—Property subject to mortgage.*

A member of a joint Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager of the portions in his possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. His right to such profits is not as mesne profits received by a person in wrongful possession but as appurtenant to his right in his share of the lands. In a suit for partition by a member of a joint Hindu family, the plaintiff is not ordinarily entitled to claim past mesne profits. He is not entitled to interest on his share of the profits realised by the defendant who was in possession subsequently. The plaintiff is not disentitled to his share of the profits realised by the said defendant from family properties which were subject to mortgages and which were redeemed by the said defendant with family funds. In that case plaintiff is entitled to the profits only from the date of redemption. The defendant is not entitled to interest on the amounts paid by him for redemption. (*Oldfield and Venkatasubba Rao, JJ.*) *T. RAMASWAMI Aiyar v. T. SUBRAMANIA Aiyar*

43 M. L. J. 406; 16 L. W. 297.

———*Partition—Suit—Parties—Creditors. See* (1921) DIG. COL. 646 *SHANMUGA NADAN v. ARUNACHALA CHETTY.*

45 Mad. 194; 42 M. L. J. 97; 30 M. L. T. 172; (1922) Mad. 332.

———*Partition—Unilateral declaration—Execution of a will.*

An unequivocal declaration by a member of the coparcenary body of his intention to be divided in status is sufficient to effect a severance with out an agreement between all the coparceners being required 40 I. C. 36; 43 C 1031; 35 A. 80; 12 N. L. R. 165; 45 M. L. J. 609 Rel. Where a Hindu coparcener specifies his share as one third in his will and thereafter purports to dispose of it, there is a division in status created by the will and the provisions of the will are valid and operative. (*Broadway and Martineau JJ.*) *JUMMA RAM v. MUNSAB RAI*

67 I. C. 812.

———*Partition—Unilateral declaration—Service of notice by a coparcener.*

Under the law of the Mitakshara an unambiguous and definite intimation of intention on the part of one member of the family to separate

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himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then, was held in jointness. This intention may be intimated by the sending of notice. (*Mr. Ameer Ali*) RAMALINGA ANNAVI v. NARAYANA ANNAVI. 45 Mad. 489.

43 M. L. J. 428 : (1922) M. W. N. 399 : 26 C. W. N. 929 · 16 L. W. 639 : (1922) P. C. 201 · 30 M. L. T. 255 : 20 A. L. J. 839 · 24 Bom. L. R. 1209 : 68 I. C. 451 : 49 I. A. 168 (P. C.)

———*Partition—Validity of—Assignment of debt due to the family to one of the members—Debtor not entitled to question—Death of member pending proceedings.*

The death of a member of a joint Hindu family during the pendency of the partition proceedings does not affect the validity of the final partition. Consequently where at the family partition a mortgage debt due to the family is assigned to one or some of the members of the family, it is not open to the debtor to raise an objection to the validity of the partition between the members of the creditor's family. (*Rafiq and Lindsay, JJ.*) ASLAH KHATUN v. BALDEO PRASAD. 20 A. L. J. 957.

**Reversioner.**

———*Reversioner — Interest of, not transferable, nor capable of relinquishment in favour of widow.* See T. P. ACT, S. 6 (a).

24 Bom. L. R. 351.

———*Reversioners—Not the legal representatives of the widow—Not bound by her claim before Land Acquisition officer.* See LAND ACQUISITION ACT, Ss. 25, 3, 9 AND 18.

42 M. L. J. 298.

**Reversioner—Presumption.**

The fact that no other reversioner comes forward and shows a superior claim over the plaintiff within 12 years of the death of the widow does not raise a presumption that he is the reversioner and his claim as a reversioner must be decided on its merits. (1899) A. W. N. 191 distinguished (*Gokul Prasad, J.*) JAGANNATH PRASAD v. RAM LAL. (1922) All. 412.

———*Reversioner — Rights of — Lease by limited owner beyond the period of her life—Election to avoid by reversioner—Death of limited owner—Termination of tenancy.* See HINDU LAW, LIMITED OWNER. (1922) Pat. 353.

———*Reversioner — Proof of relationship — onus.*

In order that a reversioner may succeed to the property of the last male owner he must prove not merely that he was a reversioner but that he was the nearest reversioner. (*Lyle, A. J. C.*) BHIMMA SINGH v. MT. SUNDER. 9 O. L. J. 186 · 4 U. P. L. R. (O. C.) 79 : (1922) Oudh 218.

———*Reversioners — Remote reversioner, derives title through nearer one—Adverse possession—Effect of* See LIM. ACT, ART. 144.

4 Lah. L. J. 201

———*Reversioner—Rights of—One reversioner does not claim through another.*

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One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father 22 A. 33, 28 M. 57 Ref. (*Drake Brockman, J. C.*) GULLB THAKUR v. FADALI. 68 I. C. 566.

———*Reversioner—Rights of—Sale or relinquishment invalid, See (1921) DIG. COL. 647, MUSST. BHAGWATI KUER v. JAGDAM SAHAY*

6 Pat. L. J. 604.

———*Reversioner — Right to sue—Setting aside a will.*

Where a will alleged to have been made by the last owner is impugned, the suit to set it aside must be brought by the presumptive reversionary heir, but if the nearest heir had refused, without sufficient cause, to institute proceedings or had precluded himself by his own act or conduct from suing or had colluded with the widow or had concurred in the act alleged to be wrongful and, if the next presumptive reversioner stated in the plaint the circumstances under which he claimed to sue a Court would exercise a judicial discretion in determining whether he was or was not competent to sue 6 C. 764 Ref. (*Abdul Raoof and Campbell, JJ.*) SUNDAR LAL v. KULLA RAM. 65 I. C. 820.

———*Reversioners — Right of remote reversioners—Omission of nearer reversioners to assert title.*

Where the nearest male reversioners of a deceased Hindu do not choose to avail themselves of their right to possession of the property on the death of the limited owner, it is not open to the remoter reversioners to sue for possession. (*Mears, C. J. and Gokul Prasad, J.*) BIND BAHADUR SINGH v. MT. RITURAJI. 20 A. L. J. 702 : (1922) All. 420 : L. R. 3 A. 380 : 68 I. C. 776.

———*Reversioner—Suit for possession—Not barred by suit by widow.*

A suit for possession by a Hindu widow in her own right does not operate as *res judicata* in a subsequent suit for possession by the reversioner (*Greaves and Cumming, JJ.*) SOSHI KUMAR SARKHEL v. CHANDRA KUMAR SAMADDAR CHOWDHURI. 35 C. L. J. 348 · 68 I. C. 322.

———*Reversioner—Suit for mere declaration of reversionary title during life-time of widow or other heirress—Not maintainable.* See SP. REL. ACT S. 42. 20 A. L. J. 282.

**Stridhanam.**

———*Stridhanam—Succession — Unmarried woman—Prostitution—Effect of.*

The Mitakshara law recognises two forms of descent to a Hindu woman's self-acquired property according as whether she is married or unmarried. It is not the law that when an unmarried woman has fallen from chastity no one can succeed to her property except the Crown. The mother of the woman would be an heir. In the case of Hindu widows who have become prostitutes, the succession to their stridhanam is regulated by the same rules as those which apply to the succession of married women. (*Stuart, J.*) MUSSAMMAT BHANGA v. SHEIK DIN MAHOMED. 4 U. P. L. R. (A.) 8 : 65 I. C. 593



## HINDU LAW—Stridhanam.

———*Stridhanam* — Unmarried female —  
*Succession—Sister.*

The case of an unmarried woman is treated as analogous to that of a childless woman married in a disapproved form and the Succession in both cases is confined to the father's family. Consequently a sister is a preferential heir to any descendant of a paternal ancestor. Several degrees removed 36 B. 339, 43 M. 32, 14 N. L. R. 84 Ref. (*Drake Brockman, J. C.*) *MADHO v. SAMPAT*, 5 N. L. J. 249.

———*Stridhan—Daughter's estate—Mode of devolution—Berar—Mitakshara.*

In Berar a Hindu daughter inheriting from her father takes an absolute estate. In Maharashtra and Berar where the Mitakshara is paramount and the Mayukha of secondary importance the inheritance to non-technical stridhan would devolve on the death of the daughter on (1) unmarried daughter, (2) Married Daughter who is unprovided for, (3) Married daughter who is "provided for" (4) Daughter's daughter (5) Daughter's Son, (6) Son (7) Son's Son. 14 B. 612, 31 B. 453, 6 B. H. C. R. I.; 6 B. 85, 17 B. 758 Ref. (*Prideaux, A. J. C.*) *GOVINDA v. DOOMI*, 5 N. L. J. 187; 65 I. C. 671.

———*Texts—Balambhatta's Commentary—Value of.*

*Shah, J.* Though Balambhatta is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination. (*Macleod, C. J. and Shah, J.*) *DATTATRAYA v. GANGABAI*, 46 Bom. 541; 24 Bom. L. R. 69; (1922) Bom. 321.

## Widows.

———*Widow—Accretion to estates—Debts not collected by widow.*

Where a Hindu widow in possession of her husband's estate does not collect a mortgage debt due to her during her life-time, it becomes an accretion to the estate. (*Daniels and Lyle, A.J.C.*) *SAIYED MAHOMED HADI v. MT. PARBATI*, 9 O. L. J. 312.

———*Widow—Accretion to estate—Income of property.*

A Hindu widow has absolute control over the income of the property which she inherits from her husband subject of course to the payment of the debts left by him and unless it can be shown that she intended to make the savings part of the estate of her husband she would have full power of disposal over it. Where the estate is under litigation and the income of the estate is being deposited in Court subject to the result of the suit which the widow has filed, there is nothing to raise any presumption that she intended the income to be an accretion to the estate. If she clearly wants to treat the property as property over which she had absolute dominion the fact that she purported to deal with properties to which she had no such right along with properties over which she had a right of disposal, would not indicate an intention on her part to treat one as an accretion to the other. That she purported to act beyond her powers as regards some of the items cannot defeat her right to dispose of items over which she had absolute disposing power.

## HINDU LAW—Widow.

(*Schwabe, C. J. and Coutts Trotter and Kumara-swami Sastri JJ.*) *ZAMINDAR OF BAADRACHALAM v. RAJA VENKATADRI APPA RAO*, 48 M. L. J. 486, 16 L. W. 369; (1922) Mad. 457.

(1922) M. W. N. 532; 31 M. L. T. 221 (H.C.)

———*Widow — Acquisition — Accretion — Assets.*

The question whether a Hindu widow dealt with the accumulated income of her deceased husband's estate so as to make it a part of the corpus depends on the circumstances of each case. Where a Hindu widow had mortgaged with possession her husband's estate but on her death her reversioners took possession of the properties and realised the rents that had accrued due during the widow's life time, the moneys so realised are assets of the widow in the hands of the reversioners and are liable to satisfy the claim of the mortgagees. (*Dalal, A. J. C.*) *CHHANNU LAL v. MT. RAJ KUAR*, 9 O. L. J. 24 (1922) Oudh 48, 67 I. C. 16.

———*Widow—Acquisitions — Accretion to estate—Onus.*

Where a Hindu widow effects savings from the income of her husband's property and with it acquires other property, unless it is shown that she dealt with it in such a manner as to indicate it was her absolute property, it must be deemed to have become part of the husband's property. (*Lord Buckmaster.*) *NABAKISHORE MANDAL v. UPENDRA KISHORE MANDAL*, 20 All. L. J. 22; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; (1922) M. W. N. 95; 24 Bom. L. R. 346; 15 L. W. 417; L. R. 3 P. C. 77; 30 M. L. T. 234; 3 Pat. L. T. 311; (1922) P. C. 39; 65 I. C. 305 (P. C.)

———*Widow—Acquisitions—Enfranchisement of inam—Absolute estate—Reversioners not entitled. See INAM ENFRANCHISEMENT.*

(1922) M. W. N. 305,

———*Widow — Acquisition— Income of her husband's estate—Accretion.*

A Hindu widow has full power to dispose of the income of her husband's estate as it accrues. A widow has full power during her life time to invest or otherwise dispose of accumulated income accruing during her possession of a widow's estate there is no reason why a widow should be precluded from exercising an act of appropriation with regard to property to which she has established her title and which is being wrongfully withheld with her by a person in unlawful possession of it. Where there is a manifestation of the widow's intention to appropriate the income from her husband's estate it is sufficient to prevent its passing as part of her husband's estate. 10 I. A. 150, 20 Cal. 433 ref. (*Daniels, J. C.*) *SHYAM NARAIN v. JADUNATH SINGH*, 25 O. C. 41; (1922) Oudh 118; 68 I. C. 242.

———*Widow — Acquisitions — Presumptions —Purchase in the name of daughter—Intention —Suit by reversioner—Onus*

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Where a limited owner like a widow acquires properties out of the income of her husband's estate, the presumption is that the acquisitions are impressed with the same character as the funds employed for their acquisition. The mere fact that the acquisition is made by the widow in the name of her daughter does not rebut the presumption. In considering whether the acquisition was intended to be a gift to the daughter, one important test is the character of the possession of the properties (*i. e.*) whether they were in the possession of the widow or in the exclusive possession of her daughter. 6 M. I. A. 35; 13 M. I. A. 232; 6 I. A. 233, 9 M. I. A. 123, 26 C. 227 Ref. (*Mookerjee and Buckland, JJ.*) SRIMATI CHARUSILA DASI *v* SRIMATI MRINALINI DASI. 64 I. C. 531.

———Widow—Acquisitions — Savings from husband's estate if accretion See (1921) DIG. COL. 650 KESHAV PANDURANG *v* MARUTI KRISHNA SHINDE, 46 Bom. 37; (1922) Bom. 144.

———Widow—Alienation—Consent of nearest reversioner—Presumption of necessity—Gift—Husband's wishes. See (1921) DIG. COL. 650 DRIGPAL SINGH *v* HARHAR BAKSH SINGH. 64 I. C. 80.

———Widow—Alienation—Consent of reversioner, effect of—Presumption.

An alienee from a Hindu widow must prove by evidence that the widow was in need of money at the time of the alienation and that he made enquiries as to the necessity for the loan. The mere presence of the reversioner at the time of the payment of the consideration for the sale to the widow does not raise a presumption of necessity. But the vendee may prove that the presence of the reversioner and his conduct amounted to a representation of necessity which he *bona fide* believed (*Dalal, A. J. C.*) SHEOAMBAR KHAN *v* BALKARAN SINGH. (1922) Oudh 112; 65 I. C. 360.

———Widow—Alienation—Consent of reversioner—Evidence of necessity—Question of fact

In the case of an alienation by a Hindu widow the consent of the male reversioners is presumptive evidence of legal necessity depends on the facts of each case. (*Wazir Hasan, A. J. C.*) RAM BODH SINGH *v* RAM NARAYAN SINGH. 4 U. P. L. R. (J. C.) 3; 65 I. C. 776.

———Widow—Alienation—Consent of reversioner—Proof of necessity.

In the case of an alienation by a Hindu widow if it is proved that the consent of the immediate reversioners had been obtained it raises a strong presumption of the existence of legal necessity for the transfer, which if not rebutted by contrary proof, will validate the transaction as a right and proper one, 30 A. 1; 36 M. L. J. 493, foll. (*Tudball and Sulaiman, JJ.*) HARJAN RAI *v* MAHABIR TEWARI. 64 I. C. 474.

———Widow—Alienation—Gift—If challenged by reversioners—Strangers if can impeach—Nature of the transaction.

A sale, mortgage or gift by a Hindu widow which purports to pass the absolute title is valid

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against every one except the reversioners and unless the reversioners elect to treat it as a nullity it subsists as against every one else. A Hindu widow is not a tenant for life, but owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with her alienation is not therefore absolutely void but is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure, treat it as a nullity without the intervention of any court, and he might show his election to do the latter by commencing an action to recover possession of the property. Consequently a gift of the whole of her husband's property made by a Hindu widow not challenged by the reversioner during her life time and acquiesced in by those who would take a vested interest after her death cannot be challenged by any one else. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled to remain in the possession of the donee that is their affair and no one else can object. If the donee remains in possession under a claim of right for 12 years he will acquire an indefensible title even against the reversioner. (*Miller C. J. and Mullick, J.*) MAHARAJAH KESHO PRASAD SINGH *v* CHANDRIKA PRASAD SINGH. 3 Pat. L. T. 797; 68 I. C. 394 (2).

———Widow—Alienation—Gift to son-in-law of entire property to induce him to marry—Validity.

A Hindu Widow has for certain purposes a clear authority to dispose of her husband's property and she might do it for religious purposes which included dowry to a daughter. Although as a general rule such dowry shall not exceed "a quarter" the words "quarter" simply enjoins the allowance of as much as will suffice for the marriage. A gift of the whole property of small value will be held valid after her lifetime. 37 Cal. 1 and 22 Mad. 113 Referred to. (*Ryves, J.*) BHAGWATI SHUKUL *v* RAM JATAN TEWARI. (1922) All. 381.

———Widow—Alienation—Gift—Religious purpose—Gift in accordance with wishes of deceased husband.

A gift made by a Hindu widow in accordance with the expressed dying wishes of her husband, especially one entailing the many spiritually beneficial acts that were contemplated, would be binding on the reversioners. 6 N. L. R. doubted. (*Hallifax, A. J. C.*) RAMCHANDRA BALKRISHNA *v* RAM CHANDRA. (1922) Nag. 222; 65 I. C. 952.

———Widow—Alienation—Mortgage—Necessity—Long term for redemption—Reversioners when bound.

A person who deals with the Hindu widow, having a limited estate, is bound to establish the facts, which justified the transactions under which he claims. 20 A. L. J. 22 Rel. In the case of a mortgage it is incumbent on the mortgagee to show not only that there was a necessity to borrow but also that it was not unreasonable to borrow at some such high rate and upon such terms and

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if this is not shown the rate and terms would not stand, even though the charge might be upheld. A mortgage may be wholly or in part necessary and yet the terms and conditions entered therein, may be unreasonable and oppressive and the reversioners may not be bound by them. Where a mortgage was executed by a widow in favour of her brother, and the terms and conditions, which the mortgagee for the lady to agree to, were such as to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, and in fact to render redemption practically impossible. *Held*, that the terms were clearly oppressive and unreasonable intended more to fetter the right of redemption than to secure any advantage to the mortgagor and the reversioners were not bound by them. 17 A. L. J. 591 Ref. (*Kanhaiya Lal, J. C.*) DARYAO SINGH v. KALI SINGH

90 L. J. 213. 4 U. P. L. R. (O. C.) 63.  
(1922) Oudh 175 : 68 I. C. 164.

**Widow—Alienation—Necessity—Consent of reversioner—Presumption.**

The consent of the immediate reversioner at the time of the transfer by a Hindu widow, would, in the absence of evidence to the contrary, be only a presumptive proof of legal necessity but the legal necessity relied upon must be such as under the Hindu Law would justify a transfer. (*Stuart and Sulaiman, JJ.*) UDAI BHAN SINGH v. GAJENDRA SINGH.

L. R. 3 A 376

Widow—Alienation—Necessity—Consideration not binding to a partial extent—Form of decree. See (1921) DIG COL 651 VISWANATHA SASTRIGAL v. VALAMBAL AMMAL

30 M. L. T. 14 (H. C.)

**Widow—Alienation—Future Necessity**

It is not competent to a Hindu widow to alienate her husband's estate in order to raise money for a future necessity. A daughter's marriage which is not likely to take place for several years to come is not a necessity. 46 P. R. 1912 foll. Where there is a mortgage on the estate but there is no pressure from the creditor the widow is not justified in selling immoveable property for paying off the mortgage and keeping the balance on her hands in anticipation of future necessity. 31 Mad. 153 dist. (*Abdul Raoof and Martineau, JJ.*) BALLA SINGH v. GURDIT SINGH

3 Lah. L. J. 484

**Widow—Alienation—Necessity—Future necessity—Bulk of the consideration for necessity Form of decree.**

A Hindu widow is not always bound to sell exactly for the amount for which there is legal necessity. In each case the court has to see whether having regard to the circumstances the alienation was a proper one. 1 B. L. R. 201, 14 C. W. N. 895 Ref.

The rule that a widow should not alienate in anticipation of a necessity is not an inflexible rule. What is to be seen is whether in the particular case the widow has dealt fairly towards the expectant heir. Even granting that a minor portion of the consideration is not proved to have been taken for legal necessity, the alienation ought to be upheld. 26 I. C. 178 ; 26 I. C. 418.

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Ref. (*Abdul Raoof and Martineau, JJ.*) NAMAN MAL v. HAR BHAGWAN, (1922) Lah. 317 : 2 Lah. 357 : 66 I. C. 362.

**Widow—Alienation—Necessity—Maintenance—Consent of the reversioner—Attestation.**

Where it was found that though the husband of the widow left large landed property, the lands were unproductive and the widow unable to live on without borrowing, a mortgage created by her could not be said to be without necessity. Where a reversioner had attested the mortgages and had acted throughout as the attorney of the widow, he is estopped from challenging the alienation as having been made without consideration or necessity. (*Le Rossignol and Wilberforce, JJ.*) ARURA v. SHIVDEV SINGH.

4 Lah. L. J. 45 : (1922) Lah. 61

**Widow—Alienation—Necessity—Maintenance—Future maintenance**

A Hindu widow is justified in alienating her husband's estate where its income is insufficient for her maintenance. She is not obliged first to run into debt and then to sell the land in order to discharge the debt with interest added. If by first selling the land she can so improve the estate as to provide sufficient for her own maintenance, this is not merely an prudent but a necessary arrangement. (*Chevis and Campbell, JJ.*) RADHA RAM v. KUSHI RAM (1922) Lah. 204 : 66 I. C. 343.

**Widow—Alienation—Necessity—Onus of proof—Recitals to be specific.**

A Hindu widow cannot sell more than her interest in her husband's property unless there is legal necessity and the onus is on the purchaser to prove it. If payment of debts is relied on there ought to be a recital in the deed of the specific debts paid off. (*MacLeod, C. J. and Shah, J.*) MOHANSINGH UMED RAMOL v. DALPATSINGH KAMBAJI. 46 Bom. 753 : 24 Bom. L. R. 289 : (1922) Bom. 51 : 67 I. C. 235.

**Widow—Alienation—Necessity—Permanent lease—Fair rent—Onus**

A person who deals with a Hindu widow having a limited estate must be aware that he may be called upon to establish the facts which justify the transactions under which he claims.

The mere fact that the rent reserved was a fair market rent, or the price obtained was a fair market price cannot alone and in themselves be regarded as sufficient. (*Lord Buckmaster.*) NABAKISHORE MANDAL v. UPENDRAKISHORE MANDAL 20 A. L. J. 22 : 26 C. W. N. 322 : 35 C. L. J. 116 : 42 M. L. J. 253 : (1922) M. W. N. 95 : 24 Bom. L. R. 346 : 15 L. W. 417 : L. R. 3 (P. C.) 77 : 30 M. L. T. 234 : 3 Pat. L. T. 311 : (1922) P. C. 39 : 65 I. C. 305 (P. C.)

**Widow—Alienation—Necessity—Recitals in deed—Value of**

Though recitals in a sale deed by a Hindu widow could not by themselves be taken as conclusive evidence of legal necessity, the recitals coupled with other evidence, circumstantial or otherwise, may amount to sufficient proof in the circumstances that the transactions were binding

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on the family, 44 C. 186 (P. C.) Rel. (*Lindsay and Stuart, JJ.*) SAJU PRASAD v. MAHOMED SHAKUR. (1922) All. 126. 66 I.C. 564.

—Widow—Alienation—Necessity—Religious or charitable purposes—What are—Gift of a small portion of the estate to Deity for the spiritual, welfare of her deceased husband—Validity of

The Hindu Law recognises two sets of religious acts as justifying an alienation by a Hindu widow. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed by the Hindu Religious Law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. With reference to the first class of acts the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case if the income of the property or the property itself is not sufficient to cover the expenses she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view.

Where a Hindu widow after performing a pilgrimage to Jagannath gifted a small portion of her husband's estate (in this case a one seventy-fifth) for the observance of bhog (food offerings) to the deity and for the maintenance of the priest and she purported to make the gift for the welfare of her deceased husband's soul and his salvation, *Held*, that the gift was valid though the widow had ample income from her husband's estate out of which she might have made the gift, 8 M. I. A. 329; 13 M. I. A. 209, 8 Mad. 552, 34 Mad. 288 approved. 22 Cal. 506 dist. (*Mr. Ameer Ali*). SARDAR SINGH v. KUNJ BEHARI LAL

44 All. 503 : (1922) P. C. 261 :  
16 L. W. 871 : 31 M. L. T. 253 (P. C.) :  
69 I. C. 86 : 49 I. A. 383. (P. C.)

—Widow—Alienation—Necessity—Small portion not applied for necessity—Effect of,

Where out of the consideration of Rs. 5,300 for a sale by a Hindu widow, a sum of Rs. 4,588 was applied for the discharge of debts binding on the estate the mere fact that the remainder was spent by the widow on purposes not binding on the estate, would not vitiate the sale. In judging of the value of the lands, regard should be had to its market value if sold in a lump. At a private sale of a considerable extent of land purchased in lump the price would depend not so much on the valuation of its component parts calculated on a regular scale, as on the need of the vendor for money and the competition for lands in that locality at the time of the sale. (*Sir John Edge*). MEDAI DALAVOI THIRUMALAYAPPA MUDALIAR v. NAINAR TEVAN. 16 L. W. 478.

31 M. L. T. 149 (P. C.) : (1922) P. C. 307 :  
(1922) M. W. N. 804 : 4 U. P. L. R. (P. C.) 92.

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—Widow—Alienation—Necessity—Test of.

The expression "necessity" when used in connection with an alienation by a Hindu widow, has a somewhat special, almost technical meaning. A widow can alienate if there are no other means available for the obligatory ceremonies to secure the repose of the soul of her husband. She can alienate immoveable property to pay the last owner's debts or (if there is no other available source of supply) for her own or for infant children's maintenance. Necessity does not mean actual compulsion but the kind of pressure which the law recognises as serious and sufficient. (*Lord Phillimore*). RAMSUMRAN PRASAD v. MT. SHYAM KUMARI. 31 M. L. T. 200 :

49 I. A. 342 (P. C.) : (1922) P. C. 356 :  
3 Pat. L. T. 749 : 16 L. W. 956 : 69 I. C. 71.

—Widow—Alienation—Payment of her debt—Consent of reversioners—Necessity—Presumption See (1921) DIG. COL. 652; BHUP SINGH v. JAMMAN SINGH 44 A. 95 :  
64 I. C. 630.

—Widow—Alienation—Pension for manager—Liability of executor or successor to estate. See (1921) DIG. COL. 652 MAHARAJAH KESHO PRASAD SINGH v. SRI SARAN LAL. 30 M. L. T. 50 15 L. W. 589 :  
(1922) P. C. 226 :  
L. R. 3 P. C. 115 : 26 C. W. N. 689 (P. C.)

—Widow—Alienation by way of gift—Consent of reversioner—Effect—Estoppel. See (1921) DIG. COL. 651 BASAPPA DODFAKIRAPPA v. FAKIRAPPA SHENKRAPPA. 46 Bom. 292 :  
(1922) Bom. 102 : 64 I. C. 214.

—Widow—Alienation of estate—Proceeds in the hands of third person—Right to follow. See (1921) DIG. COL. 653 RAMAYYA v. MAHALAKSHMI. (1922) Mad. 357 : 64 I. C. 481

—Alienation—Reversioners—Right of. to set aside—Limitation.

An alienation of an absolute estate by a Hindu widow by way of gift is not binding on the reversioner and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have it set aside notwithstanding Art. 91 of the Lim. Act. (*Muller, C. J. and Mullick, J.*) MAHARAJAH KESHO PRASAD SINGH v. CHANDRIKA PRASAD SINGH. 3 Pat. L. T. 797 : 68 I. C. 394. (2)

—Widow—Alienation—Setting aside—Equities—Duty to refund consideration.

If it has been proved that a sale by a widow having a limited interest, has benefitted the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that if the consideration money for the sale is found intact at the death of the widow, the estate has benefitted to that extent. So that if the reversioner after the widow's death wishes to have the sale by her set

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aside, he can only succeed if he restores the money. It would be different if it could not be proved that the purchase money was still intact in the estate. (*Macleod, C. J. and Coyajee, J.*) SOMESHWAR JETHABAI DAVE v SOMESHWAR GOVINDRAM JOGIR. 24 Bom L. R. 493. 67 I. C. 658.

—Widow—Alienation—Setting aside—Form of decree. See (1921) DIG COL. 653 PRAMATHA NATH BASU v. BHUBAN MOHAN BASU. 49 Cal 45 : (1922) Cal 321 64 I. C. 980.

—Widow—Alienation—Setting aside—Improvements—Mesne profits—Set off.

Where an alienee from a Hindu widow effected permanent improvements on the property which resulted in an increased rental and the alienation is set aside at the instance of the reversioner on the death of the widow, it is open to the Court to set off against the mesne profits awarded to the decreeholder the increased rent that was attributable to the improvements, even though the improvement was not actually executed by the person in possession at the moment when the decree for possession was made, (*Lord Buckmaster*). BARHAM DEO NARAIN SINGH v. RAM RATAN SAHU. L. R. 3 P. C. 20

—Widow—Alienation—Setting aside—Reversioner—Daughter—Agnate.

It is competent to the nearest male reversioner of deceased Hindu to maintain a suit for a declaration that an alienation of the estate by the widow is not binding, even though there is a daughter in existence as nearer reversioner. 27 P. R. 1916 foll. (*Abdul Raoof and Martineau, JJ*) BALLA SINGH v. GURDIT SINGH. 3 Lah. L. J. 484

—Widow—Alienation—Setting aside—Reversioner—Rights of.

An alienation by a Hindu widow of the estate or a portion of the estate is not void ab initio but is only voidable if it transgresses the limitations imposed by the Hindu law on the power of alienation. The death of the alienor does not necessarily render the alienation inoperative 25 C. 1 (P. C.) Ref. The right of the reversioner to challenge the validity of the alienation is a permanent factor of his title to the property which develops from a bare spes successiones into a vested interest on the death of the widow. The reversioner's right to challenge the validity of one alienation is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of one and the same title. He has a right of election; he may choose to challenge one alienation and assent to another or he may challenge both or assent to both. He may exercise his right of election in regard to one alienation at one time and in regard to another alienation at another time. Nothing is a surer indication of election than a challenge in the suit. 34 C. 329 P. C. Ref. (*Wazir Hasan, A.J.C*) BAHADUR SINGH v. SULTAN HUSAIN KHAN. (1922) Oudh 171 : 66 I. C. 455.

—Widow—Alienation—Setting aside—Rights of reversioners—Mesne profits.

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Where a Hindu reversioner sues to recover property alienated by a Hindu widow, he is entitled to mesne profits from the death of the widow.

A voidable transaction is good as against third parties till it is set aside but as regards the person who has the right to avoid it if it is in a state of suspense until such party exercises his option (*Daniels and Lyle, A. J. C.*) SAIYID MAHOMED HADI v. MT. PARBATI. 9 O. L. J. 312.

—Widow—Alienation—Settlement in favour of daughters—Family arrangement—Rights of alienee from daughters—Mesne profits—Liability for.

In the absence of a bona fide dispute relating to the estate by an independent person a widow cannot parcel out the estate of her husband under the guise of a family arrangement. Consequently a settlement by a Hindu widow in favour of her two daughters giving each of them a moiety of the estate absolutely is not binding on the reversioner.

13 L. W. 436 ; 27 M. L. J. 149.

22 C. L. J. 52 Dist.

An alienee from a limited owner without necessity is liable for mesne profits from the death of the limited owner. (*Spencer and Devadoss, JJ.*) JOGA YERRAYYA v. NAKINA SALLEYYA.

16 L. W. 752.

—Widow—Compromise—Powers of—Necessity—Test of.

A compromise made bonafide for the benefit of the estate and not for the personal advantage of the limited owner will bind the reversioner quite as much as a decree on contest. 21 C. L. J. 157 approved, 33 A. 357 ; 9 M. L. A. 539, 604 Ref. 6 C. L. R. 76 dist. (*Lord Phillimore*) RAMSUN-RAN PRASAD v. MT. SHYAM KUMARI.

31 M. L. T. 200 (P. C.) 3 Pat. L. T. 749 :

16 L. W. 956 : (1922) P. C. 356 : 69 I. C. 71 : 49 I. A. 342 (P. C.)

—Widow—Compromise—Settlement of family dispute—Binding on reversioners.

A genuine family settlement entered into for the purpose of avoiding litigation on doubtful claims is binding on the reversioners even though one of the parties to that compromise was a female with a limited estate. Such a compromise is based on the assumption that there was an antecedent title of some kind on the parties and the agreement acknowledges and defines what that title is. 33 A. 356 ; 1 I. A. 157 Ref. (*Daniels and Lyles, A. J. C.*) KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD.

25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh 236.

—Widow—Compromise—When binding on reversion—Onus of proof—Suit to enforce mortgage—Conveyance of property.

Where a Hindu widow who inherited her husband's properties executed a mortgage of some of them and when the mortgagee sued to enforce the mortgage entered into a compromise by which she conveyed the properties to the mortgagee, in a subsequent suit by the reversioner to recover the properties, the burden of proving that the compromise as well as the mortgage are binding on the reversion lies on the alienee.

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In an action against the widow on a contract made by her a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property. 35 M. 560, 10 L. W. 594; 38 C. 639, 8 A. 369 followed. 31 M. L. J. 87; (1921) M. W. N. 312 distinguished (*Schwabe C. J., Coutts-Trotter and Kumaraswami Sastri, JJ.*) *NALLA TIRUPATHIRAJU v. NANDIKOLLA VENKAYYA*. 45 Mad. 504; 42 M. L. J. 392.

15 L. W. 395. 30 M. L. T. 181.  
(1922) M. W. N. 207. (1922) Mad. 131.  
67 I. C. 479. (F. B.)

—Widow—Decree against—Binding on reversion. See C. P. CODE, S. 11.

16 L. W. 94

—Widow—Decree against—Binding on reversion—Fraud—Collusion.

In the absence of fraud or collusion a decree obtained against a Hindu widow has binding effect on all the reversioners. 2 W. R. 31, 40 A. 593. Where there is absolutely nothing to suggest that the trial in a suit against the widow was not a fair one and that there was any special ground which was not urged at that time, the reversioner is bound by the decree (*Stuart and Sulaiman, JJ.*) *JAI NARAIN SINGH v. GITA PRASAD L. R. 3 A. 447* (1922) All. 473.

—Widow—Decree—Execution proceedings against daughter—Execution sale binding on reversioners—Remote reversioners—Rights of See (1921) DIG. COL. 655. *PRAMATHA NATH BASU v. BHUBAN MOHAN BASU*.

49 Cal. 45. (1922) Cal. 321.  
64 I. C. 980

—Widow—Decree against—Sale in execution—Interest of reversioners if affected.

A decree passed in respect of a tort committed by a Hindu widow, as by a trespass on the lands of her neighbour, is not binding on the reversion. Where the widow of a fixed rate tenant trespassed on some lands of the zemindar who obtained a decree against her and brought the fixed rate tenancy to sale in execution of the decree Held that the execution sale was not binding on the widow. (*Mears, C. J. and Gokul Prasad, J.*) *ARJUN SINGH v. BINDESHRI PRASAD*.

L. R. 3 A. 361

—Widow—Letters of Administration—Widow entitled in preference to reversioner. See PROB. AND ADMN. ACT, S. 23.

64 I. C. 61.

—Widow—Mortgage right—Usufructuary mortgage—Execution sale—Rights of reversioner.

An usufructuary mortgage right vested in a Hindu widow as heir of her husband is not immoveable property. If the mortgage is redeemed during the widow's life time and the widow spent the money, as she would be entitled to do, the reversioner could not claim against the party redeeming to be again put in possession of the property until redeemed a second time. The mere fact that the widow was in possession as mortgagee would not cause those mortgage rights to be treated in law as immoveable property, as all that the widow was entitled to was to retain possession of the property as security for the debt

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until she was redeemed. Consequently mortgage rights vested in the widow represent no able property and could be sold in execution of a decree against her irrespective of any question of legal necessity. (*Macleod, C. J. and Coyajee, J.*) *BAI JADI v. PURSHOTTAM NAROTTAM DAVE*.

24 Bom. L. R. 729; (1922) Bom. 387.

—Widow—Nature of estate—Alienation—Rights of reversioners.

The estate which a Hindu widow has in property inherited by her from her husband is neither a life-estate nor an estate held in lieu of maintenance. She is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolution on her husband's heirs after her death. But she may alienate it subject to certain conditions as to necessity or propriety. Her alienation in excess of her powers is not void but voidable at the election of the reversionary heirs. The reversioner may either affirm it or treat it as a nullity at his option. 34 C. 329 Ref. (*Simpson and Wazir Hasan, A. J. C.*) *MIRZA SADIQ HUSAIN v. MAHOMED KARIM*.

90 L. J. 456;  
(1922) Oudh 289.

—Widow—Nature of estate—Powers of

The estate of a Hindu widow is not a life-estate. She is a proprietor of the estate with a right of alienation subject to certain qualifications. Each alienation by the widows in the exercise of that right must be judged by the circumstances in which it was made. 8 M. I. A. 529 Ref. (*Wazir Hasan, A. J. C.*) *BAHADUR SINGH v. SULTAN HUSAIN KHAN*.

(1922) Oudh 171;  
66 I. C. 455

—Widow—Nature of estate—Succession to a female. See (1921) DIG. COL. 656. *NARAYAN MORESHWAR v. WAMAN*.

46 Bom. 17.  
(1922) Bom. 134.

—Widow—Occupancy rights—No presumption of life interest

There is no presumption in law that a Hindu widow who is an occupancy tenant holds only a life interest—Hindu widows can and frequently do obtain occupancy rights on their own account, (*Hopkins, S. M. and Fremantle, J. M.*) *SAHU MUKUND RAM v. HABBU*.

L. R. 3 All. 23 (Rev.)

—Widow—Powers of—Grant of permanent lease—Reversioner's rights.

Ordinarily a Hindu widow in possession of her husband's estate is presumed to have only a life interest in the property. She has no right to grant a permanent lease of the property and if she does so the lease is voidable at the option of the reversioner. (*Hopkins, S. M. and Burn, J. M.*) *CHAUDHRI CHHEDA SINGH v. BHEJAN*.

L. R. 3 A. 162 (Rev.)

—Widow—Powers of—Will—Fund in Court.

There is no authority for holding that a fund in court to which the testatrix has laid a claim and to which she will be entitled if successful, cannot be disposed of by will. (*Schwabe, C. J., and Coutts Trotter and Kumaraswami Sastri,*

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JJ.) ZAMINDAR OF BHADRACHALAM *v* SRI RAJAH VENKATADRI APPA RAO 43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.) : (1922) Mad. 457.

—Widow — Remarriage — Conversion — Divesting of estate vested in her, *See* HINDU LAW, ADOPTION 5 N. L. J. 58

—Widow — Remarriage — Succession to estate of son by former marriage.

A Hindu widow is not disentitled from inheriting to her son by a former marriage, though she had remarried at the time of her son's death 11 W. R. 82 ; 29 B. 91 Ref. (*Woodroffe and Ghose, JJ.*) HAR KISHORE SEAL *v* THAKUR DHAN BAISHNUB. 26 C. W. N. 925. (1922) Cal. 140.

—Widow — Representation of estate — Decree in suit by her against adopted son impleading reversioners as parties—Reversioners not impleaded as parties to the appeal—Effect of —Decree on appeal against widow—Decree binding on estate in the absence of fraud or collusion. *See* C. P. CODE, S. 11.

43 M. L. J. 95.

—Widow—Representation of estate—Land acquisition proceedings—Reversioners not bound by her acts or claim before Collector. *See* LAND ACQUISITION ACT, Ss. 25, 3, 9 AND 18.

42 M. L. J. 298.

—Widow—Representation by—Suit by her, if bars suit for possession by reversioner. *See* HINDU LAW, REVERSIONER.

35 C. L. J. 348.

—Widow—Reversioner — Relinquishment of interest by reversioner in favour of widow—Interest of widow not enlarged thereby. *See* T. P. ACT, S. 6.

24 Bom. L. R. 351.

—Widow — Surrender — Remarriage — Effect on succession.

Where a Hindu widow surrenders or remarries the estate passes to the next heir by inheritance under the law and not under any transfer. An ordinary tenancy right held by the widow also passes in this way. (*Hallifax, A. J. C.*) SUNDAR LAL *v* BISAMBHAR. (1922) Nag. 24 : 65 I. C. 180.

—Widow — Surrender — Surrender to grandson's son having predeceased—Surrenderer Under taking to discharge mother's debts—Partial surrender—Surrender if valid—Effect of surrender if valid—Effect of surrender on prior alienations. *See* (1921) DIG. COL. 659 SRI RAJAH INUGANTI VENKATA RAJAGOPALA SURYA RAO BAHADUR *v* DATLA VENKATA SURYANARAYANA.

64 I. C. 488.

—Widow—Surrender—Reservation of a portion of moveables and house—Effect on surrender.

The retention of a house and some moveables does not vitiate a surrender of the rest of the estate by a Hindu widow in favour of her daughter. 48 C. 100 P. C. Ref. (*Pridmore, A. J. C.*) MT. SUPDI *v* MARUTI. (1922) Nag. 187 : 67 I. C. 960

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—Widow—Surrender — Validity—Essentials

To constitute a valid surrender or renunciation by a Hindu widow, she must have parted with the whole of the estate which descended from her husband (*Wazir Hasan, A. J. C.*) RAM BODH SINGH *v* RAM NARAYAN SINGH.

4 U. P. L. R. (J. C.) 3 : 65 I. C. 776

—Widow—Surrender—Validity of—Reservation of absolute estate in a portion in lieu of maintenance.

A bona fide surrender of her husband's estate by a Hindu widow in favour of her reversioner is not invalidated by the fact that she got an absolute right in a small portion of the estate in lieu of her maintenance, where the portion so allowed is not in excess of her reasonable requirements (*Kumaraswami Satri and Devadoss, JJ.*) KARUPPA GOUNDAN *v* MUDALI GOUNDAN.

43 M. L. J. 36 : (1922) M. W. N. 259. 67 I. C. 397.

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—Will—Bequest to relative's prospective wife.

There is nothing in Hindu Law to invalidate a legacy to the prospective wife of a relation, if she was in existence at the time of the testator's death. (*Batten, O. J. C.*) MT. RAMDULABI *v* BISHESHWAR DAYAL.

18 N. L. R. 143.

—Will—Construction—Absolute estate—Female donee—No power of disposition—"Malik"—Effect of such description.

Where a Hindu testator disposes of his estate in favour of his daughter and grand-daughter to be taken by them as "*malik war waris*", each of them takes an absolute estate in a moiety of the properties and this right is not affected by a provision in the will that on the death of the daughter, the grand daughter was to take the entire property. 30 A. 84 ; 38 A. 446 Rel. 23 C. 670 ; 37 M. 199 ; 35 C. 896 ; 2 I. A. 7 Ref. 12 B. 122 foll. 41 B. 70 Dist. (*Drake Brockman, J. C. and Hallifax, A. J. C.*) MANGALJI *v* RAMBHAOO.

(1922) Nag. 73 64 I. C. 752.

—Will—Construction—Bequest to widow and daughter—Absolute or limited estate—Malik—Powers of alienation. *See* (1921) DIG. COL. 660. SUDHAMANI DAS *v* SARAT LAL DAS.

66 I. C. 628.

—Will—Construction—Bequest to Hindu widow—Limited or absolute estate—Presumption against intestacy.

A Hindu testator directed the residue of his estate after payment of certain legacies to be delivered over to his wife P. after she attained the age of 20 years. *Held*, that there was a valid disposition of the property after the payment of legacies and that the wife took an absolute estate under the will, 42 M. 283 ; 44 M. 447, 30 A. 84 Rel.

There is a presumption against intestacy. Courts are not to presume that a testator who set up to write a will has not cared to say what is to become of the bulk of the property. (*Coutts Trotter and Ramesam, JJ.*) KANAKAMMAL *v* BAKTAVATSULU NAIDU. 44 M. L. J. 23 : 16 L. W. 970.

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—Will—Construction—Devise to two coparceners—Donees whether take jointly. See (1921) DIG. COL. 661, MAHALAKSHMI AMMA v. NAGAPAYA. 30 M. L. T. 17.

—Will—Construction—General principles—"malik" meaning of.

It is always dangerous to construe the words of one will by the construction of more or less similar words in a different will, which was adopted by a court in another case.

The meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related and the locality of the testator from which it may receive its true shade of meaning.

"Malik" when used in a will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights are not intended to be conferred.

Where a Hindu gave all his moveable and immoveable properties with full rights of alienation to his wives. *Held*, that the ladies took as absolute owners. (*Sir John Edge*.) MT. SASIMAN CHOWDHURAI v. SHIB NARAYAN CHOWDHURY.

42 M. L. J. 492 : 30 M. L. T. 242 : 1 Pat. 305 : (1922) M. W. N. 368 . 35 C. L. J. 427 : 20 A. L. J. 362 : 24 Bom. L. R. 576 . L. R. 3 P. C. 97 : 66 I. C. 193 : 49 I. A. 25 : (1922) P. C. 63 : 26 C. W. N. 425 . 15 L. W. 434 . 3 Pat. L. T. 133 (P. C.)

—Will—Construction—Gift to adopted son by name—Adoption invalid—Persona designata.

A Hindu adopted his daughter's son out of affection and hoped his family would recognise the adoption. The boy was adopted in 1892 and since then brought up by the adoptive father. In 1912 he made a will giving a life interest in his properties to his widow and the remainder to his "adopted son, Janardhan." Subsequently the adoption was found to be invalid. *Held* that it was not clear from the words of the will that the testator intended to make the gift to Janardan conditional on the adoption being valid and that Janardan took as *persona designata* under the will. In such cases the court should not strain to adopt a construction which would defeat the intention of the testator. 12 I. A. 72 : 31 A. 5 Kel (*Macleod, C. J. and Shah, J.*) BAI DHONDUBAI v. LAXMANRAO TRIMBAC RAO. 24 Bom. L. R. 794 . (1922) Bom. 352 : 68 I. C. 504.

—Will—Construction—Gift to widow—Full proprietary right—Nature of estate taken—Malik.

A Hindu governed by the Mithila school of Hindu law made a will by which he directed that after his death his widows should be maliks and heirs to all his immoveable properties and should have in every way full power and all proprietary rights over all the moveable and immoveable properties. *Held*, that the widows took an absolute estate with full powers of alienation. 2 I. A. 7 : 24 Cal. 342, 24 I. A. 76; 35 I. A. 17, 43 I.

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A, 188, 49 I. A. 1, ref. (*Sir John Edge*.) MUSSAMMAT SASIMAN CHOWDHURAI v. SHIB NARAYAN CHOWDHURY. 1 Pat. 305 : 35 C. L. J. 427 :

(1922) P. C. 63 : 15 L. W. 434 : 26 C. W. N. 425 : 3 Pat. L. T. 133 : (1922) M. W. N. 368 . 42 M. L. J. 492 30 M. L. T. 242 : 20 A. L. J. 362 : 24 Bom. L. R. 576 : L. R. 3 P. C. 97 : 66 I. C. 193 : 49 I. A. 25 (P. C.)

—Will—Construction—Gift to widow—Malik—Ownership.

A Hindu governed by the Mayukha law executed a will by which he constituted his wife as owner and directed that "whatever property there may remain after her death, my wife shall leave the said property to my two daughters in such manner as she may like." *Held*, that the wife was absolute owner of the estate. If words are used in a will conferring absolute ownership upon the wife, she enjoys the right of alienation without its being conferred by express and additional terms unless the circumstances or the context were sufficient to show that such absolute ownership was not intended. *Held* further that there was no trust created in favour of the daughters as the subject matter on which the trust was to operate was too uncertain to enable the Court to give it administration. (*Lord Buckmaster*) BHAI DAS SHIV DAS v. BAI GULAB.

46 Bom. 153 : 42 M. L. J. 385 : 15 L. W. 412 : 30 M. L. T. 149 (P. C.) : 20 A. L. J. 289 : L. R. 3 P. C. 16 : 35 C. L. J. 315 : 24 Bom. L. R. 551 : (1922) P. C. 193 : 26 C. W. N. 129 : 65 I. C. 974 : 49 I. A. 1 : (P. C.)

—Will—Construction—Gift to widow—Nature of estate.

Where a Hindu testator bequeathed the whole of his self-acquired property in favour of his wife describing her as his *Waris* and *qabiz* and conferring upon her the same rights over the property as he himself had, *held*, that the wife took an absolute estate in the property. 30 All. 84 : 42 Mad. 283 ; 2 Lah. 175, 1 Lah. 415 ref. (*Wazir Hasan, A. J. C.*) MAHOMED HAMIDULLAH KHAN v. FAKHRJAHAN BEGAM. (1922) Oudh 109 : 65 I. C. 452.

—Will—Construction—Gift to widows—Nature of estate—Survivorship. See (1921) DIG. COL. 662 ACHAMMAL v. NARAYANASWAMI NAICKER. 69 I. C. 5.

—Will—Construction—Gift to widows—Restriction on alienation—Nature of estate, taken.

A Hindu testator died leaving a Will whereby he bequeathed his property to his three widows, declaring that they should have the same powers over the property as he had, but imposing some further conditions. If any one of the widows wished to transfer any portion of the property she should do so only with the consent of the other widow. On the death of any one of the widows her share was to go to the surviving lady and that if any one of the ladies did any act which would bring disgrace on the family, the others were to be entitled to deprive her of her share. *Held*, that the Will gave a limited estate which on the death of two of the widows would



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ripen into an absolute estate for the last surviving widow (*Lyle, A. J. C.*) *MAKHANA v. BINDESHRI PRASAD* (1922) Oudh 168 : 65 I. C. 457

— — — Will—Construction—Life estate—Gift of life estate with remainder—Powers of life-tenant and remainderman—Female donee. See (1921) DIG COL. 663. *MITHIBAI v. MEHERBAI*, 46 Bom. 162 : (1922) Bom 179 64 I. C. 397.

— — — Will—Construction—Prior estate for life—Creation of subsequent estates—Period of ascertainment

Where a Hindu testator after providing for a life-estate for the maintenance of his widowed daughter gives over the property on her death to his son or grandson or any other heirs then living the properties would pass to the person who was the testator's heir on the death of the tenant for life, and not to the person who was the heir of the testator at the date of his death. (*Walmsley and Greaves, JJ.*) *RAJANI KANT MONDAL v. KANTI CHANDRA MANDAL* 64 I. C. 237.

— — — Will—Construction—Provision for idols—Absence of gift—Effect—Scheme.

A Hindu testatrix addressed her will to her grandson and directed him to perform the worship of some family idols out of the income of specified properties. There was no gift of any property to the idols nor any provision made for worship after his death :—

*Held*, (1) no heritable shebaitship had been created (2) the properties were conferred on the grandson subject to the maintenance of the worship, and (3) the trust treated being a private one, a scheme under S. 92 C. P. Code was not proper. (*Lord Buckmaster*) *GOPAL LAL SETT v. PURNA CHANDR BASAK*.

43 M. L. J. 116. 20 A. L. J. 625 : 36 C. L. J. 57 : 49 C. 459 : 24 Bom. L. R. 937 : (1922) P. C. 253 : 16 L. W. 963 : 67 I. C. 561 : 49 I. A. 100 (P. C.)

— — — Will—Proof of—Degree of.

Much technical proof may not be necessary for a Hindu will but there must be some evidence to say that a document purporting to be a Will by a Hindu was executed by him. (*Broadway and Abdul Qadir, JJ.*) *HAR BHAGWAN v. HUKHAM SINGH*. 3 Lah 242 : 4 Lah L. J. 245 : (1922) Lah 243 : 68 I. C. 769.

— — — Will—Right to question—Reversioner—Genuineness.

A person, on his death, left a widow but no children and no near relatives. The appellants, who successfully opposed the registration of the will brought a suit against the widow and the sister's son of the widow, in whose favour the will was made, for a declaration that they held the position of the nearest agnates of the deceased and that the so called will was not executed in fact and was, if executed, executed by him while in an unsound state of mind. They failed to prove their relationship but alleged that the deceased had an intention to make a will, but a will in favour of charity. *Held* (1) The natural order of trying such a case would be to take up first the question whether the persons who were attacking the will had any title to raise the question. (2) The admission of the appellants, that the deceased had an intention to make a will,

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raised a presumption of the genuineness of the will, (*Lord Dundas*.) *PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSHMAMMA* (1922) P. C. 315 : 17 L. W. 1 (P. C.)

HINDU WIDOWS REMARRIAGE ACT, (XV of 1856) S. 1—Applicability of—Remarriage of Hindu widow permitted by custom See (1921) DIG COL. 665. *BHAGWANDIN v. INDRANI*. 65 I. C. 117.

— — — S. 1—Hindu widow—Remarriage—Subsequent death of her son—Inheritance.

A Hindu widow can inherit from her son by a former marriage, though she had remarried at the date of her son's death. 11 W. R. 82 Rel. 29 B. 91 Ref. (*Woodroffe and Ghose, JJ.*) *HAR KISHORE SEAL v. THAKUR DHAN BAISHNUB*, 26 C. W. N. 925 : (1922) Cal. 140.

— — — S. 2—Hindu widow—Conversion to Mahomedanism—Remarriage thereafter—Forfeiture of estate.

A Hindu widow who becomes a Mahomedan and remarries loses her right to her husband's property S. 2 of the Hindu Widow's Remarriage Act includes all persons who being Hindus become widows and any such widow, if she remarries, loses the estate which she inherited from her deceased husband. Apart from the Act, under the Hindu law a widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she remarries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. The reason therefore for her keeping the estate of her deceased husband disappears.

11 A. 330 : 31 A. 161 : 32 A. 489 diss 1 M. 226, 41 M. 1078, 21 C. W. N. 906 : 22 C. 589, 14 C. W. N. 346 : 8 C. L. J. 542 Rel. (*Coutts and Adams, JJ.*) *MT. SURAJ JOTE KUER v. MT. ATTAR KUMARI*. (1922) Pat. 235 : 3 Pat L. T. 551 : (1922) P. 378 : 67 I. C. 550.

HINDU WILLS ACT (XXI of 1870), S. 216—Will—Executor—Power to carry on business—No direction in will—Discretion of court—Debts incurred in carrying on business—Indemnity.

A died leaving a will dated the 11th December, 1904, whereby he appointed his wife B and another person executors and gave B power to adopt a son to him, and made the adopted son proprietor of his estate. His estate consisted *inter alia* of banking businesses at C and D. The banking businesses were the ancestral business and the backbone of the firm, although they were to a great extent hazardous and the credit of the estate rested entirely on the businesses which were carried on by borrowing money and were without capital. On the 24th May, 1905, after discharging a caveat, a probate was issued to the executors. When the caveat was entered on the 5th April, 1905, administrators *pendente lite* were appointed. The plaintiff was adopted on the 26th April, 1906. The executors after the issue to them of probate, without obtaining the leave or directions of the Court continued the testator's businesses though no power was given

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to them by the will, down to the 19th April, 1912, when they stopped payment at C and D. The claimant during the period the executors were carrying on the business, lent money on hatchittas to the business, the account being a running one and all the sums now claimed by the claimants were in respect of liabilities incurred by the executors during their conduct of the business:

*Held* that when probate was granted to the executors, the whole of the testator's estate including the businesses vested in them and that they held it from that time not as managers but as executors and subject to their rights and liabilities as such.

Under S 216 of the Hindu Wills Act, their duties were to collect with reasonable diligence the property of the testator and the debts due to him. Their right was not to carry on the business for an indefinite period but only for the purpose of realisation as one of the assets of the estate.

The executors were personally liable for the debts and had no general rights of indemnity out of the estate *Re Evans* 34 Ch. D. 597, *Strickland v. Symens* 26 Ch. D. 245. Ref.

If the assets had accrued to the business and through it to the estate during the trading, the executors would have been entitled to the indemnity from the estate for what it had cost them to obtain such assets if they were not indebted to the estate, and the creditors could stand in their shoes to the extent of the executor's rights.

Mere delay in filing accounts does not destroy any right of indemnity that may exist; for such right to exist, the executors must show that they are not indebted to the estate. (*Greaves, J.*) *SUDHIR CHANDRA DAS v. RASSESWARI CHAUDHURI*.

35 C. L. J. 46.

**IMMOVEABLE PROPERTY** — Fishery rights—Nature of—If amount to. *See* LIM ACT ART. 144. (1922) Pat. 195.

———Royalty—Not an interest in immovable property—Mortgage of, does not require registration or attestation. *See* T. P. ACT SS. 3 AND 58. 65 I. C. 673

**INAM**—*Enfranchisement* — *Karnam service*—*Title deed*—*Arrangements relating to*—*Effect*.

Inam title deeds do not create a title where none existed before. They are not conclusive as to the title of the persons in whose favour enfranchisement is to operate, and it is open to aggrieved parties to show that a name or names have been added by mistake.

At the time of the enfranchisement of a karnam service inam, the office holder and his deputy entered into an agreement as a result of which the title deed was issued in the names of both: *Held*, both were estopped from contending the other had no title (*Spencer and Ramesam, JJ.*) *TADIKONDA LAKSHMINARASIMHAM v. VENKATARATNAYAMMA*.

30 M. L. T. 334 (H. C.)

———*Enfranchisement* — *Effect of* — *Karnam lands*—*Service inam*—*Enfranchisement* if enures to the office-holder exclusively or to his family as well—*Madras Acts II of 1894 and III of 1895* *See* (1921) DIG COL. 666 *MUSTI VENKATA JAGANNADHA v. VEERABHADRAYYA*.

30 M. L. T. 14. 26 C. W. N. 302 : (1922) P. C. 96 (P. C.)

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———*Enfranchisement* — *Title deed issued to widow*—*Absolute estate*—*Rights of reversioners*.

Where a service inam land is enfranchised in the name of a woman and the title deed in terms is an absolute grant of the land to her, she takes an absolute estate in the property and it descends to her own heirs as distinguished from those of the last male owner. 44 Mad 643 P. C. foll. Where after the death of her minor son who held the office of Karnam, the mother was appointed to the office and the inam land was afterwards enfranchised in her name her daughter's sons will succeed to the property in preference to the relations of her husband. (*Spencer and Devadass, JJ.*) *ABDUKURI VENKATARAMADAS v. PACHIGOLLA GAVARRAJU*.

43 M. L. J. 153. (1922) M. W. N. 305 :

31 M. L. T. 154 H. C. : 16 L. W. 228 : (1922) Mad 173.

———*Estates in Berar*—*Rules governing*.

The devolution and incidents of Inam Estates in Berar are regulated by the Berar Inam Rules, subject entirely to the sanad or certificate or other documents evidencing the special terms of the grant in the particular case (*Dhobley, A. J. C.*) *KRISHNAJI v. NILAKANTH*. 18 N. L. R. 163.

———*Grant of*—*What passes to the grantee*—*Fixity of rent*—*Enfranchisement*—*Berar Inam Rules*

The devolution and incidents of an inam estate in Berar are regulated by the Berar Inam Rules, subject entirely to the sanad or certificate or other document evidencing the special terms of the grant in the particular case. An inam or grant may be entire or only partial. The mere fact that the same portion of the revenue which has been paid previous to the Inam enquiry has continued to be paid would not show that the jagir had been enfranchised and that it had become a freehold. Property consisting of an ordinary Inam village is liable to partition at the suit of a co-sharer, except when it is held on saranjam or other impartible tenure or where the terms of the original grant imposed a condition upon its enjoyment that the management should rest with a particular branch of the family of the grantee, (*Dhobley, A. J. C.*) *KRISHNA RAO v. NILKANTH*. 5 N. L. J. 25 (1922) Nag. 52.

———*Grant of both warams*—*No presumption as to*.

In the case of an inam grant there is no presumption that both the warams were granted to the Inamdar or only that the melwaram was granted. It is a question of fact to be decided on the evidence in each case. 41 M. 1012 ; 43 M. 166 ; 43 M. 567 Ref. 44 M. 588 disapproved. (*Mr Ameer Ali*). *SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL v. VEERAMA REDDI*.

45 Mad. 586 : 43 M. L. J. 640 : 16 L. W. 102 : 31 M. L. T. 54 (P. C.) (1922) M. W. N. 749 : (1922) P. C. 292. 63 I. C. 538 : 49 I. A. 286 (P. C.)

———*Partibility*.

The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition except when the estate is held on an impartible tenure or where the terms of the grant impose a condition upon its enjoyment that

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the management should rest with a particular branch of the family of the grantees. Incidents of *Saranjam* considered. (*Dhobley, A. J. C.*) *KRISHNAJI v. NILAKANTH.* 18 N. L. R. 163

—Presumption as to what passes—recent Privy Council rulings on the law. See *VATAN*, 24 Bom. L. R. 252

—Religious office—Grant for upkeep of mosque and performance of religious services therein—Grantee not bound to account for disposal of income so long as services are performed. See *RELIGIOUS END. ACT*, S. 14. (1922) M. W. N. 74

—Resumption proceedings—Effect of.

The object of the government in Bengal in the resumption proceedings was not to resume the lands and to re-settle the lands with the persons who originally held them—The resumption was not of the land but of the revenue and resumption meant nothing more than assessing the land to Government revenue. (*Das and Bucknall, JJ.*) *MAHANT RAMRUP GIR v. LAL CHAND MARWARI.* 1 Pat. 475 : 3 Pat. L. T. 352 : (1922) P. 243 : 67 I. C. 401.

—Service Inam—Alienation—Attachment of property in execution and sale—Legality of.

An inam granted for the performance of Swasthivachakam service in a Hindu temple is not liable to be attached and sold in execution of a decree against the holder for the time being. The grant is one burdened with the performance of service of a public nature and the sale of such property is also opposed to the nature of the interest affected and is also contrary to public policy within S. 23 Contract Act. (*Schwabe, C. J. Coult's Trotter and Kumaraswami Sastri, JJ.*) *NETI ANJANEYALU v. SRI VENUGOPAL RICE MILL, LTD., TENALI.* 45 Mad. 620 : 42 M. L. J. 477 : 15 L. W. 513. (1922) M. W. N. 307 : (1922) Mad. 197. 30 M. L. T. 225 (F. B.)

—Service tenure—Effect of failure to perform services—Character of holding not changed. See *ADVERSE POSSESSION*. 1 Pat. 292.

—Service inam—Surplus income—Right to—Resumption on failure of service—Rights of Government—Powers of Court.

Where there is an inam burdened with a trust, the surplus remaining after the expenses of the trust have been met belongs to the inamdar and he is not accountable therefor. 30 M. L. T. 101 : 15 L. W. 241 Ret. It is not for the Court to treat inams as resumed on the ground of the services having become unnecessary. The power of resumption rests only with the government and the govt. alone can give directions for the application of its income. (*Spencer and Devadas, JJ.*) *JAKKAM REDDI SESHADRI REDDI v. SRI S. SUBRAMANIA IYER, K. C. I. E.* 16 L. W. 839.

—Services rendered—Agreement between grantor and grantee dispensing with service—Effect of—Conversion into ordinary jeroiyati land. See (1921) DIG. COL. 668. *SRI VARADARAJAH*

**INCOME TAX ACT (1918) S. 3.**

*SOORU HARISCHANDRA DEO BAHADUR v. KANDA BARIKIVADU.* 15 L. W. 150 : (1922) Mad. 119.

**INCOME TAX—Profits—Calculation of Deduction for bad debts—Practice.** *Income tax Law of Jamaica S. 10.*

Under S. 10 of the Income Tax Law of Jamaica (which closely follows the English law) an assessee in computing the profits of his trade or business cannot deduct a debt found to be bad in the year of assessment but incurred in a previous year. The right to a deduction in respect of bad debts is confined to debts incurred in the year of assessment. (*Lord Buckmaster.*) *GLENER COMPANY LTD. v. THE ASSESSMENT COMMITTEE.* 31 M. L. T. 227 (F. C.) : (1922) 2 A. C. 169.

**INCOME TAX ACT, VII of 1918—Ss. 25(1) and 51—Agricultural income—Selami or premium uttarayan—Liability to assessment.** See (1921) DIG. COL. 669. *BIRENDRA KISHORE MANIKYA v. SECRETARY OF STATE FOR INDIA* 48 Cal. 766.

—S 2—Forest income—If agricultural income.

*Semble.*—Forest income is "agricultural income" within the meaning of S 2 of the Income Tax Act. (*Ayling, Coult's Trotter and Ramesam, JJ.*) *SECRETARY TO THE CHIEF COMMISSIONER OF INCOME TAX v. ZEMINDAR OF SINGAMPATTI.*

45 Mad. 518 : (1922) M. W. N. 353 : 31 M. L. T. 21 (H. C.) : (1922) Mad. 325 : 15 L. W. 496.

—Ss 3 and 10—Income—What is—Interest not realised.

Where compound interest is payable by a debtor to his creditor with yearly rests and the creditor adds to the principal amount, the interest which has accrued due at the end of the year, but does not receive payment either in cash or by counter credit in the debtor's accounts, such interest is not taxable income within S 3 of the Income Tax Act. (*Ayling, Krishnan and Ramesam, JJ.*) *BOARD OF REVENUE, MADRAS v. PYDAH VENCATACHALAPATHY GARU.* 16 L. W. 174 : (1922) M. W. N. 480 : 31 M. L. T. 255 (H. C.) : (1922) Mad. 426.

—Ss. 3 and 33 (1)—Non-resident foreigner—Business connection—Mode of taxing income—Liability of foreigner. See (1921) DIG. COL. 670 *THE DEPUTY COMMISSIONER OF INCOME TAX, MADRAS v. MESSRS BHANJEE RAMJEE AND Co.* 64 I. C. 239.

—S. 3—Profits—Meaning of.

The term 'profits' in S 3 of the Income Tax Act means chargeable income and must be computed from the gross income after allowing for the sums paid and debited under sub-section 2. (*MacLeod, C. J. and Shah, J.*) *THE TATA INDUSTRIAL BANK LTD. In re.* 46 Bom. 567 : (1922) Bom. 75 : 24 Bom. L. R. 118 : 66 I. C. 979.

—S. 3 (1)—Income accruing, arising or received in British India—Liability to pay Income-tax—Income earned and distributed out of British India—Assessment. See (1921) DIG. COL. 670. *THE AURANGABAD MILLS LTD., In re.* 64 I. C. 9

## INCOME TAX ACT (1918), S. 3.

———S. 3 (1)—*Income received in British India—What constitutes—Liability to tax.*

The assessee was a contractor who did extensive work for the Government in British Baluchistan which was exempted from the operation of the Indian Income Tax Act, 1918. The assessee received the moneys due to him in British Baluchistan and brought them into the Punjab either by cheques or by transmission by post or personally. The Punjab Income Tax authorities sought to assess him on the profits so received. *Held* the profits arose or accrued in British Baluchistan and were received there. The same profits could not again be received in British India. Consequently the income was not liable to Indian Income Tax. 43 M. 75 dist (Shadi Lal, C. J., Scott Smith, Broadway, Abdul Raoof, and Martineau, JJ.) SUNDAR DAS v. COLLECTOR OF GUJRAT. 3 Lah. 349 (F B)

———S. 3 (3)—*Agricultural income—Permanently settled estate—Exemption from further tax—Forest and fishery income—Effect of.*

The peishcush of a permanently settled estate under Madras Regn. 25 of 1802 must be deemed to have been fixed in commutation not only of the rentals of cultivated lands but also of all income which might be derived from forests or fisheries, and the sanad issued to the zemindar as well as the regulation alike make it clear that these incomes in the hands of the zemindar are exempted from further taxation by the Govt. This exemption applies to taxes which might be imposed thereafter as well as to taxes then existing. Consequently income derived from forests and fisheries in a permanently settled estate are exempted from liability to income tax. (Ayling Coutts Trotter and Ramesam, JJ.) SECRETARY TO THE CHIEF COMMISSIONER OF INCOME TAX, MADRAS v. ZEMINDAR OF SINGAMPATTI.

15 L. W. 496 : 45 Mad 518 :  
(1922) M. W. N. 353 : 31 M. L. J. 21 (H. C.) :  
(1922) Mad. 325.

———S. 8—*House property—Meaning of—Business premises.*

Business premises such as shops, offices, godowns, etc. are not included in the terms "house property" as used in S. 8 of the Income Tax Act, 1918 before its amendment in 1920. (Robinson, C. J. and Maung Kin, J.) MESSRS ROWE AND CO. v. GOVERNMENT. 1 Bur. L. J. 46 : 67 I. C. 781.

———S. 9—*Ownership of railway—Burma Railways—Secretary of State—Relationship with.*

The Burma Railways Co. are the owners of the Railway system and all its premises for the purpose of S. 9 (2) of the Income Tax Act but they are owners not by reason of their being partners with the Secretary of State for India. (Robinson, C. J. and Maung Kin, J.) THE BURMA RAILWAYS COMPANY v. THE SECRETARY OF STATE. 11 L. B. R. 33 : 64 I. C. 801.

———S. 9—*Profits—Computation of—Depreciation in the value of securities held by a bank.*

A banking concern having been assessed for income tax on profits amounting to Rs. 12,54,130 it claimed to deduct from the taxable profits a sum of Rs. 2,98,000 being the amount of depreciation on war bonds and securities belonging to the

## INCOME TAX ACT (1918), S. 19.

Bank, arrived at by comparing the market rates with valuations in the books of the bank.

*Held*, that the deduction claimed for could not be allowed under S. 9 of the Income Tax Act 1918. (Macleod, C. J. and Shah, J.) THE TATA INDUSTRIAL BANK, LTD. *In re.* 46 Bom 567 : 24 Bom. L. R. 118 : (1922) Bom. 75 66 I. C. 979.

———S. 9 (2) (iii)—*Business profits—Company managing railway on behalf of Secretary of State—Computation of profits—Deduction of guaranteed interest—Interest on borrowed capital.*

The Bengal Nagpur Railway company was sought to be assessed to income-tax on a sum of Rs. 1,72,60,585 representing the earnings of the railway allocated for payment of the company's share of surplus profits under the terms of agreement with the Secretary of State namely Rs. 14,63,387 and 1,57,98,766 allocated in payment of (a) a sum of Rs. 1,07,59,381 being the interest debitable to the undertaking of the Secretary of State's open live capital. This sum is the interest due to the Secretary of State on 15½ million pounds capital found by him. (b) A sum of Rs. 13,07,440 being the payment to the Secretary of State in rupee currency of the amount of the guaranteed interest payable by him on the share of the capital of the company. This interest is paid on 3 million pounds share capital found by the Bengal-Nagpur Railway and made over to the Secretary of State to be held by the latter absolutely as his property and repayable only in the event mentioned in the agreement between the Secy of State and the Bengal-Nagpur Railway (c) A sum of Rs. 37,31,945 payable on account of interest on borrowed capital raised by issue of debenture stock and debentures *Held* (1) that the liability of the Bengal-Nagpur Railway company to tax must be determined with reference to the special agreement with the Secretary of State; (2) that the company was liable to pay tax on what they actually got; (3) and that the sums (a) and (c) were to be excluded in computing profits sum (b) represented interest which the company got for their three million capital and which had to be deducted before surplus profits can be ascertained. This was deducted in order that the Secretary of State might meet his obligations to the company in respect of the three million pounds they had made over to him. (Woodroffe, Greaves and Ghose, JJ.) THE BENGAL NAGPUR RAILWAY CO. LTD. v. THE SECRETARY OF STATE FOR INDIA. 49 Cal. 815 : 27 C. W. N. 34 : (1922) Cal. 503.

———S. 9 (2)—*Deductions from taxable income—Under-writer's commission paid on issue of new shares, if exempt from tax, See (1921) DIG. COL. 671 TATA IRON AND STEEL COMPANY LTD. In re.* 64 I. C. 12.

———S. 19—*Adjustment—Registered firm—Registration after the year of account—Effect of.*

An adjustment can be made during a financial year in which the collector's certificate of Registration under S. 12 (a) is in force in respect of income of a firm for the previous year in which the firm was not registered. (Schwabe, C. J. Oldfield and Coutts Trotter, JJ.) SECRETARY TO

## INCOME TAX ACT (1918), S. 31,

THE BOARD OF REVENUE *v.* MESSRS MAHOMED SHERIFF HUSSAIN MEAN SAHIB & CO. MADRAS  
43 M. L. J. 434 : (1922) M. W. N. 563 :  
16 L. W. 333 : 68 I. C. 655

———Ss. 31, 33 and 34—Scope of—Agent—Assessment of, on behalf of non-resident principal—Receipt of income.

Held by the majority (*Ghose J.* contra) that S. 34 of the Income-tax Act merely defines who may be included as an agent under S. 31 and the agent under the section must be in receipt of the income under the latter section. Where an Indian Company distributes its Indian profits to share holders outside British India, the company cannot be deemed to be the agent of the foreign share-holders and assessed as such to supertax in British India. (*Woodroffe, Greaves and Ghose JJ.*) THE IMPERIAL TOBACCO COMPANY OF INDIA *v.* THE SECRETARY OF STATE FOR INDIA

49 Cal. 721 : 26 C. W. N. 745 :  
(1922) Cal. 454 : 67 I. C. 902:

———S. 39—Assessment by Collector—Finality of order—Suit in Civil Court—Jurisdiction. See (1921) DIG. COL. 668 SECRETARY OF STATE FOR INDIA *v.* A. H. FORBES. 3 Pat. L. T. 125  
(1922) P. 361.

———S. 46—Notice under—Method of service.

S. 46 of the Income Tax Act does not require that service of a notice must be by its being placed in the hands of the person named therein by the officer of the Court himself and does not exclude other forms of Service permitted by O. 5 of the C. P. Code. (*Hallifax, A. J. C.*) THE LOCAL GOVERNMENT *v.* ISMAIL BHAI.

68 I. C. 623 (2) : 23 Cr. L. J. 591.

———S. 51—Question of fact—Power of High Court—Objects of a company.

The question whether the purchase and sale of landed property is one of the objects with which a company was formed or whether the development of the property in order to earn a continuing profit year by year was its real object, is one of fact with which the High Court on a reference under S. 51 is incompetent to deal (*Robinson, C. J., Maung Kyin and Pratt, JJ.*) AHLONE LAND CO., LTD. *v.* GOVERNMENT.

1 Bur. L. J. 53 : 67 I. C. 633 (F. B.)

———S. 51—Reference to High Court—Pendency of—Case before Revenue authority essential. See (1921) DIG. COL. 673. PANALAL GANESHDAS *In re*. 46 Bom. 707 : (1922) Bom. 345 :  
64 I. C. 610.

———S. 51—Reference to High Court by Board of Revenue Right of audience—Vakils—Counsel. See (1921) DIG. COL. 672. BIRENDRA KISHORE MANIKYA *v.* SECRETARY OF STATE FOR INDIA 48 Cal. 766.

INCOME TAX ACT (IX of 1922) S. 24 — Firm—Loss—Set off.

Under S. 24 of the Income Tax Act, the share of loss in a registered firm has been permitted to be set against the partners other incomes, but the same privilege has not been extended to the share of loss in an unregistered firm. (*Fremantle, J. M.*) LALA PAGMANDAR DAS *v.* KING EMPEROR. L. R. 3 A, 535 (Rev.)

## INJUNCTION.

INDIAN SOLDIERS LITIGATION ACT (IX of 1918) S. 5—Applicability of—Decreeholder joining after decree—Effect of—Extension of time

It is open to the Court under S. 5 of Act IX of 1918 to have postponed any proceedings which was pending but it could not interfere with the operation of any decree or alter the condition prescribed by it so as to permit a suspension of its operation or a postponement of the condition till the expiry of six months after the close of the war. Where a decree had been passed before a person joined the army the grant of a certificate, under S. 5 of Act IX of 1918 has not the effect of extending the period allowed by the decree for payment of the money directed to be paid to the defendants. (*Kanhaya Lal J., C.*) BADAL *v.* CHHATTAR SINGH. 25 O. C. 74 :  
[1922] Oudh 131 : 66 I. C. 205.

———S. 11—Applicability of—Service under war conditions.

To attract the operation of S. 11 of Act IX of 1918 the plaintiff must show that he was serving abroad on war conditions before the expiry of the period of limitation (*Broadway, J.*) FEROS *v.* GHULAM SARWAR 67 I. C. 379.

INHERENT POWER—Consolidation of suits—Order for, against the wishes of parties—Propriety of. See C. P. CODE, S. 151.

3 Pat. L. T. 584.

———Scope of—Power not to be used] so as to enable party to evade the law of limitation. See C. P. CODE, S. 151,

43 M. L. J. 184.

INJUNCTION—Contravention of—Injunction by inferior court restraining decreeholder from execution of decree by sale of the property—Execution sale held by superior Court—Legality of. See EXECUTION SALE, SETTING ASIDE. (1922) Pat. 225.

———Easement—Imposition of additional burden—Effect of—Acquiescence.

A plff. can seek relief by means of an injunction within the period of Limitation against a party seeking to establish an easement against him. There may be cases where it would be inequitable on account of the plff's acquiescence over a period of less than 20 years to grant the relief. If on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, then I agree that the court ought to penalise the plff. for his neglect to assert his right earlier. In other cases injunction might be issued. (*Macleod, C. J. and Coyajee, J.*) KASHIBHAI KALIDAS *v.* VALLABHBHAI.

24 Bom. L. R. 305 : (1922) Bom. 83 :  
67 I. C. 356.

———Easement—Right of privacy—Invasion of—Damages.

A mere invasion of plaintiff's right of privacy is insufficient to entitle him to an injunction. There must be a threat of disturbance sufficient to cause substantial damage to plff. or in other words, it must amount to a nuisance, which in law implies substantial damages. The damage must not be merely sentimental or trifling : but

## INJUNCTION.

in considering whether the property of the plff is in fact injured or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard is had to the character of the neighbourhood and the pre existing circumstances (*Fawcett, J. C. and Kemp A. J. C.*) **SHAH MAHOMED v. RAMZAN** 66 I. C. 833

—Execution sale—No notice to decree holder or officer conducting sale—Effect—Sale not invalid See C P CODE, O 21, R 92 (1922) All. 232.

—Form of—Nuisance—Working of factory—Restriction on.

In a suit for an injunction to restrain a nuisance caused by the working of a factory at night if the plaintiff succeeds the decree should direct the defendant to refrain from carrying on the working of the factory in such a manner as to occasion a nuisance to the plaintiff. An absolute prohibition against the working of the factory during specified hours is unwarranted. (*Broadway and Abdul Qadir, JJ.*) **CHIRAGH DIN v. KARIM BAKHSI.** 64 I C. 169.

—Grounds for—Discretion of Court—Injury.

On a claim for an injunction the Court has to consider not merely whether the plaintiff's legal right has been infringed or even materially infringed but also whether under all the circumstances of the case he ought to be granted an injunction as the proper and appropriate remedy for such infringement. Where the parties were relatives on bad terms and the suit for injunction was prompted by desire to cause injury to the defendant, the Court would not grant the relief 18 B. 474 Ref. (*Shadi Lal, C. J and Campbell, J.*) **RAM CHANDRA v. RAGHBIR SINGH** 4 U. P. L. R. (Lah.) 69 : 67 I. C. 299.

—Light and air—Obstruction to—Erection of buildings—Damages—Discretion of court.

Where in consequence of the obstruction the plaintiff had less light and air than before to such an appreciable degree as to injure his property in point of value, comfort, convenience, or usefulness according to its character as a residence or a place of business or warehouse an injunction is the proper remedy where substantial and wrongful injury had been done to the plff's rights 8 P. R. 1909, 308 P. L. R. 1913; 14 C. 339, 1 L. W. 166 Rel. Though it would be possible for the plaintiff to open another window on the opposite wall or one of the other walls and it might be a neighbourly act on his part to meet the defendant in this way, he is not legally bound to do so and is entitled to enjoy the light and air that he has been enjoying through the window for over 20 years. 2 P. R. 1893 Ref. In cases of this kind, injunction is the rule and damages the exception. (1911) 1 M. W. N. 251 : 8 B. 95 Rel. (*Broadway, J.*) **THAKUR DAS v. ABDUL HAMID** 67 I. C. 288.

—Reference to arbitration—Suit impeaching contract—Injunction restraining arbitration when granted. See C. P. CODE, O. 39, R. 2. 15 S L. R. 5.

## INSURANCE.

—Temporary—Absence of reasonable grounds—Right of aggrieved party to sue for damages—Proof of malice. See DAMAGES, CAUSE OF ACTION 45 P. L. R. 1922

—Trade name—Similarity of names—Injury—Test of—Injunction when issued. See TRADE NAME, 24 Bom. L. R. 1181.

—Perpetual—Breach—Successive breaches—Enforcement of decree—Limitation. See LIM. ACT ART. 183 (1) 66 I C. 166.

INSOLVENCY—Questions of title—Decision on—How far binding—Procedure See PRO. INS ACT, S 4. L. R. 3 A. 285.

—Sale order confirming—Appeal—Parties.

When an appeal is filed against the order of a District Judge confirming a sale effected in insolvency proceedings, the auction purchaser and Official Receiver are necessary parties and the omission to make them parties is fatal to the appeal. (*Martineau, J.*) **MT. TARLOK DEVI v. JOTI RAM.** 68 I. C. 716.

—Insurance—Mortgage of insured property—Liability of insurer to mortgagee—Notice.

Where the owner of a mill insures it against fire, and subsequently mortgages it to a third person and the mill and the premises are destroyed by fire, the insurance company is not liable to indemnify the mortgagees against the loss. The contract is one to indemnify the insured and not any other person between whom and the company there was no privity of contract. To entitle the mortgagees to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagees or to apply the policy money in reinstatement or otherwise for the benefit of the mortgage or an assignment of the policy taken. In the absence of any such covenant or assignment of the policy the mortgagee cannot claim anything against the insurer. The right of the mortgagee was to bring the mortgaged property to sale or in the event of its alienation by the mortgagor to follow it into the hands of a purchaser. If the insurance company sold the remnants of the machinery, etc. after the fire under the terms of the policy, then, the contract of insurance being one of indemnity, any salvage belonging to the insurers is presumed under such circumstances, to have been abandoned and anything that remains of the property belonging to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. (*Robinson, C.J and Maung Kin, J.*) **P. V. CHETTY FIRM v. MOTOR UNION INSURANCE COMPANY,** 1 Bur. L. J 28 : 67 I. C. 777.

INSURANCE—Naming of beneficiary in the policy—Effect of.

Where the husband of a lady supplied the premia but the name of the step-son of the lady was put as the person to whom the insurance amount was to be given, the amount belongs to the son and not to the husband even assuming that the principle of *benami* transactions were applicable to such a case. (*Shadi Lal, C.J. and Martineau, J.*) **MATIN v. MAHOMED MATIN.** (1922) Lah. 145.

## INTEREST.

**INTEREST**—No agreement to pay—Suit on accounts.

In a suit on accounts where there is no agreement relating to interest and where no notice had been given that interest would be charge no interest is chargeable either under the Interest Act or as damages under S. 73 of the Contract Act. (*Abdul Roof and Harrison, JJ*) **RANJIT SINGH v. KARIM BAKSH.** 68 I. C. 678.

—**Damdupat**—Rule of—Decree on mortgage.

The rule of damdupat applies so long as the relation of debtor and creditor exists but not when the contractual relation has come to an end by reason of a decree. 40 Cal 710 33 Cal. 1269 foll. (*Kotval, A. J. C.*) **NARAYAN v. NATHMAL.** 17 N. L. R. 200 (1922) Nag. 155 : 65 I. C. 275

—**Mesne profits**—Decree silent as to—Power of executing court to award interest at Court rate of 6 per cent, See C. P. CODE, S. 2 (12). 20 A. L. J. 348.

—**Mortgage**—Post diem—Right of mortgagee—Damages—Measure of. See MORTGAGE, INTEREST. 66 I. C. 771

—**Post diem**—Mortgage—No express stipulation for payment of interest after due date—Implied obligation. See MORTGAGE—INTEREST. 20 A. L. J. 752.

—**Right to**—Interest Act not applicable—Court's power to award interest—Equity—Money wrongfully received

Apart from contract and the provisions of the Interest Act the Court can decree interest by way of equitable relief in a proper case where justice, equity and good conscience require it.

Where money belonging to the plaintiff is retained by the defendant wrongfully and the former sues to recover the sum so retained on the basis of money had and received by the latter to the former's use, the plaintiff is entitled in equity to interest thereon.

*Per Oldfield, J.*—The plaintiff's claim is sustainable under Ch. IX of the Trusts Act and under S. 95 of the Trusts Act the defendant remains subject to the same liabilities including the liability to pay interest as if he were a trustee of the money retained by him. (*Oldfield and Krishnan, JJ.*) **ARUNACHALAM CHETTIAR v. B. RAJA RAJESWARA SETUPATI.** 42 M. L. J. 74 : (1921) M. W. N. 873 : (1922) Mad 55 : 15 L. W. 63

—**Unconscionable rate**—Court's duty.

The defendant borrowed grain valued at Rs 99 which he promised to pay after 16 years and the rate of interest charged was 25 per cent compound interest. The plaintiff claimed Rs. 1,000 as value of grains, principal and interest included. *Held*: A Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no court shall allow it. The mortgagors could not possibly have realized the real effect of the stipulations as to interest. (*Batten J. C.*) **HOOKUMCHAND v. NIDHAN SINGH.** (1922) Nag. 124 : 5 N. L. J. 256 : 67 I. C. 245.

## INTERPRETATION.

—**When courts can interfere**—English principles, how far applicable in India. See MORTGAGE—INTEREST. 1 Pat 263.

**INTEREST ACT (XXXII of 1839) § 1**—Sale of property—Consideration unpaid—Interest.

The vendee under a sale deed agreed to pay a certain sum to the vendor in case the latter gave him a registered receipt. *Held*, that the vendee must tender the money before the vendor could be brought under an obligation to give a receipt and his not having been done, the vendor was entitled to interest at the current rate. (*Stuart, J.*) **BIDHI CHAND v. SAT NARAIN.** L. R. 3 A 163.

**INTERNATIONAL LAW**—Prize Court—Duties of—Hague Convention—Sixth Article—Interpretation of

A court of prize is only entitled to deal with the conduct of a belligerent only in connection with the particular matters before it and has no general censorship of the conduct of belligerents. Consequently considerations arising out of the general conduct of the war by a belligerent ought not to influence a prize Court in determining a dispute forming on the interpretation of a single and separable compact like the 6th article of the Hague Convention. The rules of municipal law regulating the formation, the interpretation and discharge of contracts cannot be imported wholly into the construction of international compacts (*Lord Sumner, J.*) **STEAMSHIPS BLONDE etc., In the Matter of.** 31 M. L. T. 260 (P.C.)

**INTERPRETATION**—Amending Act—Intention of legislature.

Whatever may have been the intention of the legislature in passing an Amending Act Courts must give the provision of the Act their literal construction. It is not proper to approach the statute by assuming an intention apart from the language of the statute, and having made that fallacious assumption, to bend the language in favour of the assumption, so made. 13 A. C. 294 ; 1891 A. C. 107 ; 23 C. 563 foll. (*Daniels and Lyle, A. J. C.*) **KUAR NAGSHAR SAHAI v. KUAR MATHURA PRASAD.** 25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh 236

—**Amending Act**—Vested right—Not affected.

If the application of the provisions of an Amending Act makes it impossible to exercise a vested right of sui, the Act should be construed as not applicable to such cases. 41 C. 1125 ; 17 C. L. J. 316 Rel. (*Mookerjee and Chotzner, JJ.*) **AJIT SINGH v. BHAGABATI CHARAN MUKERJEE** 36 C. L. J. 263 : (1922) Cal. 491.

—**Maxim**—*Expressio unius exclusio alterius*—Scope of the rule in modern legislation.

A general rule of construction of acts of the legislature is *expressio unius exclusio alterius*. [The express mention of one thing implies exclusion of another] But the method of construction summarised in the maxim cannot be applied without limitation ; for a failure to make an expression

## INTERPRETATION.

complete may easily arise from the accidents of legislative procedure, and it is common to find provisions put into statutes *ex abundanti cautela* and at the instance of parties interested. Consequently provisions sometimes found in statutes, enacting imperfectly or for particular cases only, that which was already and more widely the law have occasionally furnished ground for argument based on the maxim, that an intention to alter the general law was to be inferred from the partial or limited enactment. But the maxim is plainly inapplicable to such cases. The only inference which a Court can draw from such superfluous provisions (which often find a place in Acts to meet unbounded objections and idle doubts) is that the legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution (*Mookerjee and Rankin JJ.*) KRISHNA KAMINI DAS v NILMADHAB SAHA. 36 C. L. J. 382

———Fiscal enactment—Construction in favour of subject. See COURT FEES ACT.

(1922) U. B. 14 : 65 I. C. 553

———Intention of the legislature—Words to be looked to.

When the terms of a statute are clear, it is contrary to all principles of interpretation to first receive the intention of the legislature in enacting the statute and then to construe the language in accordance with that intention. (*Simpson and Wazir Hasan, A. J. C.*) MIRZA QADIR HUSAIN v. MAHOMED KARIM. (1922) Oudh 289 : 90 L. J. 456.

———Later enactment — Implied repeal of earlier enactment — Clear language — Necessity for.

Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so. 10 A. C. 59, 68 : 6 De G. M. & G. 1 Ref. (*Lord Phillimore*). NICOLLE v NICOLLE. 31 M. L. T. 90 (P. C.)

———Penal Statute—Strict construction. See MAD. DT. MUN. ACT, Ss. 249, 338, ETC. 42 M. L. J. 149.

———Principle of rectification of Section of same Act. See T. P. ACT, Ss. 97, 98. 20 A. L. J. 476 (P. C.)

———Proceedings of the legislature—Reference to, when permissible. See (1921) DIG COL 680. O'RAISEE v. JOSEPH. 64 I. C. 171.

———Proceedings of the Legislature—Reference to, not permissible.

In interpreting a statute reference is not permissible to the proceedings of the legislature which result in the provisions of an Act. 22 C. 788 ; 21 C. 732 Ref. (*Mookerjee and Chotzner, JJ.*) DINA NATH PAL v. RAJA SATI PRASAD. 27 C. W. N. 115 : 38 C. L. J. 220.

## INTERPRETATION.

———Re-enactment—Words judicially construed *re enacted in statutes pari materia*

Where an Act has received a judicial construction, putting a certain meaning on its words, and the legislature in a subsequent Act in *pari materia* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed, even if they were such that might originally have been construed, otherwise (*Mookerjee and Panton, JJ.*) ISAN CHANDRA v. SAFATULLA. 26 C. W. N. 703 : 35 C. L. J. 36 (1922) Cal. 331 : 68 I. C. 219.

———Reference to prior state of law—Ambiguity See (1921) DIG COL. 680 SARBESWAR PATRA v. MAHARAJ SIR BEJOY CHAND MOHATAP. (1922) Cal. 287.

———Repealing enactment — Retrospective operation.

A repealing enactment cannot be given a retrospective operation. So as to impose an impossible condition on pain of forfeiture of a vested right 17 C. L. J. 316, 18 C. L. J. 274 ; 39 M. 645 Ref. (*Mookerjee and Chotzner, JJ.*) MAKAR ALI v. SARF-ADDIN. 36 C. L. J. 132.

———Retrospective operation—Statutes taking away vested right.

Every statute which takes away or impairs vested right must be presumed not to have a retrospective operation, unless the language clearly supports a contrary construction. (*Mitra, O. A. J. C.*) MT. LAHINI v. BALA. 18 N. L. B. 85 : (1922) Nag. 227.

———Retrospective operation—Vested rights not to be affected.

When the law is altered by statute pending an action, the law as it existed when the action was commenced, must decide the rights of the parties to the suit unless the legislature expresses a clear intention to vary the relation of the litigant parties to each other. (*Dhobley, A. J. C.*) SETH LAKHMICHAUD v. BAJIRAO. 5 N. L. J. 251.

———Simplicity.

Statutes should be interpreted as simply as possible. When a document is stamped, though wrongly and inadequately, it must be taken to be insufficiently stamped and not unstamped. (*Pratt, J.*) THE COLLECTOR OF RANGOON v. ABDUL RAHMAN SIRCAR. (1922) L. B. 27 : 67 I. C. 640.

———Special and general statutes—Rule of construction.

A general statute must yield to a special Act applicable to a particular locality. A general statute is presumed to have general cases only in view and no particular cases which have already otherwise been provided for by a special or a local Act. (*Shadi Lal, C. J. and Abdul Quadir, JJ.*) SIBA SINGH v. SUNDAR SINGH. 3 Lah. L. J. 522.

———Statement of objects and reasons—If to be referred to.



## INTERPRETATION

The rule of interpretation of statutes is that where the wording of an Act is absolutely clear and unambiguous, a Court cannot look to the statement of objects and reasons of the Act or try to discover whether the words used mean something above and beyond what they clearly say. (*Harrison, J.*) **RUP KISHORE v. BHAGAT GOVIND DAS**, (1922) Lah 211.

— *Statute conferring jurisdiction—Means of exercising jurisdiction impliedly conferred.*

It is a well-known rule of interpretation of statutes that where a statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures, and employ such means as are essentially necessary to its execution. 23 C 514; 24 C. 751, Ref. (*Mookerjee and Panton, JJ*) **YASIN ALI MIRDHA v. RADHAGOBINDA CHOWDHURI**. 26 C. W. N 381 (1922) Cal. 118

— *Taxing statutes—Strict construction.*

In statutes of taxation the imposition of a duty must be in plain terms and such statutes must be construed strictly. The onus lies on the Crown to show that the person whom it is sought to tax falls clearly within its operation (*Robinson, C. J. and Maung Kim, J.*) **MESSRS ROWE AND CO v. GOVERNMENT**. 1 Bur L. J. 46 67 I C 781.

— *Taxing enactment—Strict construction*

It is a sound principle that the subject is not to be taxed without clear words to that effect, and in dubio, you are always to lean against the construction which imposes a burden on the subject. (*Shadi Lal-C. J. Scott Smith Broodway, Abdul Raouf and Matineau, JJ.*) **SUNDAR DAS v. COLLECTOR OF GURJAT**. 3 Lah. 349 (F. B.)

**JAGIR—Funeral expenses, if a charge on income.**

Each new Jagirdar gets his Jagir free of claims in connection with his predecessor, and it is doubtful whether funeral expenses of the previous holder are a legal charge on the Jagir income. A declaratory decree in favour of a Jagirdar who refused to pay funeral expenses was refused especially because he did not claim refund of expenses paid under order of Collector (*Cherus, J.*) **ASAD ALI v. MT SHARIFUN-NISSA**.

(1922) Lah 365

**JALKAR—Rights of fishery—Nature of right—Mode of acquisition—Limitation. See LIM. ACT. ART 144.** (1922) Pat 195.

**JUDGMENT—Admissibility of—Judgment vacated by subsequent order consequent on non-payment of court-fee—Admissibility.**

A judgment declared plaintiffs' right to a certain share of the property and further directed that on his paying up the deficient Court-fee a decree should be drawn up and on his failure so to do, the suit should stand dismissed. The plaintiff defaulted to pay the Court fee as directed and by a subsequent order the suit was dismissed. Held that the order virtually vacated the judgment in the case which should thereafter be treated as non-existing. The judgment should not be used as evidence in a subsequent suit 35 B. 88 Ref. 1 (*Suhrawardy and Cuming, JJ*) **SASIMUKHI CHOWDHURANI v. SARASWATI SEN**.

65 I C. 522.

## JURISDICTION

— *Expunging from—Inherent power of High Court—Judgment of lower court not made the subject of appeal or revision, 20 A. L. J. 261.*

— *Suit on—Default of appearance.*

Where the High Court of Justice in England had entered judgment in a case on default of appearance and the action had not been tried on the merits, an action on that judgment cannot be maintained. 40 Mad. 12 tolid (*Viscount Cave*). **OPPENHEIM AND CO v. HAJEE MAHOMED HANIF SAHIB** 45 Mad. 496: 43 M. L. J. 422.

24 Bom. L. R. 1245:

26 C. W. N 642 16 L. W. 33:

(1922) M. W. N 396: 4 U. P. L. R. (P. C.) 36.

L. R. 3 P. C. 185: (1922) P. C. 120:

36 C. L. J. 444: 30 M. L. T. 291 (P. C.)

49 I. A. 174.

**JURISDICTION—Civil Courts—Action of revenue authorities unauthorised—Power to grant relief See BENGAL PUBLIC DEMANDS RECOVERY, ACT, S. 37,** 35 C. L. J. 304

— *Civil Courts—Exclusive jurisdiction of revenue courts—Suit, if lies*

In a case where the Revenue Courts have exclusive jurisdiction, a suit for a declaration that the decree is void and ineffectual does not lie in the Civil Court on the bare ground that the proceedings were contrary to law (*Kanhaya Lal, C. J.*) **SAT DEO v. JAI NATH** 90 L. J. 141: 4 U. P. L. R. (O. C.) 43 (1922) Oudh 75: 67 I. C. 808

— *Civil Court—Fraudulent decree of Revenue Court—If can be set aside—Remedies.*

*Per Walsh, J.:* A civil court has no jurisdiction to set aside the proceedings of a Revenue Court. But it can declare that orders or decrees were obtained fraudulently, or that a party is entitled to possession as owner or award damages for deceit or fraud. (*Walsh and Ryves, JJ*) **JAMMAR v. MAHADEO PRASAD** L. R. 3 A. 195.

— *Civil Court—Suit for recovery of municipal tax illegally levied—Suit cognizable by Civil Court. See BERAR MUNICIPAL LAW Ss. 51 AND 53* 65 I. C. 532.

— *Civil or Revenue Court—Ejectment—Usurious mortgage of occupancy holdings—Mortgagor's son obtaining possession—Suit in ejectment.*

Respondent became mortgagee of an occupancy holding in 1896. Appellant, the son of the mortgagor, took possession of a portion of the mortgaged property during the life time of his father. Subsequently after the death of the mortgagor the mortgagee brought a suit in ejectment. Held that the suit was maintainable only in a Revenue Court. (*Hopkins, S. M.*) **KALLU v. BHOLA SINGH**. L. R. 3 A. 433 (Rev.).

— *Civil and Revenue court—Question of proprietary title.*

The civil courts have jurisdiction on the question of proprietary title. The order of the Revenue Court based on possession can be contested in the Civil court. The order of the latter court is final and possession obtained under a civil court decree or a declaratory decree, when

## JURISDICTION.

there is already possession, entitles the decree holder to entry of his name in the proprietary register (*Hopkins, S. M. and Fremantle, J. M.*)  
*LACHMAN PRASAD v. MT. FARRUKH BEGAM*  
 4 U. P. L. R. (B. R.) 41 : L. R. 3 A 540 (Rev

— Civil and revenue courts—suit affecting validity of sale for arrears of land revenue—If maintainable in Civil Court See LOWER BURMA LAND AND REVENUE ACT, S. 56 (a) 67 I. C. 636

— Civil or revenue court—Validity of lease—Determination of.

Where it is necessary to dispose of a case pending before a Revenue court to decide the question whether a particular lease is or is not valid, it is the duty of the Revenue court to decide it and not to leave the question for decision by a Civil Court (*Fremantle, J. M.*) *RAJA RAM SINGH v. RAMA KEWAT* L. R. 3 A 81 (Rev) 65 I. C. 577

— How determined — Redemption suit—Allegations in the plaint.

In a suit between persons claiming a mutually exclusive right to redeem the mortgage, and not between co-mortgagors, one of whom has succeeded in inducing the mortgagee to allow him to redeem it, and the other of whom has brought the suit seeking to enforce his right of redemption against the heirs and transferees of the original mortgagee and the persons who are said to have redeemed the mortgage without any right, the jurisdiction of the Court is determined by the allegations made in the plaint, and that being so the value of the mortgaged property cannot be taken into account for determining where the suit for redemption will lie. The questions of title or adverse possession that might arise are only incidental to the main relief claimed in the plaint (*Kanharya Lal, J. C.*) *SHANKER v. RAM BAHADUR*. (1922) Oudh 45

— High Court — Contempt of subordinate Court—Power to take proceedings in respect of See CONTEMPT. 24 Bom. L. R. 16

— High Court—Contempt of court—Power to punish for contempt See CONTEMPT OF COURT 24 Bom. L. R. 928

— Objection to—Duty of court to decide.

Whenever an objection to the jurisdiction of a court is taken the court is bound to entertain it and give effect to it. (*Brown, J. C.*) *MAUNG PO SAUNG v. MA MUN*. (1921) 4 U. B. R. 75 : 65 I. C. 68.

— Objection as to — when avoids judicial proceedings—Patent and latent defect.

Jurisdiction may be defined as the power and authority conferred on a court to pronounce the sentence of the law or to award the remedies provided by law upon a state of facts, proved or admitted referred to the court for decision and authorised by law to be the subject of investigation or action by that Court, and in favour of or against persons who present themselves or who are brought before the Court in some manner sanctioned by law as proper and sufficient. The rule is well established that when the want of jurisdiction of a court is apparent on the face of the

## JURISDICTION.

record any judgment rendered by such a court is null and void incapable of ratification and subject to collateral impeachment. But it is equally well established that the court has jurisdiction to decide whether it has jurisdiction to entertain the suit and that the decision of the court that it has jurisdiction is final and conclusive in all collateral enquiries. (*Das and Adamu, JJ.*) *DWARKA PRASAD v. JAI BARHAM* (1922) P. 322 : 67 I. C. 686.

— Suit for declaration — Cause of action—of jurisdiction of court

A suit for declaration in respect of the title to certain property must be filed in the Court which would have jurisdiction to try a suit for possession in respect of the same property (*Kanharya Lal, J. C.*) *KANTA SIROMAN PRASAD SINGH v. GAYA DIN* 25 O. C. 184 : (1922) Oudh 249.

— Suit to set aside attachment — Forum. See (1921) DIG. COL. 684 *SHANMUKA NADAN v. ARUNACHALA CHETTY*. 45 Mad. 194.

42 M. L. J. 97 30 M. L. T. 172 : (1922) Mad. 332

— Territorial—Transfer of pending suit or proceeding.—Effect of—Decision if a nullity.

In cases of local jurisdiction the principle applies that the state of things existing at the time of the institution of the suit is sufficient to determine the jurisdiction on the theory that the progress of a suit once validly commenced in any court is not affected by change of residence or country by the defendant (1870) L. R. 6 Q. B. 161, (1899) 1 Ch. 792, 22 C. 222 Ref. But this doctrine has no application where the question is one of jurisdiction over the subject matter. Such jurisdiction must exist throughout the proceedings. Jurisdiction has reference to the power of the court over the parties, over the subject matter, over the rest of property in contest and to the authority of the court to render the judgment or decree which it assumes to make. For the validity of a judgment in a suit the jurisdiction over the subject matter must exist throughout the proceedings, as well at the time of its institution as at the time of its disposal. A court may lose its jurisdiction during the pendency of a proceedings and in such an event, if it proceeds to pronounce judgment, such judgment must be regarded as void because made without jurisdiction. Jurisdiction of the subject matter is given only by law and cannot be conferred by consent. The objection that a court is not given such jurisdiction by law cannot be waived by the parties. Cases reviewed. (*Mookerjee and Chatterjee, JJ.*) *JYOTI PRAKAS CHATTERAJ v. BAGALA KANTA CHOWDHURY*. 36 C. L. J. 124 : (1922) Cal. 274

— Test of—Allegations in plaint to be accepted

It is settled law that the jurisdiction to try a suit must prima facie be determined with reference to the allegations contained in the plaint. (*Wazir Hasan, A. J. C.*) *SHAHIDAN v. JAGANNATH* 4 U. P. L. R. 23 (J. C.) : 65 I. 443.

*KHEWAT*—Entry in—Prima facie evidence of title.

**KHEWAT**

An entry in Khewat is *prima facie* evidence of title which may be rebutted by showing that there is no likelihood of there being any title (*Simpson A. J. C.*) *SAIYAD GHDLAM MUHAMMAD v SHIYAD SABIT ALI*. (1972) Oudh 140.

— Entries in—Presumption of possession  
See PRESUMPTION, KHEWAT. 65 I C 398.

**KUMAUN RULES, R. 24—Findings of facts—interference by Commissioner.**

S. 24 of the Kumaun Rules gives a right of second appeal only on the ground laid down in S. 101 C P. Code and a Commissioner is not entitled to go into questions of fact. (*Burn, S. M. and Pearson J. M.*) *RABI DATT v. CHANDRA MANI*. L R. 3 A, 409 (Rev)

**LAMBARDAR.** See also CO-SHARER.

— Appointment of — If necessary to go beyond waj b-ul az. See U. P. LAND REVENUE ACT S. 213. L R 3 A. 32 (Rev)

— Authority of — Extent of — Agreement between cosharers and lambardar restricting powers of lambardar — Effect of — Notice to tenants. See COSHARER. L R. 3 A 244 (Rev.)

— Person in authority—Evidence Act S. 24  
See EVIDENCE ACT, S. 24. 4 Lah. L J. 235

**LAND ACQUISITION ACT (I of 1894)—Applicability of—Commencement of proceedings—Private contract as to value—Binding nature of.**

The fact that compulsory powers under the Land Acquisition Act have been involved in order to secure property from unwilling vendors does not affect the right of parties to enter into a binding contract regulating the amount of purchase price. (*Lord Buckmaster*) *FORT PRESS CO. LTD, v. MUNICIPAL CORPORATION OF BOMBAY*.

43 M. L. J. 419 16 L. W. 654 :  
46 B 767 : 31 M. L. T. 225 (P. C.) :  
24 Bom L. R. 1228 (P. C.) (1922) (P. C.) 365 :  
36 C. L. J. 539 : (1922) M. W. N. 798 :  
68 I. C. 980 : L. R. 3 P. C. 234 : 49 I. A. 331 (P. C.)

— Timber — What comprises—Bamboos  
— Compensation—Landlord and tenant. See 1921)  
DIG COL. 684 *MAHARAJAH SIR RAMESHWAR SINGH v. BASUDEVA SINGH*.

3 Pat L. T. 90.

— S. 8 (a)—Dispute as to title to land as between claimant and Government — Power of court to decide. See (1921) DIG. COL. 684 *MANGAL DAS GIRDHARDAS v THE ASST. COLLECTOR AHMEDABAD*. 64 I. C. 582 and : 64 I. C. 584.

— S. 6 (3).— Notification of Government as regards acquisition— Declaration if conclusive— Evidence Act, S. 4.

The effect of a declaration under S. 6 (3) is only to make it conclusive that the land is required for a public purpose. It does not debar a court from enquiring into the validity of the steps leading to that declaration. (*Greaves, J.*) *In re MANICK CHAND MAHATAB v THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST*. 48 Cal. 916 : 66 I. C. 600.

**LAND ACQUISITION ACT (1894), S. 19.**

— Ss. 9, 11, 18—Compensation—Apportionment by Collector—Party dissatisfied—Right of suit.

The Land Acquisition Act creates a special jurisdiction and provides a special remedy. And ordinarily when jurisdiction has been conferred upon a special court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive, 10 C. W. N. 991 ef. It is an established principle that where by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury if the mode of redressing the injury is pointed out by the statute the ordinary jurisdiction of the Civil Court is ousted and in the case of injury the party cannot proceed by action. Where in a land acquisition case a person is served with notice under S. 9 of the Land Acquisition Act he is bound to apply for a reference under S. 18 if he is dissatisfied with the award and he cannot maintain a suit to vindicate his rights in the ordinary civil Court. Similarly a person who was a party to the apportionment of the compensation cannot reopen the question by a regular suit. (*Chatterjee and Pantou, JJ*) *SAIBESH CHANDRA SARKAR v SIR BEJOY CHAND MAHATAP*. 26 C. W. N. 506 : 65 I. C. 711 : (1922) Cal. 4.

— Ss. 9, 10 and 12—Land acquisition— Acquisition of surplus land—Notice—Single holding owned by one individual—Piecemeal acquisition under erroneous decision of Superior Court—Subsequent acquisition of the rest. See (1921) DIG. COL 685 *R. C. SEN v TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA*. 48 Cal. 892 : 64 I. C. 577.

— Ss. 11 and 12—Compulsory acquisition—Compensation—Award of acquiring officer—Submission to consulting Surveyor to Government—Award reconsidered and remade—Filing of the award—Finality of award. See (1921) DIG. COL 686 *PADAMSI NARAYAN v. THE COLLECTOR OF THANA*. 46 Bom. 366 64 I. C. 103, (1922) Bom. 161.

— Ss. 18 and 23—Claim filed beyond time fixed—Objection not raised before judge—Not entertained in appeal—Land in Cawnpore town—Value calculated at 20 years's purchase. See (1921) DIG. COL. 688 *LACHMAN PRASAD v. SECRETARY OF STATE*, 43 All 652.

— S. 18, 32 and 54—Nature of proceedings under—Area of land—Extent of compensation—Decision on—Award—Appeal—Title to compensation money—Disputes—Decision not an award.

Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated The first is that necessary for fixing the amount of compensation and this is an award from which a limited right of appeal to the High Court is given by S. 54 of the Land Acqn. Act The second is when a question of title arises between conflicting claimants as regards the title to the compensation money in court When the Collector on such dispute arising between the parties places the money under the control of the

**LAND ACQUISITION ACT (1894), S. 18.**

court and the parties proceed to litigate their right to the money, the decision of the court on such dispute is a decree and is appealable to the High Court and the Privy Council. It is in no sense an award and the restriction on the right of appeal imposed by S. 84 does not govern the case 40 C 21 (P. C.) dist. 23 Cal. 526; 17 C. W. N. 935 dis. approved. (*Lord Buckmaster*) **RAMACHANDRA RAO v. RAMACHANDRA RAO** 45 Mad. 320.

43 M. L. J. 78 (1922) P. C. 80  
24 Bom. L. R. 963 16 L. W. 1  
(1922) M. W. N. 359 20 A. L. J. 684 :  
35 C. L. J. 545 L. R. 3 (P. C.) 158  
26 C. W. N. 713 : 30 M. L. T. 154 (P. C.)  
67 I. C. 408 : 49 I. A. 129 (P. C.)

—S. 18—Reference under—Question of title between Government and other claimant *See* (1921) DIG. COL. 689 **MIRZA MAHOMED WAJEEH v. SECRETARY OF STATE**, 64 I. C. 93.

—Ss 20 (c) 31 (2)—*Land Acquisition case—Award of compensation—Dispute as to—Appeal—Parties.*

Under S. 20 (c) of the Land Acquisition Act the Secretary of State is only interested in the amount of compensation which the Collector or the court on reference by the Collector awards. He is not interested as a party in the distribution or apportionment of the compensation. Where a person to whom a wrong award of compensation is alleged to have been made is not impleaded as a party respondent to the appeal by a claimant, then the court cannot award him any relief (*Mears, C. J. and Gokul Prasad, J.*) **SANWAL DAS v. SECRETARY OF STATE** L. R. 3 A. 389 : 20 A. L. J. 604 : (1922) All. 438.

—Ss. 23 and 24—*Acquisition of land—Quarries—Compensation—Apportionment of—Interest of Government—Toka tenure.*

The mere fact that there is stone underneath the land sought to be acquired does not mean that the land should be valued on a quarrying basis whether it would pay a purchaser to extract it would be purely problematical. Where Government has a partial interest in the land sought to be acquired, the valuation of the Government interest is a question of considerable difficulty. The total value arrived at after valuing the land as freehold, must be apportioned between the various parties who have interests in the land, because if an attempt is made to value each of these interests according to the market value, the total value of those interests valued in that way would be most unlikely to correspond with the market value of the land as a freehold. Where the Government has a right to enhance the rent on land, a method which has been generally used to arrive at the present value of that rent is to capitalize at a certain rate and then write it back to the date of acquisition, the rate of capitalisation and the rate of writing back being the same. (*Macleod, C. J. and Shah, J.*) **GOVERNMENT OF BOMBAY v. N. H. MOOS**.

24 Bom. L. R. 471 : (1922) Bom. 254.

—S. 23—*Land acquisition—Amount of compensation—Mistake—Power of Court to reduce.*

**LAND ACQUISITION ACT (1894), S. 23.**

A court has no power to reduce the amount of compensation awarded by the Collector even though there was a mistake in his calculation. 22 M. L. J. 379, 19 A. L. J. 871 Ref. (*Phillips and Devadoss, JJ.*) **KATHISSALI v. THE REVENUE DIVISIONAL OFFICER, CALCUT.** 16 L. W. 891 : 31 M. L. T. 409. (H. C.)

—S. 23—*Compensation—Valuation of land—Development—Schemes for.*

Where a property has been recently purchased by the claimant, the purchase money would be a fair test of its market value. It would however be open to the claimant to show that in the neighbourhood there has been a general rise in the value of property since his purchase, by adducing evidence of subsequent sales in the neighbourhood. On the other hand it would be open to government to show that the claimant when he purchased the property, had taken a far too sanguine view of its possibilities in the future. The two most important questions are (1) whether the claimant has paid so high a price that the court may caution that he has not displayed the ordinary caution which a purchaser of land should display; (2) whether there has been any increase in the value of property in the neighbourhood within the short period between the purchase and the Govt. acquisition. (*Macleod, C. J. and Shah, J.*) **K. P. FRENCHMAN v. THE ASST. COLLECTOR, HAUELI**. 24 Bom. L. R. 782 : (1922) Bom. 399 : 68 I. C. 521.

—S. 23—*Market value—Buildings and land—Valuation—Repairs—Allowance for.*

When a building and its appurtenant land cannot be valued separately and no attempt has been made to do so in the land acquisition proceedings, the market value must be determined on the net rental value and when that is done the building cannot be separated from the land, for it is impossible to say what proportion of the rent is fixed on the building to that on the land 33 B. 325, 2 C. 123 Ref. 25 I. C. 393 not foll. The question as to what should be deducted for repairs in calculating the net rental is one of fact 25 I. C. 393 Ref. (*Phillips and Devadoss JJ.*) **KATHISSALI v. REVENUE DIVISIONAL OFFICER, CALCUT.** 31 M. L. T. 409 (H. C.) : 16 L. W. 891.

—S. 23—*Market value—Compensation—Adaptability for possible use in particular way, See* (1921) DIG. COL. 689. **MOHINI MOHAN BANERJEE v. SECRETARY OF STATE FOR INDIA**.

67 I. C. 25.

—S. 23 (i)—*Compensation—Limited owner—Administratrix—Power to order distribution of costs.*

It is competent to a land acquisition judge to direct a portion of the compensation money to be paid towards the cost of the proceedings by which the money came to be awarded to an administratrix having a limited power of alienation. 39 C. 33 Ref. (*Chatterjee and Panton, JJ.*) **LALIT MOHAN DEY v. H. N. DUTTA & Co.** 65 I. C. 209.

—S. 23 (i)—*Value—Calculation*

In calculating the value of a plot of land the price previously paid for a portion of the same area affords infinitely the best material which can

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possibly exist if the prices remain stationery. (*Shail Lal, C J and Harrison, J.*) RAI BAHADUR LALA NARASINGH DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. (1922) Lah 327.

—Ss. 23 (3) and (4)—Factors determining amount of compensation—Special adaptability of the land—Principle of reinstatement explained. See. (1921) DIG. COL. 690 CHAIRMAN SERAMPORE MUNICIPALITY v. SECRETARY OF STATE FOR INDIA. 49 Cal 83 : (1922) Cal 386 66 I. C. 846.

## —S. 23—Assessment of compensation.

In a land acquisition case the price of the land proposed to be acquired must be fixed in reference to the probable use which would give the owner the best return and not merely in accordance with its present use (*Abdul Raoof, J.*) MARDWARI MAL v. SECRETARY OF STATE FOR INDIA. 64 I. C. 146.

—Ss. 25, 3, 9 and 18—“Applicant” meaning of—Object and policy of section—“widows’ claim before Acquiring officer—If precludes reversioners from claiming larger amount before District Judge.

The word “applicant” in S. 25 is used to describe the person who puts in a written application under S. 18 for having his objection to the award referred for decision to a Civil Court. He is not necessarily identical with the person who makes a claim after notice under S. 9. All that S. 18 requires is that he should be “a person interested” within the meaning of S. 3, who should not have accepted the award.

S. 25 is designed with the purpose of holding claimants to their own bargains and of preventing demands being increased at every stage from the Collector to the High Court. Claimants are estopped from getting more from the judge than what they claimed before the Collector and on the same principle their legal representatives will also be bound.

Where a Hindu widow claimed compensation at a certain rate before the Acquiring officer, but afterwards surrendered the estate to the reversioners, the latter are not precluded by S. 25 from claiming a higher amount before the District Judge; for, though a widow represents her husband’s estate for certain purposes, the reversioners are not her legal representatives. Nor are they bound by her acts on any principle of estoppel. (*Spencer and Kumaraswamy Sastry, JJ.*) GATTINENI PEDD GOPAYYA v. DEPUTY COLLECTOR OF TENALI. 45 Mad 421 : 42 M. L. J. 298 : 15 L. W. 366 : (1922) M. W. N. 183 : (1922) Mad. 100 : 67 I. C. 146.

—Ss. 25, 26, 27 and 24—Award by court—Error—Subsequent amendment—Award not a decree—Appeal—Amount of Court’s award. See (1921) DIG. COL. 690. CHANDAR LAL SHAH v. THE COLLECTOR OF BAREILLY. (1922) All. 203 : 64 I. C. 624 : 44 A. 86.

—Ss. 29 and 30—Land acquisition—Compensation—Bhatis lands—Apportionment of compensation between the occupancy and the

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khots in proportion of two to one. See (1921) DIG. COL. 691 VALLABHDAS NARAYANJI v. THE SPECIAL LAND ACQN. OFFICER. 46 Bom. 272.

## —S. 31 (2)—Scope of

The proviso to S. 31 (2) of the Land Acquisition Act applies only where the person was under a disability or was not served with notice of the proceedings. 7 Cal 388 folld., 7 C. W. N. 538 diss. (*Chatterjee and Panton, JJ.*) SAIBESH CHANDRA SARKAR v. SIR BEJOY CHAND MAHATAP (1922) Cal. 4 : 26 C. W. N. 506 65 I. C. 711.

—S. 32—Investment in the purchase of other lands—If includes erection of other buildings—Calcutta Improvement Act See (1921) DIG. COL. 691, GNANENDRA MALLICK *In re.* 67 I. C. 18.

## —S. 52—Applicability.

S. 52 does not apply to proceedings commenced by an owner of property to restrain the Calcutta Corporation and Improvement Trust from taking further steps in some pending land acquisition proceedings (*Greaves, J.*) *In re* MANICK CHAND MAHATA v. THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST. 48 Cal. 916 : 66 I. C. 600.

—S. 54—Compensation—Dispute among rival claimants as regards title to money—Decision on, appealable to Privy Council. See LAND ACQN. ACT Ss. 18, 32 and 54. 43 M. L. J. 78 : 49 I. A. 129 (P. C.)

## LANDLORD AND TENANT—Abadi—Erection of building by tenant—License implied from conduct.

Where for more than 12 years a tenant has been using a building erected by him on an abadi plot for the purpose of his agricultural operations, the existence of a license for the erection of the building could be presumed and the license could not be revoked so long as the tenant continued to be a tenant of the zemindar. (*Stuart, J.*) CHAUDHRI BALWANT SINGH v. NET RAM. L. R. 3 A. 152 (Rev.)

## —Abandonment of the tenancy—Ex parte decree against tenant’s heir.

An ex parte decree obtained by a landlord against the heirs of the tenant is evidence to show that the tenancy was subsisting at that date and negatives a plea of abandonment of the tenancy. (*Greaves and Panton, JJ.*) ANURUL CHANDRA DHAR v. KAMALA KANTA ROY. 67 I. C. 787.

## —Abandonment—Receipts granted by landlord.

If a person does not assert his occupancy rights when they accrue to him and allows the holding to pass to another, he cannot after having been out of possession for many years receive the right. There cannot be constructive possession when no right is asserted. If he did not share in the cultivation, and did not assert any right in the holding at the settlement, it must be held that he has abandoned his rights, if any, (*Hopkins S. M. and Fremantle J. M.*) UDHO SINGH v. DAI LAL. 4 U. P. L. R. (B. R.) 31.

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———*Abandonment—What constitutes—Payment of rent—Offer to payment—Effect of.*

Where there has all along been payment or offer of payment of rent by the tenant there can be no question of abandonment of the holding. (*Woodroffe and Ghose, JJ.*) SARAT CHANDRA DE v. MONORAMA DEBI 68 I. C. 295.

———*Abwab. See ABWAB.*

———*Breach of contract—Tenant surrendering before expiry of lease—Rights of landlord—Suit for damages and not for rent—Measure of damages. See LANDLORD AND TENANT—RELATIONSHIP.* 35 C. L. J. 175.

———*Cesses—Zemindar—Haqi chairum—Liability of vendee—Custom.*

The haqi i-chairum is a customary due payable to the Zemindar on the transfer by sale of house property; and this equally (after the sale became absolute) whether the sale was in its inception, conditional or not. The zemindar's right is to a share of the purchase money; it is not merely a right to claim that share from the vendor. It is therefore, incumbent on the purchaser, if he would acquit himself of all liability to see that the zemindar is satisfied in respect of his dues, and he cannot discharge himself by a payment to the vendor. 23 All. 209 foll. (*Stuari and Sulaiman, JJ.*) KEDAR NATH v. DATTA PRASAD SINGH. 20 A. L. J. 646 ; (1922) All. 370 : 4 U. P. L. R. (A.) 197 : 69 I. C. 99.

———*Co-sharer—Talukdari property—Rights of junior member*

Where a member of a joint family with the Talukdar holds property belonging to the talukdar and the two people are living together, the presumption is that the person so holding the talukdari property holds it as the agent of the talukdar (*Fremantle, J. M.*) BENI MADHO SINGH v. RANI BIJRAJ KUNWAR. L. R. 3 A. 56 (Rev.)

———*Covenant against alienation—Scope of—Involuntary transfer—Effect of. See LEASE—CONSTRUCTION.* 26 C. W. N. 173.

———*Covenant for renewal—Terms of renewal—Implied condition.*

Where there is a covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. 20 C. W. N. 948 16 C. L. J. 217 Ref. (*Mookerjee and Panton, JJ.*) GURU PROSANNA BHATTACHARJEE v. MADHUSUDAN CHOWDHURY. 26 C. W. N. 901 : 35 C. L. J. 87 : 64 I. C. 824.

———*Entry in Revenue records as tenant—Effect—Tenant not entitled to sue for a declaration of title against landlord. See SP. REL. ACT, S. 42.* 4 Lah. L. J. 207.

———*Ejectment—Accretion to holding—Plea of—Practice.*

Where in a suit in ejectment the defendant claims occupancy rights by virtue of the law of alluvion the proper issue is "Is the land in suit held by the defendant as an occupancy holding on the

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ground that it is a gradual accretion to the land which is the occupancy holding of the defendant" (*Hopkins, S M and Burn JJ.*) GAYA CHAUBE v. MAHARAJ KESHO PRASAD SINGH.

L. R. 3 A 518 (Rev.)

———*Ejectment of lessee—Effect on rent.*

Where the lessor has evicted the lessee from a part of the land demised the entire rent is suspended. 19 Cal. W. N. 871 followed, 33 Mad. 499 distinguished.

But where facts indicate an intention that the liability of the defendant lessee to pay a rent for land which was in his possession already did not depend upon the delivery of possession of the other land which was in the possession of another and where the plaintiff landlord never put any obstruction in the way of defendants recovering possession and there is no question of *malafides* on the part of the plff the entire rent should not be suspended and the defendant is liable to pay proportionate rent in respect of the land in his possession. (*Chatterjee and Pearson, JJ.*) NAGENDRA CHANDRA LAHIRI v. SIR MANINDRA CHANDRA NANDI. (1922) Cal 153.

———*Ejectment—Grove—Custard apple trees—Planting of.*

A plantation of custard apples (*Sharifa*) is a grove. When a landlord has allowed a tenant to plant and maintain a grove he cannot eject him so long as the grove remains in existence (*Hopkins, S M and Fremantle J. M.*) MUHAMMAD BASHIR KHAN v. SUKHNANDAN LAL. 4 U. P. L. R. 79 (B. R.)

———*Ejectment—Lease by landlord—Right of lessee to eject cultivating tenants.*

It is open to a landholder to give a lease of his proprietary rights which might or might not contain authority to eject a tenant. But a cultivating lease of land which is already in the possession of sitting tenants does not entitle the lessee to eject them (*Hopkins S. M and Burn, J. M.*) RIKHDEVA RAI v. RAGHOO NANDAN. L. R. 3 A. 65 (Rev.)

———*Ejectment—Portion of holding—Liability of tenant. See (1921) DIG. COL 624 RAM KANT MANDAL v. GUNESH CHUNDER SEN.*

64 I. C. 550.

———*Ejectment—Portion of holding—Notice to quit as regards a portion if valid. See (1921) DIG. COL 694 ATAL CHUNDAL v. KEDAR NATH MOOKERJEE.* 64 I. C. 551.

———*Ejectment—Sub-lessee—Rights of.*

The sub-lessee of an occupancy tenant is entitled to eject the actual cultivator. (*Burn, S. M.*) NATHI v. AJUDHI. L. R. 3 A. 486. (Rev.)

———*Encroachment—Rent for encroached land—Liability to pay. See (1921) DIG. COL., 695 ABDUL HOSSAIN v. AFSARUDDIN.* 67 I. C. 639.

———*Expropriatory tenancy—Surrender of holding.*

So long as an expropriatory tenant remains in possession of his land no surrender of his expropriatory right would be valid. (*Fremantle, J. M.*) CHHOTE LAL v. LAL SINGH.

L. R. 3 A. 260. (Rev.)

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## Forfeiture—Right of re entry—Absence of—Effect of.

In the absence of a clause for re-entry, the breach of any of the conditions of a lease does not work a forfeiture. (*Hopkins, S. M. and Fremantle, J. M.*) *RAMNARAIN v. SHEIKH ABDUL RAHMAN.* 4 U. P. L. R. (B R) 59.

## Forfeiture—Setting up a permanent tenancy.

The mere assertion of a permanent tenancy of occupancy right by the tenants does not work a forfeiture of the tenants' right to a due notice to quit. (*Spencer and Deva Doss, JJ.*) *MULLAI THAY AMMAL v. SUBBARAYAN PILLAI* 16 L W 802 (1922) M. W. N 763.

## Forfeiture—Waiver—Subsequent demand and acceptance of rent

Where subsequent to an alleged forfeiture by reason of the transfer of an occupancy holding the landlord sues the original tenant and obtains a decree for rent it amounts to a waiver of the forfeiture and the landlord cannot sue to eject the tenant on that ground. (*Mookerjee, A. C. J. and Fletcher, J.*) *RASH BEHARI CHOUDHURI v. UPENDRANATH SAHA.* 64 I. C. 711.

## Grove—Existence of, for some time—Implied consent.

Where a grove of some standing exists on the land, the Zemindar's consent for the planting of the grove must be implied. (*Fremantle, J. M.*) *NAWAB HUSAIN v. LACHMAN* L. R. 3 All. 4. (Rev).

## Grove—Trees—New plantation.

Where the trees in a grove fell down and no tree was replaced for a period of 12 years thereafter, and subsequently fresh trees were planted, the new trees do not represent an old grove replaced from time to time but a grove newly planted in recent years. (*Hopkins, S. M.*) *MANSUKH PATEAK v. THE MANAGER, COURT OF WARDS, AJUDHIA ESTATE.* L. R. 3 A. 103 (Rev).

Holding over—Lessee for a term continuing in possession without paying rent and without recognising title of landlord—Expiry of twelve years—Landlord's suit to recover possession barred. See LIM. ACT, ART. 139.

20 A. L. J. 593

## Holding over—New tenancy—Terms implied.

When a tenant holds over after the expiration of the term of the previous tenancy it is considered to be a new tenancy coming into operation after the date of the expiry of the term of the previous tenancy. (*Suhrawardy and Ghose, JJ.*) *UDOY CHANDRA BASU v. MAHOMED ALI BEPARI.*

65 I. C. 589.

## Kabuliyat—Joint tenants—Acceptance of lease by some—Effect on others.

Where four brothers were cultivating land together, a lease from the Zemindar accepted by two of them would be binding on the others only if there is evidence to show that the consent of the others was implied. (*Pearson, J. M.*) *UDAY RAM v. MT PARLEASI.* L. R. 3 A. 521. (Rev).

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Merger—Mokurrari lease—Patni lease—Intention to keep distinct See (1921) Dig. Col. 697 *DULHIN LAKSHMIPATI KUMARI v. BODHANATH TIWARI.*

(1922) M. W. N. 58 :

15 L. W. 343 30 M. L. T. 216 :

26 C. W. N. 565 : 24 Bom. L. R. 383 :

4 U. P. L. R. (P. C.) 42 : (1922) P. C. 94.

66 I. C. 551.

## Nature of tenancy—Muafi Khairati Different kinds of tenancy.

A Muafi Khairati tenant may be exempt from paying rent for services to be rendered to the Malguzar or for services to be rendered to the village. The distinction between the two classes is clear. A man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. This is one class. In the other persons are entitled to hold land as tenants, with an added condition that they shall pay no rent so long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them (*Hallifax A. J. C.*) *BED PROSAD v. KANGALU.* 67 I. C. 305.

New tenancy—Creation of—Son inheriting land from father and paying rent See (1921) Dig. Col., 697 *JYOTI PROSAD CHATTERJEE v. DAS RATH GHOSH.* 36 C. L. J. 73.

Notice to quit—Right to—Assertion of permanent rights of occupancy by tenants—Effect of—Notice not acted upon.

The mere assertion of a claim of permanent occupancy right does not deprive the tenant of his right to a notice to quit by the landlord. A notice to quit given a long time before the suit and not acted upon does not relieve the landlord from his obligation to give a fresh notice to quit before ejectment. (*Spencer and Devadoss JJ.*) *SARBVANA PERUMAL PILLAI v. SUBBAYEAR.*

31 M. L. T. 430. (H. C.)

Notice to quit—Waiver—Tenant continuing in possession—Non payment of rent—Effect of.

Where after the service of a valid notice to quit the tenant continues in possession without payment of rent and without the consent or permission of the landlord. Held that there was no waiver of the notice to quit and that the possession of the tenant was adverse thereafter. (*Dhobley A. J. C.*) *YESHWANT v. SHIWAPPA.*

68 I. C. 178.

Occupancy holding—Recognition by landlord's agent—Onus of proof.

There is no inflexible rule that a landlord's gumasta has no power to recognise the transfer of a non-transferable holding. The onus is upon the landlord in the first instance to show what the precise authority of his agent is. 15 C. W. N. 953 foll (*N. R. Chatterjee and Panton, JJ.*) *MADAN MOHAN SAHA v. PRYANATH DUTTA.*

64 I. C. 362.

Occupancy holding—Relinquishment of, by tenant.

An occupancy tenant can relinquish his rights even to the loss of a sub-lessee or mortgagee. (*Burn, J. M.*) *DURGA PRASAD v. JAGAT SINGH.* L. R. 3 A. 201. (Rev).

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—Occupancy holding—Transferability of—Decree holder whether can sell portion of holding—Landlord holding money decree—Rights of.

A decree-holder, not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree where there is no local custom of transferability. 1 Pat. L. J. 257 overruled. 48 C. 184 follid.

A landlord who has sued his tenant and obtained against him a money decree can in execution thereof sell the non-transferable occupancy holding of his tenant without the latter's consent

48 Cal. 184 followed 2 P. L. J. 530 overruled, 4 Cal 925, 37 Cal 687 Ref. 24 Cal. 355 diss. (Dawson-Miller, C. J., Das and Adami, JJ.) JUGESHWAR MISRA v. NATH KOERI.

1 Pat. 317 : (1922) Pat. 49 : 4 U. P. L. R. (Pat) 9 : (1922) P. 19 65 I. C. 335 (F. B.)

—Occupancy holding—Transfer of—Recognition by landlord—Evidence of—Burden of proof—Acquiescence

Per Das and Adami, JJ, (Chief Justice dissenting) On a question arising as to whether the transfer of an occupancy holding has been recognised by the landlord, unless it is shown that an assertion by the tenant was made to the knowledge of the landlord and the latter acquiesced in that assertion with full knowledge, there is no recognition of the transfer by the acquiescence on the part of the landlord. Mere payment of the rent by the transferee of an occupancy holding does not prove recognition of the tenant as such by the landlord unless it is further established that the landlord accepted rent from him as a tenant. The burden of proof of recognition of the transfer is on the tenant.

Per Chief Justice : It is well-established that the receipt of rent by the landlord from the transferee of a holding, not transferable by custom, will validate the transfer. But the gomastha or Patwaris of the landlord although authorised to collect rents on his behalf has no authority by taking rent from a transferee to create the relationship of landlord and tenant between his master and the transferee (Miller, C. J. and Das, J.) BHONU LAL CHAUDHURI v. VINCENT,

3 Pat. L. T. 653 : 65 I. C. 882.

—Occupancy holding—Non-transferability—If can be waived.

Where a suit for rent relating to an occupancy holding was compromised according to which in default of payment of the decree amount, the holding was to be sold, this amounted to a clear representation as to the attachability of the holding. Any right which the holder had must be deemed to have been waived. (Das and Adami, JJ.) NIDHI PARIDA v. KARUNAKAR PADHAN,

1 Pat. 153 : (1922) P. 483.

—Occupancy right—Inference from facts—Prescription—Evidence of.

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Where it was found that the tenants had been in possession and occupation of the lands in question hereditarily for nearly 80 years; that they had dealt with those lands as occupancy ryots, partitioning their holdings, transiering and mortgaging them with the knowledge and acquiescence of the plff. and his agents and they had received compensation for lands taken up by Government under the Land Acqn. Act, the tenants could well be deemed to have acquired rights of occupancy by prescription (*Mr. Amcer Ali*). SRI CHIDAMBARA SIVAPRAGASA PANDARA SANNADHIGAL v. VEERAMA REDDI.

45 Mad. 586 43 M. L. J. 640 : (1922) M. W. N. 749 : (1922) P. C. 292 :

68 I. C. 538 : 49 I. A. 286 : 31 M. L. T. 54 (P. C.) : 16 L. W. 102 (P. C.)

—Occupancy right—Recognition by Zemindar

Where in addition to the widow of the last male owner, his daughter also is recorded as being in joint cultivation, it is an admissible inference from this that the zemindars admitted that the daughter had rights in the holding resembling those of an occupancy tenant. (*Burn, J. M.*) HANUMAN PRASAD NARAIN SINGH v. BARAMDEI,

4 U. P. L. R. (B. R.) 39 : L. R. 3 A 490 (Rev.)

—Occupancy tenant—Rights of—Permanent construction.

It has been held in many cases that ryots in villages, who have acquired rights of user over areas of land adjoining their residential houses to enable them to carry on their lawful callings cannot be restrained in the exercise of such user but there is no authority for the proposition that an occupancy tenant may make permanent constructions upon the land of the Zemindar over which he has no right of user. He would be debarred, even if he had a right of user from making permanent constructions, unless the rights to make permanent constructions are included in the rights of user. (*Stuart, J.*) SANIA v. SETH BEHARI LAL, (1922) All. 273.

—Permanent tenancy—Acquisition of—Length of possession.

Mere length of possession will not confer a right of permanent occupancy on the tenant. 43 M. 567 : 41 M. L. J. 175 : 34 M. L. J. 234 Ref. (*Kumaraswami Sastri and Deva Doss, JJ.*) TANUKU MAHALAKSHMI v. CHAMARTY NARASIMHA MURTHY.

(1922) M. W. N. 146 : 15 L. W. 449 : (1922) Mad. 82.

—Permanent tenancy—Bemiadi Patta—Grant of permanent tenure by ghatwal.

A bemiadi patta does not necessarily convey a permanent heritable interest but this does not mean it cannot do so. As stated in the Settlement Report of the Patkum Pargana bemiadi riyadars hold permanent tenures the rent of which is liable to enhancement 2 P. L. J. 180 Expl.

A ghatwal who is incompetent to grant a permanent tenure is estopped from alleging that the grant did not create a permanent right if he really purported to do so. (*Coutts and Macpherson, JJ.*) KANGALI CHARAN MUKHERJI v. SURAJ NARAIN SAH,

6 P. L. J. 687 :

(1922) Pat. 90 : (1922) P. 161 : 65 I. C. 303.



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## —Permanent tenancy—Creation of—Registered lease

A permanent tenancy can be created only by a duly stamped and registered document. An application to the Revenue court is insufficient, (*Hopkins, S. M. and Burn, J. M.*) CHAUDHRI CHEEDA SINGH v. BHEJAN, L. R. 3 A, 162 (Rev).

## —Permanent tenancy—Evidence of—Presumption:

Fixity and uniformity of rent and transfer and devolution of interest for a long time without objection by the paramount owner, are elements that raise a presumption of permanent tenancy, 15 I. C. 110; 15 C. L. J. 220; 34 C. 902, 121 P. R. 1912, (*Broadway and Abdul Raoof JJ.*) RAM SAHAI v. MAHOMED SADIQ, 4 Lah. L. J. 311.

## —Permanent tenancy—Evidence of—Origin unknown—Inference from circumstances.

In a case in which there was no direct evidence as to what the original tenancy was, it appeared that a *pucca* house was erected on the premises in question at least 50 years before suit, that from that date the rent fixed and paid for the premises in question had never varied, that the tenant from time to time had disposed of his interest, and that during that period the value of the land had risen. Held that the proper inference to be drawn on the facts was that the tenancy was a permanent tenancy and not one from month to month. (*Sir Walter Schwabe C. J. and Wallace, J.*) ABDUR SALAM SAHIB v. M. KANDASAMI CHETTIAR, 43 M. L. J. 556; 16 L. W. 473; (1922) M. W. N. 639.

## —Permanent tenancy—Incidents of—Inference from conduct.

Prima facie the use of the word *taluka* in a lease imports permanency. Even though there are no words of inheritance in a *puttah* and *kabuliyat* creating a tenure still such incident may be proved by evidence bearing on the history of the tenure and the conduct of the parties, 10 M. I. A. 183; 12 M. I. A. 263; 34 C. 902 foll.

Though a particular tenure may not be a permanent tenure it may by reason of an agreement between the lessor and lessee be saleable in execution of a decree for rent. Held, on the evidence of the case that the tenure in question was permanent, heritable and transferable. 21 C. W. N. 809, 46 I. C. 1, 25 W. R. 536 and 12 W. R. 403 ref. (*Richardson and Panton, JJ.*) SECRETARY OF STATE v. ANANDA MOHAN ROY, 65 I. C. 145.

## —Permanent tenancy—Payment of premium—Thika—Mokrari—Incidents of.

A tenancy may be permanent without payment of premium.

Where a document stated that the tenant, the grantee, would pay the *thika mokra* rent of a certain amount and the grantee was authorised to cultivate from generation to generation: Held, that the word '*thika*' was used to indicate the creation of a tenancy and the word '*mokra*' meant *mokrari* and hence the rent was fixed in perpetuity. (*Mookerjee and Panton, JJ.*) RESHEE CASE LAW v. SANKAR CHANDRA PAL, 35 C. L. J. 90; (1922) Cal. 128; 64 I. C. 774.

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## —Permanent tenancy—Reclamation lease—Uniform rate of rent.

Where certain tenants had been in possession of a large area of land under reclamation leases and it was found that they had continued in possession for a long time, that the rate of rent had remained unchanged all along, that there had been several cases of succession by heredity to the original grantee and the lessor had described the tenants as *istimrari* and entitled to permanent possession, held, that the leases were meant to be perpetual (*Burn, J. M.*) SARJOO PRASAD v. KASHI, L. R. 3 A 46 (Rev).

## —Permanent tenancy—Rent to vary with area—Rights of tenants—Enhancement of rent.

From the year 1878 the defendants had held the lands in question at a rental of As. 2 per *bigha* but in a lease of 1886 there was a provision to the effect that if at any time on measurement the debts, were found to be in possession of excess area, they should pay rent at the rate of As. 2 for the excess area. There was also a provision that the tenants were to continue in occupation from generation to generation and that they should pay a proportionate part of any additional cesses levied by the Crown. Held, that the rent was fixed in perpetuity at As. 2 per *bigha* and was not liable to be enhanced. 47 Cal. 280; 1 C. L. J. 572, 19 C. W. N. 56 Rel. (*Mookerjee and Panton, JJ.*) AMAR NATH BHATTA CHARJEE v. HRISHIKESH LAHA, 35 C. L. J. 138; 64 I. C. 829.

## —Permanent tenancy—Tenancy at will

—Land used as house site—Dakhilas—Evidentiary value. See (1921) Dig. Col. 700. SRIMATI SASHIBALA DEBI v. AMOLA DEBI, 66 I. C. 61.

—Permanent tenancy—Uniform rent. See (1921) Dig. Col. 701 JYOTI PRASAD CHATTERJEE v. DASRATH GHOSH, 36 C. L. J. 73.

## —Recognition of tenancy—Receipt for rent granted by tahsildar—Effect of.

A receipt for rent granted by the Tahsildar to the transferee of a tenant does not amount to a recognition by the landlord unless it was proved that the Tahsildar had authority from the landlord to recognise the tenancy. Nor does the fact that the tenant's occupation of the land was acquiesced in for 9 years without remonstrance amount to recognition. (*Ross and Coutts, JJ.*) BALGOBIND MANDAR v. DWARKA PRASAD, 1 Pat. 394; 66 I. C. 55; 3 Pat. L. T. 409; (1922) P. 279; (1922) Pat. 142.

## —Relationship—Onus of proof.

Where a person is not recorded as a tenant and the landlord does not admit he is one, the onus is on the person setting up a claim to tenancy to prove that he was a tenant. (*Batten, J. C.*) ALAMSINGH v. SETH GOPALDAS, 68 I. C. 664.

## —Relationship—How created—Tenancy not in writing but possession given.

Per *Mookerjee, J.*—When in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that

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specific performance can be obtained between the parties to the agreement in the same court and at the same time as the subsequent legal question falls to be determined. (*Mookerjee and Buckland, JJ.*) JOGENDRA KRISHNA ROY v. KURPAL HARSHI & Co 49 Cal. 345. 35 C. L. J. 175. 68 I. C. 993.

———*Relationship—Lessee for a term of years whether can create tenancy extending his term.*

A lessee who is a raiyat for a term of years, cannot create tenancy rights in favour of another extending his own term against the wishes of his landlord. A tenancy can be created only by a contract either express or implied between the landlord and the tenant or by statute. (*Jwala Prasad and Bucknill JJ*) JEGENDRA SINGH v. MAHARAJA KESHO PRASAD SINGH. (1922) P. 429.

———*Relationship—Road cess return.*

A road cess return signed by the landlord is admissible against him to show that the relationship of landlord and tenant existed between the parties (*Adam, J.*) SADHU SARAN v. AMBIKA LAL. 68 I. C. 676.

———*Relationship of—Tenant taking a mortgage of a fractional share—Rights of*

A tenant does not cease to be a tenant by becoming the mortgagee of a fractional share in the mahal. (*Hopkins, S. M.*) GAYA DIN v. SHEO GOVIND L. R. 3 A. 241 (Rev.)

———*Rent—Abadi site—Customary payment—Chaukidara.*

Where a custom is proved to that effect, it is competent to a zemindar to realise ground rent or *chaukidara* from occupancy tenants residing on the abadi. (*Stuart, J.*) LAIQA v. SHIAM SUNDAR LAL. L. R. 3 A. 154 (Rev.)

———*Rent—Abatement—Eviction from a portion of the holding—Title paramount—Physical dispossession if necessary—Onus of proving eviction by title paramount. See (1921) DIG. COL. 701* BALKA BEHARI GHOSH v. MADAN MOHAN ROY. 68 I. C. 477.

———*Rent—Apportionment—Consent of landlord—Conduct of agent.*

Where after the death of the original recorded tenant of a holding at a rental of Rs 22, it was found that for a series of years the agents of the landlord had given four rent receipts each for Rs. 5-8-0 in favour of the heirs of the original tenant, held that the receipts were sufficient evidence in writing, of the consent of the landlords' agents to the division of the holding and if the landlord alleged that the agents had no authority to consent to a division of the holding, the onus lay on him to prove the allegation. 25 C. 531 foll. (*Teunon and Newbould, JJ.*) AKHOY KUMAR GOUS v. ERADATULLA KAZI. 64 I. C. 883.

———*Rent—Decree against some of the heirs of a tenant—Execution sale*

On the death of a tenure-holder, if a decree is obtained for rent against some of the heirs the interest of those heirs that are not parties to the

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decree will not be affected either by the decree or by the sale under that decree 26, C. W. N. 138. (*Suhrawardy and Cumming, JJ*) ABDUL GANI v. NARENDRA KISHORE ROY. 65 I. C. 592.

———*Rent—Enhancement—Contract—Diara Act and Bengal Tenancy Act.*

If there is a contract between the parties that rent should be payable at a certain rate, prima facie that is binding. Such a contract cannot be affected by the settlement of rent under the Diara Act. But if there was a settlement of rent under chap. X of the Bengal Tenancy Act, the tenant is liable to pay the same. (*Chatterjee and Suhrawardy JJ*) AMBIKA CHARAN SEN v. GIRISH CHANDRA SEN. 68 I. C. 719.

———*Rent—Enhancement—Procedure.*

If in a suit for enhancement of rent there are large divergences in the prevailing rates of rent, the Court should adopt a medium rate both on legal and equitable grounds. (*Hopkins, S. M.*) TULSHI v. MAHABIR PRASAD. L. R. 3 A. 35 (Rev.)

———*Rent—Enhancement—Duty of court to fix and declare new rent—Patwari.*

An enhancement of 30 per cent after 50 years cannot be called excessive. It is the duty of the court to fix and declare the new rents and not leave it to the patwari. (*Fremantle, J. M.*) SHEO SHANKAR TEWARI v. SAHU NARAIN DAS. L. R. 3 A. 428 (Rev.)

———*Rent—Favourable rate—Calculation of.*

In finding out whether land is held at a favourable rate of rent the calculation should be based on the accepted rental and not on the standard rental. (*Hopkins, S. M.*) RAM BEHARI v. BALDEO. L. R. 3 A. 77 (Rev.)

———*Rent suit—Eviction by title paramount—If a good defence See BENGAL TENANCY ACT, S. 48 (a).* 35 C. L. J. 159.

———*Rent—Suit by landlord for rent in respect of a portion of the holding.*

Where a landlord brings a suit for rent of a portion of the holding he cannot be allowed to treat the claim as one for the rent of the entire holding. To decree such a claim would be in effect to allow a splitting up of the tenancy without any ascertainment of the portion of the rent which is due from the particular portion of the holdings for which the rent is claimed. (*Coutts and Das, JJ*) MAHARAJA KESHAWA PRASAD SINGH v. MATHURA KUAR. (1922) Pat 336 : (1922) P. 608.

———*Rent—Suspension of—Dispossession from portion of holding.*

Dispossession of a tenant by the landlord from a portion of the holding causes suspension of the entire rent of the holding. (*Newbould and Panton, JJ.*) RAMANI KANTA ROY v. HARA CHANDRA DAS. 68 I. C. 495.

———*Rent—Suspension of—Dispossession of tenant from a portion of the premises—Effect of. See (1921) DIG. COL. 704.* MESBAHUDDIN AHMED CHOWDHURY v. ABDUL BORKAT. 65 I. C. 839

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*Rent—Suspension—Possession not given to tenant*

The tenant is not entitled to a suspension of the rent of the entire tenure, where there is reason to suppose that the landlord omitted through a *bona fide* mistake, to give possession of lands largely jungle and therefore little known and where there has been for forty years no objection from the tenant, but payment of rent by him. (*Woodroffe and Cumung, JJ.*) KATYANI DEBI *v.* UDAY KUMAR DAS 49 Cal. 257 : (1922) Cal. 348 : 69 I. C. 117.

*Rent—Wife paying for husband—Rent claimed from wife not in possession.*

Where the defendant is not in possession of some lands for which she is paying rent by reason of the claim by her husband, *held* she cannot be called on, to pay rent for the lands of which she has no possession. (*Woodroffe and Cumung, JJ.*) KATYANI DEBI *v.* UDAY KUMAR DAS.

49 Cal. 257 : (1922) Cal. 348 : 69 I. C. 117.

*Revenue—Assessment—Objection to—Absence of notice—Effect of*

Where a part proprietor had no notice of the quinquennial assessment and had no opportunity of appealing against it, it is open to him to object to the assessment at a subsequent date (*Hopkins S. M. and Burn, J M.*) DURGA PRASAD *v.* EMPEROR.

L. R. 3. A. 512 (Rev.)

*Rights interse—Acquisition of land—Claim for compensation by tenant and Khot.*

Certain Khoti lands were acquired under the Land Acquisition Act. The Khot claimed the whole of the compensation. The grass lands having passed from hand to hand under sale deeds the Khot was perfectly aware that the villagers were enclosing these grass lands and were treating them as if they belonged to them. *Held*, it was impossible to say that the villagers could not acquire by such action proprietary rights in the lands so enclosed and dealt with. They were entitled to compensation along with the Khot according to the custom of the villages. The acquisition of right by prescription is open in law to these villagers against the Khot whatever his rights under the lease may be. (*Macleod, C. J and Shah, J.*) VALLABHADAS NARAYANJI *v.* LAND ACQUISITION OFFICER. (1922) Bom. 365.

*Rights of landlord—Surrender by tenant before expiry of period—Damages.*

Where there was a tenancy for 3 years, the tenant cannot put an end to it before the expiry of the period by merely giving notice of relinquishment. Even where the landlord accepts the surrender by re-entry, he is entitled to damages for the breach of contract, but not for rent for the unexpired period, though the latter may form the basis for damages (*Mookerjee and Buckland, JJ.*) JOGENDRA KRISHNA ROY *v.* KIRPADE HARSHI & Co. 49 Cal. 345 : 68 I. C. 993 : 35 C. L. J. 175

*Sir land—Sale—Exproprietary rights.*

In the case of joint sir, sale does not destroy its character but it continues sir of the remaining

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co-sharers provided exproprietary rights are not claimed. (*Pearson, J M*) BALRUP TEWARI *v.* MT. SONKALI KUNWAR L. R. 3 A. 498 (Rev.)

*Subtenancy—Creation of—Wajib-ul-arz—Construction.*

When a mauza was settled in 1893-1894, the plff and one N were the kotwars each having succeeded his father in this office. The village service holding consisted of survey Nos 104 and 105 of which plff. occupied the former and N the latter. The Settlement officer decided that one kotwar was sufficient for the village whereupon plff was dismissed. It was, however, arranged, that plff should retain possession of survey No. 104 paying the assessed rental of Rs. 6 to N. The *jamabandi* of the Settlement Record showed plff. as N.S. subtenant, N. himself being recorded as the village-service tenant. The *wajib-ul arz* contained an entry on the subject as follows : "As J (plff) is a kotwar of long standing, he should himself cultivate survey No. 104 which is at present under his cultivation and should pay Rs 6 rent to N" In the subsequent settlement the entire service holding was recorded in the name of N's son D and the clause aforesaid was omitted in the new *wajib-ul-arz*. In a suit by plff. for possession and correction of the *wajib-ul-arz Held*, that a sub-tenancy had been created in favour of plff. and that he was entitled to remain in possession of the field in his cultivation. The new *wajib-ul-arz* should be modified by insertion of an entry that the sub-tenancy enjoyed by plff until his ejection would enure for his life time only. (*Drake Brockman, J. C.*) JHIBLIA *v.* DAWLATIA. 18 N. L. R. 34 : (1922) Nag 158.

*Sub-tenancy—Proof of direct payment of rent—Effect of.*

Direct payment of rent to the zemindar or lessor raises a presumption against sub-tenancy but this presumption may be rebutted by proof that the zemindar or lessor recognised another person as his tenant in chief (*Pearson, J M.*) BAIJ NATH SINGH *v.* SHEODARSHAN SINGH.

L. R. 3 A. 415 (Rev.)

*Tenancy—Presumption of consent—Question of fact*

It is a question of fact in each case whether the circumstances raise a presumption as to the landowner's consent to the occupation of land by a person as tenant. The landholder's consent cannot be inferred merely from the length of possession or from knowledge. (*Hopkins, S. M. and Burn, J. M.*) SEETLA BUX SINGH *v.* NAWAB ABDUL MAJID. L. R. 3 A. 40 (Rev.)

*Tenancy—Terms of—Inference from conduct.*

Where the terms upon which a tenancy was created cannot be proved by direct evidence the subsequent conduct of the parties may be considered with a view to determine the nature of the tenancy 16 C. L. J. 322 Ref. (*Newbold J.*) ABHAIPADA SIRCAR *v.* ATOR DOME, 67 I. C. 66.

*Tenancy at will—Incidents of—Mortgage—Redemption.*

A mortgage by a tenant at will is not binding on the landlord but it is open to the landlord to

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recognise it by accepting rent from the mortgagee during the currency of the tenancy. Such a mortgage is not *ab initio void* and a suit for its redemption is maintainable. (*Kanhaya Lal J C*) BHAIROON v. BALAK. 9 O. L. J. 331 : 4 U. P. L. R. (O. C.) 88. (1922) Oudh 287 : 68 I. C. 558.

———*Thekadar—Powers of—Onus.*

A thekadar has presumably the full powers of a Zemindar and he can alter holdings in the absence of proof of any restriction on his powers (*Burn, J. M.*) BHAIYA GANGA BUX SINGH v. RAM SUPHAL. L. R. 3. A. 524 (Rev.)

———*Transfer of holding—Fixed rate tenancy—Effect of transfer—Transferee an agricultural tenant.*

A fixed rate tenant transferred all his property including a fixed rate holding to the defendant who on the death of his transfer took possession of the property and re-built a house which was in ruins. The zemindar thereupon sued to eject the defendant who was himself an agricultural tenant. *Held*, that the suit was not maintainable (*Stuart and Ryves, JJ.*) THA KURJI MAHARAJ v. ANANT BHARTHI. 20 A. L. J. 922

———*Transfer of non-transferable holdings—Ejectment—Abandonment.*

Where a transfer is not by way of sale, the landlord though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been an abandonment. 40 Cal. 870 ; 17 C. W. N. 832 ; followed 10 C. W. N. 492 not followed. (*Greaves and B. B. Ghosh, JJ.*) SRIMATHI AMBIKA DEBI v. SRIMATHI SWARNA MAYI DAS. (1922) Cal. 135 68 I. C. 425

———*Transfer of portion of holding—Effect*

The transfer of a portion of even a non-transferable holding by the tenant would be binding as against the landlord, provided the original holder or occupier has not abandoned possession of the whole holding (*Miller, C. J. and Adams, J.*) PIRTHI MAHTON v. JAMSHED KHAN. 3 Pat. L. T. 403 : (1922) P. 289 : 67 I. C. 656

———*Trees—Right to plant—Grove land.*

In the absence of a custom or contract to the contrary, a tenant of a grove has the right to plant new trees in the place of those which have decayed or have been cut down. (*Hopkins, S. M. and Freemanlle, J. M.*) JAS RAM v. LALA PAHLADI LAL. 4 U. P. L. R. 6 (B. R.)

———*Trees—Right to—Trees planted by zemindar.*

Where with the permission or acquiescence of the zemindar trees have been planted on the holding by the tenant, the latter has a right to cut them in the absence of any custom to the contrary (*Daniels, A. J. C.*) CHATUR v. RUKMANGAD SINGH. 25 O. C. 181 : (1922) Oudh 249.

———*Under proprietary right—Incidents of—Right of re-entry—Forfeiture.*

The absence of a right of re-entry is one of the essential factors in underproprietary right and the forfeiture of a lease is not involved by the breach

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of any of its conditions where there is no provision for re-entry (*Hopkins, S. M. and Freemanlle, J. M.*) RAW NARAIN v. SHEIKH ABDUL RAHMAN. 4 U. P. L. R. (B. R.) 59.

———*Under proprietary right—Rent—Liability to pay*

All lands decreed according to the circular of 1867 are under-proprietary lands whether they pay rent or not. (*Fremanlle, J. M.*) SANT BUX SINGH v. NAWAB QAMAR JEHAN BEGAM. L. R. 3 A. 104 (Rev.)

———*Under proprietary right—Settlement records—Declaratory decree.*

In a settlement made in 1867 the right of the respondents was recorded as that of Thekadar without having either proprietary or under-proprietary rights in Mauza Kusehli in the appellant's estate of Surapjur. In 1868 a decree was passed between the parties to the same effect. In spite of this declaratory decree the respondents claimed Pukhtadri or under-proprietary right in some proceedings in 1887 to which the appellant's predecessor was a party and the claim was allowed. Again when the original settlement ended about 1897, a new settlement was made on the footing that the respondent's predecessors were underproprietors. Further the Court of Wards, on behalf of the then taluqdar, sued the respondents for rent as Pukhtadars. *Held*, that in spite of the decree of 1868, a title, so long recognised could not be defeated. (*Lord Buckmaster.*) PIRTHIPAL SINGH v. GANESH DIN SINGH. 44 M. L. J. 29 (P. C.) (1922) P. C. 383.

———*Under raiyati holding—Transferability of holding—Custom.*

As a general rule an under-raiyati holding is not transferable but an under-raiyat may under certain circumstances acquire a right of occupancy and if he so acquires it his right is transferable. 42 C. 751 ; 18 C. L. J. 262, 32 C. L. J. 46 Ref. (*Newbould and Cumming, JJ.*) TUKA MEAH v. NABIN CHANDRA MAZUMDAR. 65 I. C. 701.

———*Zemindar—Entry of near relation's name as tenant—Rights of cultivator.*

Where a zemindar gets the name of a son or near relation entered in the papers while he himself makes all arrangements, collects rent, etc. the mere entry does not create rights adverse to those of the actual cultivators. (*Burn S. M. and Pearson, J. M.*) PAHAR SINGH v. MT. JAMNA KUAR. L. R. 3 A. 503 (Rev.)

———*Zemindari—Lease—Power to interpose another tenancy.*

A Zemindar or tenure holder who has carved out a tenure or under tenure is competent to interpose between himself and his tenant an intermediate holder who may realise the rent payable to himself by his original tenant, English and Indian case law reviewed. (*Mookerjee and Buckland, JJ.*) JAHAR LAL BHUTRA v. BHUPENRA NATH BASU. 49 Cal 495 : (1922) Cal. 412.

LAND TENURE—Dohli tenure—Incidents of. See CUSTOM—ALIENATION. 65 I. C. 253

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—Ghatwali—Grant of permanent tenure by ghatwal—Estoppel. See LANDLORD AND TENANT, PERMANENT TENANCY. 6 Pat. L. J. 687

—Khoti tenure—Khoti Khasgi lands—Khoti Nisbat—Faida—Liability to pay

All Khoti lands are liable to pay Faida, that is, the Khot's profits. It constitutes his remuneration for the trouble and risk of collecting the revenue of the village and managing the village. Khoti Khasgi lands in the hands of a cosharer Khot or Khoti Nisbat lands in the hands of his alienee are not exempt from payment of Faida. (*Macleod, C. J. and Coyajee, J.*) JAYANT BAPSHA SAVANT v. ABDUL RAHMAN.

24 Bom. L. R. 358 : (1922) Bom. 235 : 68 I. C. 335.

—Mirasi—Incidents of—Hindu temple—Ekabogham—Mirasidar.

Lands may be held on mirasi tenure by the deity in a Hindu temple as a juristic entity with all the rights and obligations incident to that tenure. An ekabogam miras or tenure is the possession of village land by one person or family without any cosharer. The appellation is continued in some instances where other parties have been admitted to hold portions under the original tenure so long as that remains unaltered (*Lord Shaw*) T. P. SRINIVASACHARIAR v. C. A. EVALAPPA MUDALIAR.

45 Mad. 565 · 43 M. L. J. 536 : 16 L. W. 247 ·

24 Bom. L. R. 1214 : (1922) P. C. 325 :

L. R. 3 P. C. 213 · 36 C. L. J. 524

31 M. L. T. 1 (P. C.) : 49 I. A. 237 (P. C.)

—Mirasi tenure—Kudivaram right—Chingleput District

There is no presumption that any land in a Chingleput village not in the possession of mirasidars is held under them and that mirasidars are entitled to the kudivaram of all lands, whether or not in their possession, (*Oldfield and Odgers, JJ.*) ELLAPA NAIDU v. BOOLOGACHARY.

42 M. L. J. 359 : (1922) M. W. N. 180 :

16 L. W. 531 : (1922) Mad. 97.

—Muafi—Right of muafidar to acquire sir rights.

It is competent to a muafidar to acquire sir rights. (*Burn, J. M.*) NAURANGIR v. SUMERAN PARBAT,

L. R. 3 A. 240 (Rev.)

—Noabad lands—Settlement by Government—Rights of party in possession.

The determination of the precise nature of the right of the Government in Noabad lands is not free from difficulty. In respect of Noabad lands Government stands in the same position as an ordinary Zemindar and it may settle the lands like an ordinary Zemindar with whomsoever it likes. 24 I. C. 820; 24 C. W. N. 211 : W. R. 327; 17 W. R. 376; 9 W. R. 312; 9 C. L. J. 265; 26 C. 792; 20 C. W. N. 636 Ref. (*Chatterjee and Pearson JJ.*) NAZIR AHMED CHAUDHURY v. SECRETARY OF STATE.

26 C. W. N. 913 · 35 C. L. J. 580 :

(1922) Cal. 337 : 69 I. C. 74

—Oudh—Bankati brit—Birtias if have under proprietary right.

In Oudh, there exist various kinds of birtas, the incidents of each of which differ from those of others.

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The *pottah* of the *birtias* in this case expressly declared that the grantor had given the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in *rayats* which carried with it the duty of sinking wells. The birt-holder was to enjoy it free for five or six years. A comparatively small but gradually ascending rent was fixed for the years 1210 to 1214 in proportion to the increasing productiveness of the soil. After 1214, he was to pay the revenue to the sarkar prevalent in the Taluqa the daswant being a deduction in the nature of a rebate. The rent of the tenure could not be capriciously enhanced by the Taluqdar as the assessment of the jama was to be in accordance with the rate prevalent in the Taluqa :

Held, in view of the above and other circumstances of the case that the judicial Commissioners were right in holding that the grantees had under-proprietary right in the village. (*Mr. Ameer Ali*) RAJA MOHAMMAD ABUL HASAN KHAN v. LACHMI NARAIN.

26 C. W. N. 249 :

(1922) P. C. 41 (P. C.)

—Oudh—Biswi—Paramsana—What are—Extinction of right to redeem—Effect of.

*Biswi* is a kind of under-proprietary tenure arising out of a special class of mortgage by the proprietor to a cultivator of the latter's holding for a sum of money paid as consideration. A low rent representing the difference between the full rent and the interest or the money is reserved to the mortgagor—This is known as *paramsana*. The extinction of the right of redemption of a mortgage of this kind does not destroy the right of the mortgagor or his successor to claim the *paramsana* as rent (*Kanhaiya Lal, J. C.*) SAT DEO v. JAI NATH.

9 O. L. J. 141 :

4 U. P. L. R. (O. C.) 43 : (1922) Oudh 75 :

67 I. C. 808

—Oudh—Under-proprietary rights—Restoration of—How proved.

The letters of the Government of India dated the 10th and 19th October 1859, which form the First Schedule to the Oudh Estates Act, have not in every case restored all under-proprietary rights which existed before the annexation of Oudh. It must be shown that the right has been recognised by the Government after the date of Lord Canning's proclamation, either by an entry in the settlement records or by a settlement decree or in some other way (22 O. C. 201 and I. L. R. 12 Cal. 1 referred to.) (*Daniels, J. C.*) MAHOMMAD RASHIDUDDIN ASHRAF v. RAM SUKH. 24 O. C. 342 : 65 I. C. 514.

—Patnidar—Intermediate tenure between patni and darpadni. See (1921) Dig. Col. 706. NILAMBAR GHOSH v. MIR MOHASANUDDIN

67 I. C. 105.

—Patni—Power of Zemindar to create a tenure intermediate between Patni and Darpadni. See (1921) Dig. Col. 706. MADHU SUDAN SAHA CHAUDHURI v. DEBENDRA NATH SARKAR.

66 I. C. 200.

—Service tenure—Karamkari and Adim-ayavana tenures—Inalienability and forfeitability—Custom—Forfeiture—Waiver, evidence of.

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Karamkari and Adimayavana tenures are not inalienable by custom in South Malabar and the janni is not entitled to forfeit them on alienation.

The burden is on the landlord to prove the custom of inalienability and forfeitability of such tenures. Evidence relating to Pravarthanubhavam grants which are grants for the performance of future services is inadmissible in considering the question of the existence or otherwise of the custom of inalienability and forfeitability as the resumption of Pravarthanubhavam grants arises under the general law itself and not from any special custom.

A right of holding on alienation and even inalienability of it cannot be inferred from the mere existence of a right of escheat in the landlord on failure of the grantee's heirs.

Where resumability does not follow inalienability the right of resumption and re-entry on alienation must be expressly given.

*Prima facie* alienation of a portion of a holding will offend against the rule of inalienability if there is one and unless it can be shown that under the very custom which imposes the rule of inalienability the rule does not apply to partial alienations. A partial alienation will be sufficient to work a forfeiture.

Ignorance on the part of the alienee of an inalienable holding as to the inalienability and forfeitability of such a tenure cannot raise any estoppel against the landlord if he was in no way responsible for such ignorance; nor can the fact that the landlord did not exercise his right of enforcing forfeiture in the case of previous alienations (*Ayling and Krishnan, JJ.*) ZAMORIN OF CALICUT v. UNIKAT KARNAN SAMU NAIR.

15 L. W. 164 : (1922) Mad. 290.

38 M. L. J. 275 : 27 M. L. T. 111 :

55 I. C. 380.

—Sir land — Alienation by co-sharer — Effect.

A co-sharer cannot alienate permanently the Sir which is recorded separately in his name for purposes of cultivation. Revenue Courts have the right to declare such leases invalid (*Fremantle, J. M.*) DUKHI KOERI v. LOKNATH SINGH.

L. R. 3 A. 225 (Rev.)

LEASE—Construction — Absolute right — Use of technical expressions—*Naslan bad naslan—Ba qaemu qams.*

A lease recited that the lessee was to be in possession of the village leased *ba qaemu qami* of the lessor. Held, that the intention was to confer an absolute estate subject to the liability to pay annual rent. The use of the words *Naslan bad naslan* without more shows an intention to convey an absolute estate 14 C. 296 Ref. *Wazir Hasan, A. J. C.*) LACHHMAN DAS v. BHAGWANT RAM.

65 I. C. 707.

—Construction — Agreement among co-owners to remain in possession by rotation — Not a lease—Registration unnecessary. See T. P. Act, Ss. 105 AND 107.

9 O. L. J. 184

—Construction—Building lease—Presumption of permanency.

A lease of land measuring 4 bighas for erection of buildings, etc. provided that the lessee was to pay an annual rent of Rs. 180 at the rate of 45

## LEASE—Construction.

Rs per bigha and also Zemindari *dat cess* and other cesses legally payable from the Bengali year 1302. On a question arising as to the construction of the lease, Held, that the lease was one from year to year at an annual rent of Rs 45 per bigha and though the lessees had power to build, yet it could not be construed to be a permanent lease. Though the fact that a lease is for building purposes raises a presumption that it is a permanent one, yet such presumption cannot outweigh the terms of the lease itself (*Miller, C. J. and Mullick, J.*) L. E. RALLI v. A. H. FORBES (1922) Pat. 209 :

3 Pat. L. T. 467 : 4 U. P. L. R. Pat. 43 :

(1922) P. 258 : 67 I. C. 744.

—Construction—Concurrent leases—Landlord granting a lease before expiry of the term. See (1921) Dig. COL 707 JOHAR MULL BHUTRA v. BHUPENDRA NATH BASU, 67 I. C. 108.

—Construction—Execution of lease after the commencement of the agricultural year—Relation back.

*Prima facie* an instrument takes effect from the date on which it is executed. But if it is shown that the agreement was actually made at or before the commencement of the year but there was delay in executing the formal instrument embodying it of which a reasonable explanation is forthcoming, then effect should be given to what is shown to be the clear intention of the parties. (*Hopkins S. M and Fremantle, J. M.*) JAI SINGH v. THAKUR SUJAM SINGH.

L. R. 3 A. 202 : 4 U. P. L. R. (B. R.) 82.

—Construction—Lease for seven years—Breach of condition—Acquisition of occupancy right—Right of re entry.

A seven years' lease gave the zemindar a right of reentry on the failure of the tenant to carry out the ordinary conditions contained therein. Held that the lease was a seven years' lease and barred the acquisition of occupancy rights by the tenant. (*Hopkins S. M and Fremantle, J. M.*) DURGA v. BAHADIUR SINGH.

L. R. 3 A. 510 (Rev.)

—Construction — *Kabuliyat* — Provision for payment of *salami* — Involuntary transfer—Covenant against alienation

A *kabuliyat* stipulated that at every transfer a certain *salami* should be paid. The tenure in respect of which this *kabuliyat* was given was sold in execution of a money decree. The landlord subsequently sued for recovery of the stipulated *salami*.

Held, that the covenant did not cover an involuntary sale. A condition in a lease restraining transfer is not applicable to a case of involuntary transfer unless there are words in the covenant which clearly make it applicable to such a transfer.

The transfer in execution of a money decree cannot be treated as on the same footing as a voluntary sale. 42 C. 172 foll 21 C. W. N. 117 (*Newbould and Suhrawardy, JJ.*) KUMAR MONMATHA NATH MITRA v. CHUNI LAL GHOSE.

26 C. W. N. 173 : (1922) Cal. 96.

**LEASE—Construction.****Construction—Provision for additional rent—Special occasions—Durbar**

Where a lease of a house in Delhi contained a clause authorising the tenant to sublet and provided that if the tenant sublet the whole or a portion of the house to any chief for "Durbar," occasion the tenant should pay 25 per cent of the rent received from such Chief in lieu of the rent reserved by the lease. *Held*, that the intention of the parties was that the clause regarding payment of 25 per cent. of the rent received from a chief should be operative on special occasions when there was a competition for house accommodation in Delhi among ruling chiefs, and that the clause did not refer to isolated visits of individual chiefs. Whenever an occasion arose to which the clause was properly applicable, the tenant was bound to pay the landlord 25 per cent of the money recovered from a chief without deduction of any commission or other expense incurred by the tenant. (*Abdul Raouf and Campbell, JJ.*) NAURANG AHMED v. BASHESHA NATH.

32 P. L. R. 1922 (1922) Lah 155 : 65 I. C. 115.

**Construction—Rent—Provision for payment in kind—Fixing of money value—Rights of landlord.**

Where a lease provides for the payment of rent in kind and also fixes the approximate value of the produce, it is open to the landlord to realise the market value of the produce. He is not confined to restrict his claim to the approximate value of the produce specified in the lease deed 37 C. 626 foll. (*Ross, J.*) JITENDRANATH CHATTERJI v. JHAKU MANDAR.

3 Pat. L. T. 456. (1922) P. 4 : 66 I. C. 780

**Construction—Right to build—Boundaries and area—Conflict—Effect of.**

The fact that the lessee was given possession of an area of land less than that granted by the lease does not justify his encroaching on other land or the lessor outside the area specified in the boundaries. The condition of a lease governing the lessor's right to build was as follows: "you shall not be competent to make big excavations but you shall be competent to construct pucca wall, pucca priyy and pucca plinth of the tin ghur."

*Held*, that reading the clause as a whole, it was the intention of the parties that the lessee's right to erect permanent structures should be limited to those specified in the condition and that this condition amounted to a prohibition to build any other structures than those expressly mentioned (*Newbould and Cuming, JJ.*) DINANATH DAS v. GOPAL CHANDRA DAS.

67 I. C. 90.

**Covenant for renewal—Option not stating terms of renewal—Presumption.**

Where there is a covenant for renewal, if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself 20 C. W. N. 948 foll. (*Mookerjee and Panton, JJ.*) GURUPRASANNA BHATTACHARYA v. MADHUSUDAN CHOWDHURY.

26 E. W. N. 200 : 35 C. J. 87 : 64 I. C. 824.

**LEGAL PRACTITIONER.****Forfeiture—Relief against clause—Nullity.**

A *mokurari* lease granted before the T. P. Act, contained a clause that if default were made in the payment of 3 instalments of rent, the lease should be null and void. *Held*, the clause was one of nullity, but as there is no distinction between clauses of forfeiture and nullity in India even though the T. P. Act may not in terms apply courts have power to relieve against forfeiture, (*Das and Adami, JJ.*) HIRANANDHAN OJHA v. RAMDHAR SINGH.

1 Pat. 363 : (1922) P. 528.

**Mourasi Mokurari—Fixed rate of rent—Consent decree agreeing to pay enhanced rate—Effect of.**

Where under a *mourasi mokurari* lease, a permanent, transferable and heritable tenancy was created at a permanent rate of rent, and sometime after a consent decree was passed in a suit according to which the tenant agreed to pay an enhanced rate :

*Held*, this did not destroy the tenancy or supersede the original tenancy or destroy the transferable character of the tenancy (*Mookerjee and Cuming, JJ.*) PRIONATH GHOSE v. SURENDRA-NATH DAS.

26 C. W. N. 657 : 35 C. L. J. 440 : (1922) Cal 511.

**Tenancy from year to year—Re-entry under certain circumstances—Lessee if can be entitled even otherwise. See AGR TENANCY ACT, S. 11 (a).**

4 U. P. L. R. 18 (B R).

**Term fixed—Putra Poutradi Santathi—Meaning of—Collaterals if excluded.**

Where a lease for forty years was granted to a person and his *putra poutradi santathi*, and the lessee died before the expiry of the full term, leaving no lineal descendants, but only collaterals:

*Held*, the words "*putra poutradi santathi*" when appearing in a will convey an absolute estate of inheritance, alienable and never resumable, unless in a particular case some custom were proved which would exclude the ordinary law 7 Cal. 304 (P.C.) and 31 Cal 561, followed.

There is no difference whether such words be found in a will or lease, and as the properties were leased absolutely for 40 years, it passes to the collaterals on the death of the original lessee. (*Mucelod C. J. and Shah, J.*) CHANDMAL KESARMAL v. VISHVANATH BALVANT SOHONI.

24 Bom. L. R. 300 : (1922) Bom. 45 : 67 I. C. 230.

**LEGAL PRACTITIONER—Advocate—Barrister—Authority to bind client by compromise See (1921) DIG. COL. 907 HAROON v. EBRAHIM.**

64 I. C. 528.

**Advocate—Compromise of litigation—Powers of.**

In the absence of express authority or consent on the part of the client to a compromise, an advocate in Burma has no power to compromise a suit in which he is engaged.

There is no distinction in this respect between an advocate to act only as counsel and one to act both as counsel and solicitor. 13 A. 272, 21 M. 274. ref. (*Maung Kim, J.*) U. P. O. YEIK v. BA KHAING.

1 Bur. L. J. 1.

## LEGAL PRACTITIONER.

———*Advocate—Powers of compromise—Failure of client to repudiate in time—Effect of acquiescence—Powers of court to set aside consent orders.*

Express authority is not needed for a counsel to enter into a compromise within the scope of the suit. Where there is a limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. But the position is one of difficulty where the limitation is unknown to the other side or when counsel acts on instructions as to a compromise under a misapprehension and not in exercise of that authority which is vested in him as an advocate of the party to the litigation—Principles as laid down in English cases referred to.

Where a consent order was passed in the presence and with the sanction of the client and he acquiesced in it for a long time, and long after the drawing up of the order, he changed his mind or found it impossible to comply with the terms thereof, *Held*, a proper case had not been made out for receiving the order.

The court undoubtedly has a very large discretion in the matter before the order is actually drawn up and perfected, but there is no such discretion where the order has in fact been drawn up and perfected. (*Das and Bucknill JJ.*) NILMONI CHOUDHURY v. KEDIAR NATH DAGA.

1 Pat. 480 : 3 Pat. L. T. 371 : (1922) P. 232 : 67 I. C. 96.

———*Arbitration—Authority of pleader to submit case to arbitration—No power to revoke appointment of arbitrator made by parties and substitute another.* See ARBITRATION.

65 I. C. 879.

———*Counsel—Duty of.*

It is incumbent on counsel to see that their clients are properly represented when their case is called on for hearing—If a counsel is unable to appear himself he should arrange for another counsel to take the brief for him. (*Abdul Raoof and Martineau, JJ.*) SAIF ALI v. CHIRAGH ALI SHAH.

68 I. C. 785.

———*Defamation—Suit for damages—Words used during argument—Immunity from liability—English and Indian law.* See TORT—DEFAMATION (1922) Pat. 85.

———*Deputy of—Effect of service on.* See C. P. CODE, O. 3 R. 5, 90 L. J. 170.

———*Duty of—Acceptance of vakalat—Duty to appear.*

When a pleader accepts a brief it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the court by a writing signed by him or his client and filed in Court (*Lyle, A. J. C.*) SHEO LAIQ SINGH v. AUSAN SINGH

25 O. C. 40 : 90 L. J. 170 : 67 I. C. 554.

———*Duties and obligations of—Towards clients and towards society.* See LEGAL PRACTICE, S. 13.

26 C. W. N. 580.

## LEGAL PRACTITIONER.

———*Enrolment of—Proceedings—Nature of.*

The proceedings relating to enrolment of pleaders are purely administrative and not judicial. (*Dawson Miller, C. J., and Mullick and Jwala Prasad, JJ.*) SUDHANSU BALA HAZRA, *In re*

1 Pat. 104. 3 Pat. L. T. 69 : (1922) Pat. 97 : (1922) P. 269 : 64 I. C. 636.

———*Misconduct—Alteration of deed after execution—Evasion of stamp duty.*

Where with a view to avoid paying a penalty as required by the stamp law, a solicitor altered a deed materially, after its execution, he was struck off the rolls, (*Lord Sumner*) A SOLICITOR IN THE MATTER OF

31 M. L. T. 107 (P. C.)

———*Professional misconduct—Power to take action—Power of District Judge to initiate proceedings in respect of misconduct in subordinate court.* See LEG. PRACT. ACT, S. 4.

35 C. L. J. 520.

———*Professional misconduct—Unfounded imputations in open Court against the fairness and impartiality of the presiding Judge—Duty of pleaders towards their client and the Court.* See LEG. PRACT. ACT SS. 13 AND 14.

27 C. W. N. 28.

———*Right to appear—Powers of District Magistrate over private pleaders—General directions to Subordinate Magistrates—Revision.*

A District Magistrate has no power to issue general directions to his subordinate Magistrates to allow a person to practice as a private pleader in their courts. If however a particular pleader is aggrieved by any order of the District Magistrate or other magistrate refusing to hear him he can apply in revision to the High Court (*Oldfield and Devadoss, JJ.*) NAGASAMI IYER, *In re*.

16 L. W. 879.

———*Vakalatnama—Ex parte decree—Application to set aside—Pleader appearing in the suit not required to file fresh vakalatnamah.* See C. P. CODE, O. 9, R. 13.

24 Bom. L. R. 744.

———*When can act—Effect of accepting vakalat—Duties and obligations of.*

*Per Sanderson, C. J.* The acceptance of a vakalatnama which is much more than an authority to act by a pleader entails a duty upon him to attend the court on the day fixed for the hearing or at least to make arrangements with other pleaders to look to the client's interest.

A pleader cannot divest himself of the duty arising by the acceptance of vakalatnama without leave of court. He is bound to give reasonable notice to the client so as to afford him an opportunity of obtaining other legal assistance.

*Per Woodroffe, J.*—When a person becomes a pleader he becomes an officer in a judicial system in which his position, rights and duties and the authority to which he is subject are determined. If he has a grievance he must seek the remedy from the administrative authority concerned. It follows that he cannot join in an action to boycott a court or any particular judge.



## LEGAL PRACTITIONER'S ACT, S. 6.

It is open to any practitioner for reasons personal to himself to refuse to practice in any particular court, but he must, if he has accepted a brief, discharge himself in the proper manner. What would be a lawful excuse considered.

Mere acceptance of a vakalatnama does not bind the pleader to appear in every day of the proceedings if there are special terms affecting the matter. The acceptance of a general vakalatnama is sufficient to start the case against him, and if there was any special contract the burden of proving this, as a matter specially within his knowledge, is on the pleader.

If a pleader stipulates for fees before he does any work, he is not bound to do the work without payment—But if he accepts a vakalatnama without such stipulation, he must proceed to represent him even though unpaid, until he is properly discharged.

*Per Mookerjee, J.* :—A pleader who has accepted a vakalatnama and filed it in court is ordinarily bound to appear and conduct his case in the absence of an agreement to the contrary. If he fails to perform this duty he must be ready to justify his conduct by proof that the client failed to fulfil an implied term of the agreement such as the advance payment of fee, etc.

His liability continues till he has discharged himself by recourse to the appropriate procedure. This is not a matter solely between the pleader and the client.

Failure to appear renders him liable to disciplinary action by the court. What would be justifying reasons for absence considered.

Fresh vakalatnama is not necessary to entitle the pleader to appear in proceedings subsequent to decree. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) *EMPEROR v. RAJANI KANT BOSE.* 49 Cal. 732 : 35 C. L. J. 356 : 26 C. W. N. 589

LEGAL PRACTITIONERS ACT (1879), Ss. 6, 7, 8—*Women, if entitled to be enrolled as pleaders.*

Women are not entitled to be enrolled as pleaders of courts in India 44 Cal. 290 f. 11. (*Dawson Miller C. J. Mullick and Jwala Prasad, JJ.*) *In re SUDHANSU BALA HAZRA.* 1 Pat. 104 : 3 Pat. L. T. 69 : (1922) Pat. 97 : (1922) P. 269 : 64 I. C. 636. (F. B.)

—S. 13—*Boycott of courts—Duties and obligations of pleaders.*

*Per Sanderson, C. J.* :—If a pleader in pursuance of a concerted movement to boycott the courts, deliberately abstained from attending it, he is guilty of a course of conduct which cannot be justified or tolerated.

Pleaders have duties and obligations to their clients in respect of the suits and matters entrusted to them. It is an equally important duty and obligation on them to co-operate with the court in the orderly and pure administration of justice.

If a pleader has any complaint against any Subordinate Judge, he has two courses open to him, *viz.* to make a representation to the particular Judge or to the High Court. (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) *In the matter of TARINI MOHAN BARARI.* 29 C. W. N. 580 : 35 C. L. J. 403.

## LEGAL PRACTITIONER'S ACT (1879), S. 13.

—S. 13—*Re-admission—Procedure.*

The High Court has power to reinstate a legal practitioner who had been dismissed for misconduct of any description. Before the Court should exercise such powers it should be clearly convinced not by mere protestations of repentance or regret but by actual facts that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession. The proper course is for the petitioner to apply to a Bench presided over by the Chief Justice and ask for a rule in the matter. The Bench over which he presides can then, if a *prima facie* case is made out, direct that a rule be issued and call upon the Government Advocate to show cause why the petitioner should not be reinstated. The matter would then come up before a Bench specially constituted and the case would be determined by that Bench. 12 Cal. L. J. 625 Foll. (*Miller, C. J. and Mullick, J.*) *MATHURA P. ASAD In re.* (1922) P. 604.

—S. 13 (b) and (f)—*Applicability of—Disciplinary action against pleader.*

Where a pleader after accepting a Vakalatnama and before it has been properly revoked or terminated, fails to appear in Court without justification, he is liable to the disciplinary jurisdiction of the High Court.

*Per Sanderson C. J.* : The fact that the report of the munshi and the reference of the Judge do not agree, does not render the proceedings improper.

*Per Woodroffe, J.* :—The evidence must establish the petitioner's guilt beyond all reasonable doubt.

Proceedings fall under S. 13 (b) in so far as they involve neglect of duty towards the client in accepting a vakalat and without excuse not fulfilling the duties; under S. 13 (f) in so far as the conduct was directed against the court by abstention from attendance on account of "Hartal."

*Per Mookerjee J.* : The test to find out whether the conduct of a pleader falls within the Act, is to consider whether the misconduct is of such a description as shows him to be an unfit or unsafe person to enjoy the privileges and manage the business of others in the capacity of a pleader. (*Sanderson, C. J., Woodroffe, and Mookerjee, JJ.*) *EMPEROR v. RAJANI KANTA BOSE.* 49 Cal. 732 : 26 C. W. N. 589 : 35 C. L. J. 356.

—Ss. 13 (b) (f) and 14—*Misconduct—Imputation of prejudice to presiding Judge.*

A letter written by a legal practitioner imputing racial antipathy to a judge and charging him with having allowed such feelings to influence him in passing unfavourable orders to the practitioner constitutes misconduct. A belated apology in the High Court was held to be insufficient and the pleader was suspended from practice for 3 months. (*Broadway and Martineau, JJ.*) *KHEWAJA FAKHARUDDIN In the matter of.* 67 I. C. 504 : 23 Cr. L. J. 408

—Ss. 13 (c) and (f) and 14—*Legal practitioner—Additional District Magistrate—Power*

## LEGAL PRACTITIONERS ACT (1879), S. 13.

*to report to High Court regarding misconduct of pleader—Impulsion against the fairness and impartiality of the Magistrate.*

An Additional District Magistrate appointed with all the powers of a District Magistrate is a Court Subordinate to the High Court within S. 14 of the Legal Practitioners Act and is competent to draw up a charge and report the professional misconduct of a pleader appearing before him in a criminal case before him. The correct procedure is to forward the report through the Sessions Judge to the High Court. The High Court may and ought, in a proper case, to take action even without the intervention of a Subordinate Court in matters relating to the misconduct of pleaders. A pleader who makes unfounded imputations on Court against the fairness and impartiality of the tribunal in a pending trial, is guilty of professional misconduct within S. 13 (b) and (f) of the Legal Practitioners Act. Pleaders have a duty not only towards their clients but also towards the Court of which they are officers and is part of their duty to co-operate with the Court in the pure and orderly administration of Justice. (*Sanderson, C. J. and Richardson, J.*) MAHENDRA LAL ROY *In re.* 27 C. W. N. 88

—S. 13 (f)—Pleader—Professional misconduct—Organised resistance to unpopular tax—Security.

S. 13 (f) of the Leg. Practitioners Act is not confined to acts done in a professional capacity and where a pleader was guilty of organising a determined resistance to the payment of a tax with the result that he Magisterial authorities had to bind him over to keep the peace, there is sufficient foundation for disciplinary action under S. 13 of the Leg. Pract. Act. (*Lord Buckmaster*) SHANKER GANESH DABIAI v. SECRETARY OF STATE FOR INDIA 31 M. L. T. 192.

49 Cal. 845 : 44 M. L. J. 32 : 18 N. L. R. 176 : (1922) P. C. 351 : 49 I. A. 319 (P. C.)

—S. 14—Nature of proceedings under—Object of section—Written statement put in.

Per *Sanderson, C. J.* S. 14 of the Leg. Pract. Act was probably provided for the purpose of giving the High Court the benefit of the District Judge's opinion and also as an additional protection to the person, whose case might be under consideration. The fact that the District Judge's opinion differs from that of the Munsif does not render the proceedings improper.

Per *Woodroffe, J.*—The proceedings under the section are quasi criminal in the sense that they may result in penalties—*Quære* whether the pleader can be examined on oath?

It is open to the pleader in such a case to say nothing, give no explanation, adduce no evidence, or refuse to be examined on oath. Though it is legally open to him to do so, it is neither a proper nor wise course. The onus is on the party making the charge, but any explanation offered may be taken into account.

Per *Mookerjee, J.*—Proceedings under the section are not of a criminal nature, though it is undoubtedly a judicial proceeding. Their object is to preserve the purity of courts and the proper and honest administration of the law. Fair notice and opportunity to be heard must be given.

## LEGAL PRACTITIONERS ACT (1879), S. 14.

If he submits a written statement, the Court is bound to take it into consideration. But it is not obligatory on the Court to rule out all conceivable hypothetical grounds which could have been but had not been set up in answer.

The ultimate decision is always with the High Court and the divergence of opinion between the lower courts does not affect jurisdiction. (*Sanderson C. J., Woodroffe and Mookerjee, JJ.*) EMPEROR v. RAJANI KANTA BOSE.

35 C. L. J. 356 : 49 Cal. 732 : 26 C. W. N. 589.

—S. 14—Pleader—Professional misconduct in Subordinate Court—Power of District Judge to inquire—Power of High Court to quash proceedings.

S. 14 of the Legal Practitioners Act empowers any court in which a pleader practises to consider a charge of misconduct made against him in such court and the section does not limit the consideration of a charge to the court in which the misconduct is alleged to have been committed. Consequently it is open to the District Judge to institute proceedings under the Act against a pleader in respect of his misconduct in a Subordinate Court. (1921) P. L. R. 188 Ref.

If on the facts charged, there is no ground for proceeding under the Legal Practitioners Act, the High Court can quash the proceedings under the Act.

Per *Mookerjee J.* : S. 14 of the Legal Practitioners Act does not specify the nature of the materials upon which the court concerned may take action. If the proceedings are instituted there must be an enquiry and supported by legal evidence. 15 C. 152 Ref. The charge must be formulated with precision so as to enable the legal practitioner to meet the allegations against him (*Sanderson, C. J., Woodroffe and Mukerjee, JJ.*) Re RABINDRA NATH CHATTERJEE.

49 Cal. 850 : 35 C. L. J. 520 : (1922) Cal. 484 : 67 I. C. 995.

—Ss. 14 and 13—Reference by appellate court—Statement on behalf of a party whose brief the pleader does not hold.

The High Court would exercise its disciplinary jurisdiction even though the reference under S. 14 with regard to alleged misconduct of a pleader is not made by the trial Court where the occurrence has taken place but by the appellate court which has no power to refer it. It would be necessary however that the High Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the court. Though the attitude of forgetfulness taken by the pleader perhaps to shield some of the parties was reprehensible and suspicious, the Court not having been satisfied that he was a party to a fraud, no extreme steps were taken. (*Miller, C. J., Mullick and Jwala Prasad, JJ.*) BANAMALI DAS *In re.* (1922) P. 608 (2)

—S. 14—Vakalatnamah—Acceptance of—Bona fide mistake—Effect of.

It is the duty of pleaders to strictly observe the rules relating to the acceptance of Vakalatnamahs. Where a pleader through a bona fide mistake accepted a vakalatnamah believing it to have been executed by the executant and the court accepted

## LEGAL PRACTITIONERS ACT (1879), S. 28.

his explanation and warned him to be careful in future, the ends of justice would be met thereby and proceedings need not be started afresh (*Sanderson, C. J. and Chotzner, J.*) JNANENDRA KUMAR CHOWDHURY *In the matter of.*

(1922) Cal. 178 : 65 I. C. 417 : 23 Cr. L. J. 65.

—S. 28—*Suit for fees—Oral agreement—If maintainable—“Amount” if to be fixed.*

Where a suit by a pleader for fees against his client is based on an agreement, he cannot succeed unless the agreement is both in writing, signed by the party to be charged and filed as provided in S. 28 of the Legal Practitioners Act. The ‘amount’ referred to in S. 28 need not be a fixed sum. (*Greaves, J.*) BEACHARAM LAHIRI *v* SUDEBI DAS

26 C. W. N. 709 : 67 I. C. 874

—S. 36—*Tout—Proceedings against—Procedure—Irregularity—Power to interfere—High Court.*

In proceedings to declare a person a tout under S. 36 of the Legal Practitioners Act, it is not necessary that there should be a petition. The Court can act on evidence of general repute provided an opportunity is given to the alleged tout to rebut the evidence against him and to place his case before the Court. 11 C. L. J. 513 Rel. The High Court has power to interfere with an order of the court below in proceedings under S. 36 of the Legal Practitioners Act 15 C. W. N. 1000 ; 4 C. W. N. 36 ; 1912 M. W. N. 959 ; 28 I. C. 918 ; 62 I. C. 829 Rel. (*Venkatasubbi Rao, J.*) VARADACHARIAR *v* KALYANASUNDARAM AIYAR.

16 L. W. 795.

—S. 41 Cl. (3)—*Proceedings under the Act—Conviction by Magistrate for an offence under S. 153 A, I. P. C.—Case, if can be re-opened—Offence involving moral turpitude—Penalty.*

Where proceedings under the Act are initiated against a practitioner on the strength of a conviction by a Magistrate under S. 153 A I. P. C. it is not open to the practitioner to show that the conviction was not justified on the evidence 22 A. 49 foll. Moral turpitude is always involved in the commission of an act which comes under S. 153 A, I. P. C., and a practitioner convicted of the offence should be dealt with by the High Court in the exercise of its disciplinary jurisdiction. In this case the High Court ordered the name of the Advocate to be struck off the rolls with the observation that if he wished to rejoin the profession at some future time and his attitude and conduct be favourable, his application would be considered by the Court. (*Mears, C. J., Banerji and Rafiq, JJ.*) *IN THE MATTER, OF AN ADVOCATE (T. A. SHERVANI)*

44 All. 352 : (1922) All. 140 : L. R. 3 A 73 :

4 U. P. L. R. (A) 1 : 20 A. L. J. 200 :

65 I. C. 560 : 23 Cr. L. J. 129 (F. B.)

LESSOR AND LESSEE—Adverse possession—Case of successive leases—If different. See ADVERSE POSSESSION. 35 C. L. J. 292

Covenant for possession—Limits of doctrine

In the absence of a contract to the contrary, the lessor is deemed to contract with the lessee that if the latter pays the rent reserved by the lease

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and performs the contract's binding on him, he may hold the property during the time limited by the lease without interruption. This doctrine does not include a case of disturbance by persons having no lawful title or right of entry. Like the express covenant, the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but as against other persons it protects the lessee only against lawful disturbance (*Mookerjee, Newbould and Pearson, JJ.*) UDAI KUMAR DAS *v* KATYAINI DEBI.

35 C. L. J. 292 :

(1922) Cal. 87 : 69 I. C. 126.

—Ejectment—Permanent lease—Right to eject person in possession.

Where a lessor has given a permanent lease, he cannot thereafter sue to eject a person in possession of the properties. The subsequent addition of the lessee as a party to the suit does not cure the defect. (*Pearson, J. M.*) MAHARAJAH PRABHU NARAIN SINGH *v* BHAGWANT SINGH.

L. R. 3 A. 414 (Rev.)

—Kabulyat—Construction of—Condition about payment of any tax or road cess—Whether includes income tax also—Royalty—Nature of.

Where a clause in a Kabulyat ran as follows—“In respect of land covered by this Kabulyat or any portion thereof or in respect of coal business if any tax or road cess be assessed on you by Government, when I shall pay the same.”—Held the lessee was liable to make good to the lessor the road cess and the Health Board cess also. S. 10 of the Bengal Act (V of 1912.) referred

No doubt royalty is one of the sources of the income on which the income tax is levied: but income tax is a personal tax and, therefore, the lessor had no right to recover the amount of the income tax from the lessee under the above clause.

Royalty represents the lessor's share of the profits made from the business. (*Das and Adam, JJ.*) RAJA NILKANATH *v* NIBARAN CHANDRA.

(1922) P. 75.

—Renewal—Provision for—Possession of lessee willing to accept renewal.

Though the position of a lessee willing to accept a renewal of the lease on proper terms is the same in equity as if a proper lease had been executed, it is essential that the covenant for renewal should be such as to be specifically enforced. (*Mookerjee and Cuming, JJ.*) GAJENDRA NATH DEY *v* MOULVI ASHRAF HOSSAIN.

27 C. W. N. 159 :

36 C. L. J. 48.

—Rent—Suspension of—Lessee in wrongful possession of a portion of the land—Effect of.

Where there is an eviction by the lessor or by any one claiming under him or by his procurement of the lessee from a part of the land demised the entire rent is suspended. Where however the lessee was already in wrongful possession of the major portion of a jote and took settlement of the entire jote knowing fully well that a portion of it was in the wrongful possession of a third party, Held that the liability of the lessee to pay rent in respect of the portion in his possession already did not depend upon the delivery of possession of the other portion which was in another's possession. It was not a case of the lessor putting an

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obstruction in the way of the lessee recovering possession and there was no malafide on his part. The lessee therefore was not entitled to claim suspension of the entire rent but was liable to pay proportionate rent in respect of the portion of the jote in his possession 19 C. W. N. 870 Ref 9 W. R. 382 : 33 M. 499 ; 13 C. W. N. 702 dist. (*Chatterjee and Pearson, JJ*) NARENDRA CHANDRA LAHIRI v. MANINDRA CHANDRA NANDY

26 C. W. N. 826 : 67 I. C. 800.

—*Rights of lessee—Voidable lease—Right of third parties to challenge—Estoppel—Right given by statute.*

The right to interfere with the possession of a tenant under a formal lease, independently of the lessor and in derogation of his rights, is not one of the natural incidents of a licence which carries no legal or equitable interest in the soil. When however a lease is voidable, then the principle of law to be applied is that the title of the person seeking to avoid it is not a general one in the public and such title is not in fact extended to any one except (1) those who are in contract relations or (2) those who have by convention between those who are so acquired a title to challenge ; or (3) those upon whom by statute a right of challenge is conferred. Where the lease voidable by the lessor, a suit to have it declared void brought twenty years after possession had been taken, after payment of rent and royalties had been made, and after great expenditure upon the subject of the lease by the lessee, could not be successfully maintained. (*Lord Shaw*) ALARIE JOSEPH SEGUIN v. ANNA THERESA BOYLE.

31 M. L. T. 289 (P. C.)

—*Sublease—Liability of sublessee to lessor—No privity of contract—Breach of covenant—Damages.*

A sub-lease is not an assignment by the lessee and there is no privity of estate between the lessor and the sub-lessee ; consequently the sub-lessee is not liable to the lessor in damages for breach of the covenants contained in the lease (*Mitra, A. J. C.*) SHRI SITARAM MAHARAJ v. NARAIN.

18 N. L. R. 89 : (1922) Nag. 184

**LETTERS OF ADMINISTRATION—Buddhist heir—Necessity for.**

It is not necessary for a Buddhist heir to take out Letters of Administration before he can institute a suit on a mortgage—A succession certificate will suffice (*Pratt and Duckworth, JJ.*) AH DOE v. MI AUNG THA PAU.

1 Bur. L. J. 110.

—*Special citation—Failure to issue—Effect of knowledge of application.*

Where in proceedings to obtain letters of administration, a person who is entitled to have a special citation issued to him is not so served but in spite of other knowledge of the proceedings failed to intervene, the failure to serve the citation cannot form a ground for revocation of the grant of probate, (*Adami and Das, JJ.*) KANHAI ROUT v. JOGENDRA ROUT.

1 Pat. 86 : (1922) P. 406.

**LETTERS PATENT—Appeal under—Cross objections—Provisions of Civil Procedure Code—If apply.**

**LETTERS PATENT (Bom) Cl. 12.**

The provisions of the Code of Civil Procedure relating to cross objections do not apply to appeals under the Letters Patent 21 All 297 foll. (*Mearns C J and Banerji, J.*) MT. PURNA KUAR v. MANGAL RAI.

(1922) All. 55.

—*Appeal—Questions not raised before Bench—If can be raised later.*

Even pure questions of law ought not to be entertained in a Letters Patent Appeal, if they have not been raised in the court below. (*Miller, C. J. and Adams, J.*) GRANT v. EKLAL JHA.

3 Pat. L. T. 387. (1922) P. 171 : 67 I. C. 49.

**LETTERS PATENT (All) Cl. 10—Appeal under—Memorandum of cross objection, not maintainable See C. P. Code. O. 41, R. 22.**

L. R. 3 A. 198.

—*cl. 10—Judgment—Meaning of—Order of single judge in appeals under O. 43, R. 1, C. P. Code—Appealability.*

As regards the question whether a particular adjudication is or is not a judgment within cl. 10 of the Letters Patent (All) the test seems to be not what is the form of adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment. The word "judgment" covers not merely final orders, but also preliminary or interlocutory orders 35 M. 1, 17 A. 442 Rel.

As a general working rule there has grown up in the Allahabad High Court a practice of regarding those matters which are mentioned in O. 43 R. 1 C. P. Code as being generally appealable from a single judge to a Bench. (*Mearns, C. J. and Piggott, JJ.*) SADIG ALI v. ANWAR ALI.

20 A. L. J. 801

—*(Bom) Cl. 10—Pleader—Disciplinary jurisdiction—Contempt—Criticism of pending proceedings in court.*

Anything done or said which may amount to criticism of any proceedings pending in a court of justice is calculated to hinder the even and impartial administration of justice. Pleaders of the court are expected to extend their co-operation and assistance in the task of the administration of justice and the least that could be expected of them is that by their act they will cause no hindrance to the even and impartial administration of justice. Where pleaders of a court in public meeting assembled pass a resolution extolling the accused in a pending criminal trial for their self-sacrifice and patriotism their conduct is likely to influence the verdict of the jury or the court in the trial and constitutes contempt. (*Shah, A.C.J. and Crump, J.*) THE GOVERNMENT PLEADER v. VINAYAK BALVANT CHANKAR.

24 Bom. L. R. 1049 : (1922) Bom. 361.

—*(Bom.) Cl. 12—Jurisdiction—Administration, suit—Partition of estate lying outside limits*

## LETTERS PATENT (Bom) Cl. 15.

of original jurisdiction *See* (1921) DIG. COL. 711  
 ABDUL HUSSAIN ADAMJI MASALAVALLA v. MAHO  
 MEDALLY ADAMJI

(1922) Bom. 443 : 65 I. C. 160.

———Bombay Cl. 15—*Judgment—Sanction for prosecution under S. 195 Cr. P. Code.*

It is doubtful whether an order refusing to grant a sanction to prosecute under S. 195, Cr. P. Code, is a judgment within the meaning of cl. 15 of the Letters Patent. (*Shah, A. J. and Crump, J.*)  
 ABDUL LATIF USMAN v. HAJI FAR MAHOMED,

24 Bom. L. R. 817 : 63 I. C. 33 :  
 23 Cr. L. J. 497.

———Cl. 39—*Judgment—Reference by Chief Revenue authority—Decision of High Court—Appeal. See* (1921) DIG. COL. 713,  
 THE TATA IRON AND STEEL COMPANY v. THE  
 CHIEF REVENUE AUTHORITY. 64 I. C. 931.

———Cl. 39—*Leave to appeal to the Privy. Council—Appeal from order of Division Bench refusing an application under S. 45 of the Sp. Rel. Act—Appeal. See* (1921) DIG. COL. 713,  
 ALCOCK ASHDOWN COMPANY LTD. v. THE CHIEF  
 REVENUE AUTHORITY, BOMBAY. 64 I. C. 939.

———(Cal.) cl. 12—*Jurisdiction—Suit for land—Agreement to mortgage land outside jurisdiction—Specific performance.*

Plaintiff advanced in Calcutta sums of money to the debt secured by promissory notes as well as by deposit of title deeds of property outside Calcutta. The defendant resided outside the jurisdiction. The title deeds were with the plaintiff in respect of a previous regularly executed mortgage. The defendant agreed to register and execute a regular mortgage whenever called upon to do so but refused to return the money or execute the said mortgage and in breach of the agreement defendant attempted to transfer the property to others. The plaintiff applied for leave under cl. 12 of the Letters Patent to sue the debt, on the original side of the Calcutta High Court.

*Held*, that a suit for specific performance of an agreement to mortgage lands outside the jurisdiction, is a suit for land within cl. 12 of the Charter and accordingly leave cannot be given.

5 Cal. 82 foll. (*Greaves, J.*) RATANCHAND DHAR-  
 AMCHAND v. GOBIND LALL DUTT.

(1922) Cal. 328 : 48 Cal. 882  
 66 I. C. 484

———Cl. 12—*Suit for land—Specific performance Land without the local jurisdiction.*

In a suit for specific performance of a contract to sell a tea estate situate in Assam instituted on the Original Side of the Calcutta High Court, it appeared that the contract for sale was entered into in Calcutta and the price was agreed to be paid in Calcutta but the defendant ordinarily resided in Assam. *Held* that the suit was one relating to land within Cl. 12 of the Letters Patent and that leave to sue on the original side had properly been granted. 19 Cal. 358 foll. 42 Cal. 942 ref. (*Sanderson, C. J. and Richardson, J.*)  
 NAGENDRA NATH CHOWDHURY v. ERALIGON CO., LTD. (1922) Cal. 443 : 27 C. W. N. 65 :  
 49 Cal. 670.

CONFIRMING ON APPEAL. 48 Cal. 882.

## LETTERS PATENT (Lah) Cl. 10.

———(Cal) cl. 15—*Order restoring suit—If judgment.*

An order restoring a suit dismissed for default is not a judgment within the meaning of cl. 15 of the Letters Patent and is not appealable. (*Sanderson, C. J. and Richardson, J.*) MAHARAJ KISHORE KHANNA v. KIRAN SHASHI DASI,

49 Cal. 616 : (1922) Cal. 407.

———(Cal) Cl. 15—*Order setting aside abatement—If appealable.*

A decision which sets aside an abatement is a "judgment" within the meaning of cl. 15 of the Letters Patent and is appealable. (*Sanderson, C. J. and Richardson, J.*) SARAT CHANDRA SARKAR v. MAIHAR STONE AND LIME CO. LTD.

49 Cal. 62 : (1922) Cal. 335 ;  
 67 I. C. 917.

———Cl. 15—*Revisional jurisdiction—Order without jurisdiction by single judge—Letters Patent Appeal. See* (1921) DIG. COL. 714 Bom-  
 KESH SETH v. BHUTNATH PAL. 64 I. C. 689.

———Cl. 15—*Judgment—Suit on behalf of a lunatic—Application to take the plaint off the file—Dismissal of the application—Appeal.*

In a suit instituted on behalf of a lunatic one of the defendants applied for taking the plaint off the file on the ground, amongst others, that the suit was not for the benefit of the lunatic and was an abuse of the process of the Court. The Court dismissed the application on the ground that on the materials before the Court at that stage the Court was not prepared to hold that these grounds were substantiated. The defendant appealed :

*Held*, that the order dismissing the application was not a "judgment" within the meaning of cl. 15 of the Letters Patent, inasmuch as the said order did not finally decide any right between the parties, it being open to the defendant to substantiate the grounds by further materials at the hearing of the suit. 8 B. L. R. 433 at p. 452 and 23 C. W. N. 1017 Ref. (*Sanderson, C. J. and Richardson, J.*) MOHAN MULLICK v. NOYAN MANJURI JASSI.

26 C. W. N. 242 : (1922) Cal. 172.

———(Lah) Cl. 10—*Appeal under—New point not to be raised.*

It is not open to an appellant in Letters Patent Appeal to put forward a new case not suggested in the Courts below and claim relief on that footing. (*Cheves and Scott Smith JJ.*) BASANT RAM v. MAHOMED ALI. 4 Lah. L. J. 293

———(Lah) Cl. 10—*Judgment—Order of single Judge of the High Court dismissing an appeal from an order of remand—Appealability.*

In order to decide whether an adjudication should be treated as a "judgment" regard should be had, not to the form of the adjudication but to its effect upon the suit or other civil proceeding in which it was made. If its effect, whatever, its form may be and whatever may be the nature of the application on which it was made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if not complied with, is to put an end to the suit or proceeding,

## LETTERS PATENT (Lah) CL. 10.

the adjudication is a judgment within cl. 10 of the Letters Patent 8 B. L. R. 433 ; 45 C. 111 ; 44 C. 804 ; 39 A. 191 ; 35 M. 1 (F. B.) 3 M. H. C. R. 384 Rel

The determination of the question whether the plaintiff is entitled to bring his suit after the lapse of 12 years from the date of the mutation consequent upon an alienation is a determination of a right and the adjudication thereon certainly affects the merits of the question between the parties, more especially when it involves the determination of the point whether the defendant has acquired a prescriptive right of ownership to the land in dispute. Where a suit for setting aside an alienation of ancestral land is dismissed as barred by limitation and on appeal a single judge holds that it is not so barred, his judgment confirming an order of remand by the lower appellate court is appealable under cl. 10 of the Letters Patent. (*Shadi Lal C. J. and Harrison, J.*) RULDU SINGH v. SANWAL SINGH.

3 Lah 188 : 67 I. C. 388.

—(Lahore) cl. 10—*Judgment—What is*

The term judgment in S 10 Letters Patent includes any interlocutory judgment which decides so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject matter of the suit. 1 Lahore 348 ; 35 Mad 1 followed (*Shadi Lal C. J. and Abdul Quadir, J.*) THE FIRM BADRI DAS JANAKIDAS OF DELHI v. MATHANMAL.

(1922) Lah. 185.

—(Mad) cl. 10 and 39—*Disciplinary jurisdiction Order suspending vakil from practice—Leave to appeal.*

The High Court has no power to grant leave to appeal to the Privy Council in a case where an order is made by the court suspending a vakil from practice 4 Pat L J 423, 39 M 128, 2 M 1 A. 428 foll. (*Schwabe, C. J., Coutts Trotter Kumaraswami Sastri, Krishnan and Ramesam, JJ.*) E RAGHAVA REDDI *In the matter of*

43 M. L. J. 382, 31 M. L. T. 173 (H. C.)

(1922) M. W. N. 530, 16 L. W. 328 :

(1922) Mad. 440. (F. B.)

—Cl. 15—*Judgment order in criminal case—Sanction application.*

*Semle* : If a single Judge sitting on the Original Side of the High Court grants sanction under S. 195 (1) Cr. P. Code for a prosecution his order is one made in the exercise of criminal jurisdiction and is not a judgment within the meaning of Cl. 15 of the Letters Patent. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) MUNISAMY MUDALIAR v. RAJARATNAM PILLAI. 43 M. L. J. 375.

(1922) M. W. N. 594, 31 M. L. T. 287 (H. C.)

16 L. W. 365 : (1922) Mad. 495.

—Cl. 39—*Leave to appeal to His Majesty in Council—Order suspending vakil from practice in the exercise of High Court's disciplinary jurisdiction—No power to grant leave. See LETTERS PATENT (MAD) CL. 10 AND 39* 16 L. W. 328

—(Patna) cl. 10—*Appeal against decision of single judge—Court fee, if payable. See COURT FEE.* (1922) Pat 88.

## LIMITATION.

—(Cl) 10. — *Judgment—Order remanding a case for rehearing—Order calling for decision on issue—Appealability.*

An order of a single Judge of the High Court setting aside a decree of the lower appellate court is a "Judgment" whether there is an order for rehearing of the case by the lower court or whether the case is decided by the Judge himself. But an order of a Single Judge merely referring an issue for trial by the lower Court without disposing of the appeal finally, is not a final judgment and is not appealable. (*Miller, C. J. and Coutts, J.*) MUNSHI LAL v. RAMASIS PURI

1 Pat. 246, 3 Pat L. T. 343 :

(1922) P. 384 : 65 I. C. 175.

—Cl. 31 — *Disciplinary jurisdiction—Appeal.*

Under the Letters Patent the right of appeal to His Majesty in Council conferred by the Letters Patent is confined to different classes of jurisdiction named in the Letters Patent and not to the administrative or disciplinary powers conferred upon the Court thereby. It may always be necessary in performing administrative acts for the Court or the Judge or the persons whose duty it is to carry out these acts to consider and come to a conclusion as to what his powers may be under particular Act of Council and the mere fact that such a consideration arises does not take the case out of the ordinary course. (*Miller C. J. and Adams, J.*) SUDHANSU BALA HAZRA *IN RE.*

(1922) P. 608

**LICENSE—Licensor and licensee—Obligation of licensor—License coupled with interest.**

The grantor of a license is under an obligation to place the license in a position to enjoy the license. An appropriation of the land licensed to any use inconsistent with the enjoyment of the license works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. A license to catch elephants for consideration is not revocable for it is a license coupled with an interest. Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period, it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. (*Mookerjee and Chotzner, JJ.*) KINGSLEY v. THE SECRETARY OF STATE FOR INDIA. 36 C. L. J. 271.

—*Notice of revocation—Trespassers.*

When the grantor of a license dies his heir can treat the licensee as a trespasser without giving notice of revocation of the license with respect to immoveable property. (*Kotwal, A. J. C.*) KARSE-LAL v. BADRIPRASAD. (1922) Nag. 162

—*Revocation—Death of licensor—Right of his heirs to treat licensee as trespasser. See EASEMENTS ACT, S. 60.* 18 N. L. B. 76

**LIFE INSURANCE CO.—Calculation of income—Mortality tables, what are. See MADRAS CITY MUNICIPAL ACT, SCH IV RR. 7, 17.**

42 M. L. J. 288.

**LIMITATION—Decree—Execution—Period of stay, if a deduction,**

## LIMITATION.

The period during which the execution of a decree is stayed by order of court can be deducted in computing the period of limitation for executing a decree (*Richardson and Ghose, JJ.*) CHARU CHANDRA MAZUMDAR v. FANINDRA NARAIN CHOUDHURY, 68 I. C. 897

—Decree incapable of execution—Time, when begins to run.

Until a decree is capable of execution limitation does not begin. Where the costs though taxed were not entered in the decree, an application praying that they be included is not one for amendment of decree but for supplying the defect, and in any case limitation begins only from the date the costs are included. (*Greaves, and B. B. Ghosh, JJ.*) RAJAKOTI KUMER MUKERJI v. TIN COWRI CHAKRABURTI. (1922) Cal. 136

—Deficiency of court-fees—Subsequent payment—Effect of—Difference between suit and appeal. See C. P. CODE S. 149 AND O. 7, R. 11. 3 Pat. L. T. 142

—Plea of—When to be entertained in appeal.

Where the defendant simply mentions in his written statement that the suit is barred, he is entitled to argue it upon the allegations made in the plaint. But if it was his object to raise any questions of fact in connection with the issue as to limitation, it is obligatory on him to state those facts and have an issue raised. Where this has not been done, it is not open to raise the question for the first time in second appeal. (*Das and Adam, JJ.*) KHUB LAL UPADHYA v. JUGDISH PRASAD SINGH. 1 Pat. 23 : 3 Pat. L. T. 795 (1922) P. 398.

LIMITATION ACT (1877)—Applicability to Buddhist monasteries. See LIM. ACT, ART. 144. 1 Bur. L. J. 108

LIMITATION ACT IX of 1908—Applicability of—Cause of action—Accrual of—Law governing suit.

The law of limitation is a law of procedure and it is the rule of limitation in force at the time when an application is made that governs it and not the one under which the right to apply accrued. This rule applies whether the time available under the new Act is shorter than that available under the former Act or no time is available under the new Act at all. If there has been an interval between the passing and the coming into force of a later Limitation Act, it is clear indication that the Act was meant to have a retrospective operation. 21 L. J. 193 ; (1899) P. 236, 39 M. 645 Rel. (*Oldfield and Venkatasubba Rao, JJ.*) GANAPATHI MUDALIAR v. KRISHNAMA CHARU. 43 M. L. J. 184 : 16 L. W. 178 : 31 M. L. T. 135 (H. C.) : (1922) M. W. N. 514 (1922) Mad. 417.

—Interpretation of—General and special articles.

It is a principle of the Limitation Act that the particular article must be applied in preference to the general article wherever possible. (*Le Rossignol and Campbell, JJ.*) KUNJ LAL v. GULAB RAM. 65 P. L. R. (1922) : 67 I. C. 364

## LIMITATION ACT (1908), S. 4.

—Ss. 2 and 14—Defendant—Joint Hindu family—Status of other members—Suit against manager—Subsequent suit impleading subsequently born son.

S. 2 of the Lim. Act assumes that every person who acquires an interest by devolution or otherwise in the subject matter of a litigation previously vested in others, which renders him liable to be impleaded as a defendant derives his liability to be sued from or through somebody. In the case of a new born son in a Mitakshara family the person or persons through whom he derives this liability must be the other members of the family in whom the property which the son acquires by birth was previously vested. Where a previous suit was brought against the managing member of a joint Hindu family and that suit was dismissed on the ground of want of jurisdiction in the court in which it was brought, the time taken in the conduct of the suit can be deducted under S. 14 of the Lim. Act even though the subsequent suit is brought against the original defendant and members of the joint family born subsequent to the previous suit. (*Miller C. J. and Bucknill, J.*) HARI PRASAD SINGHA v. SOURENDRA MOHAN SINHA. 66 I. C. 945 : 3 Pat. L. T. 709 : (1922) P. 450.

—S. 3—Plea of limitation—Raised for the first time on appeal—When given effect to

In order that an appellate court may give effect to a plea of limitation raised before it for the first time, it is necessary that all the facts should have been elicited and must be apparent from the record. (*Newbould, J.*) HEM CHANDRA ROY CHOWDHURY v. SRIMATI BIRAJA SUNDARI CHOWDHURANI. 67 I. C. 386.

—S. 4—Applicability of—Time fixed by pre-emption decree. See (1921) DIG. COL. 716 HIMMUN v. FAIYA. 67 I. C. 772.

—S. 4—Auction sale—Setting aside on deposit—Vacation time—Effect of deposit after re-opening.

The statutory period for setting aside an auction sale by depositing the amount in court expired during the vacation and the application together with a tender of the amount due was presented on the re-opening day. As the judge could not sign the tender that day, the money could be deposited only the next day. Held, the application and tender were both in time, as the delay was not due to any fault of the judgment-debtor. (*Kanhैया Lal, J.*) DURGA PRASAD v. BABU LAL. L. R. 3 A. 358 : 20 A. L. J. 543 : 4 U. P. L. R. (A). 117 : (1922) All. 195 : 67 I. C. 321.

—Ss. 4 to 25—Scope of—Application under C. P. Code.

Per Ramesam, J (Spencer, J contra (Ss. 4 to 25 of the Limitation Act are not confined in their application to periods prescribed in the Limitation Act but extend also to periods prescribed by other general Acts such as the Civil Procedure Code. 1 C. 226 ; 18 C. 631 foll. 40 A. 198 ; 42 A. 118 Ref. (*Spencer and Ramesam, JJ.*) MINOR SUBBARAYAN v. MINOR NATARAJAN. 45 Mad 785 : 43 M. L. J. 168 : 31 M. L. T. 140 (H. C.) : 16 L. W. 68 : (1922) M. W. N. 424 : (1922) Mad. 268.

## LIMITATION ACT (1908), S. 4.

—Ss. 4 and 14—Scope, of—Suit filed in wrong court—Deduction of holiday—Permissibility of.

A Suit was filed on 10-9-1918 the day next to the last day allowed, as the last day happened to be a holiday. The plaint however was presented in a wrong court and was returned on 23-1-1920 for presentation to the proper court. The plaint was represented on 26-1-1920 as the two previous days were holidays. On an objection raised by the defendant that the suit was barred *Held* that the holiday prior to 10-9-1918 could not be excluded under S. 4 of the Lim Act as the suit was filed in a wrong court. S. 4 applies only if the holiday follows the period that can be excluded under S. 14 but not if it precedes such period. 45 B 443 dissented 8 L. W. 256 ; 36 M. 131, 44 M. 817 foll. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDA SAMI PADAYACHI v. SAMI PADAYACHI.

43 M. L. J. 579 : 31 M. L. T. 258 (H. C.) :  
16 L. W. 911.

—S. 5—Admission of appeal subject to objections—Respondent not aware of the fact—Objection on the ground of limitation if can be raised again.

Where an appeal which was filed out of time was admitted subject to objections, but the Respondent was not made aware of the order and to question was raised as to the legality or propriety of the order and the appeal was allowed on the merits by the lower Appellate Court and the Respondent raised the question in second appeal.

*Held*, that the admission of the appeal subject to objection by the lower Appellate Court was irregular and there was no sufficient reason for extension of time under S. 5 of the Limitation Act on the materials before the Court. (*Dawson Miller, C. J. and Coutts, J.*) ABDUL KASIM v. CHATURBHUI SAHAI (1922) Pat. 20.

3 Pat. L. T. 110. 64 I. C. 55 : (1922) P. 47.

—S. 5—Applicability of—Application to bring legal representative on record.

S. 5 of the Limitation Act does not govern applications to bring on record the legal representatives of a deceased respondent. (*Chevis and Harrison, JJ.*) SHAH MAHOMED v. KARAM ILAHI (1922) Lah. 131 : 65 I. C. 121.

—S. 5—Applicability—Ex parte decree in Small Cause Suit—Application to set aside—Delay in deposit—Power to excuse. See PROV. SM. C. C. ACT, S. 17 (1) PROVISIO.

42 M. L. J. 484.

—S. 5 and art. 164—Application to set aside ex parte decree—Limitation—Delay.

S. 5 does not apply to applications under art. 164 of the Lim. Act to set aside ex parte decrees. (*Chevis, J.*) KHAIRATI v. UMAR DIN. (1922) Lah. 266 : 66 I. C. 270.

—S. 5—Delay in applying for copies—Indulgence:

A court is not bound to show indulgence to a litigant who has not been prompt in seeking the remedy available to him, e.g., in applying for copies preparatory to filing an appeal. (*Abdul Raouf, J.*) MADAN GOPAL v. MALAWA RAM.

68 I. C. 777.

## LIMITATION ACT (1908), S. 5.

—S. 5—Delay in filing necessary papers—Power to excuse.

Where the necessary papers have not been filed along with the memorandum of appeal, it is open to the court to excuse the delay under S. 5 of the Lim Act. (*Mookerjee and Chotener, JJ.*) TARA-KUMAR CHOSE v. KUMAR ARUN CHANDRA SINGH. 36 C. L. J. 389.

—S. 5—Delay in presentation of appeal—Objection when to be taken—Practice—Procedure.

Where an appeal presented out of time has been admitted by the appellate court *ex parte*, the respondent as soon as he is served with notice of the appeal, may apply by motion for dismissal of the appeal on the ground, of delay. If the respondent sleeps over his right and allows the appellant to incur expenses in bringing the case for hearing, he cannot be allowed at the hearing of the appeal to raise a preliminary objection that the appeal is time-barred (*Schwabe, C. J. and Wallace, J.*) MURUGAPPA NAICKER v. THAYAMMAL 16 L. W. 662 : (1922) M. W. N. 727. 31 M. L. T. 456 (H. C.)

—S. 5—Interference with discretion.

The High Court refused to interfere with the discretion of the judge in a Letters Patent Appeal (*Shadi Lal, C. J. and Martinneau, J.*) THE MUNICIPAL COMMITTEE, CHINOT v. BASHI RAM. (1922) Lah. 170.

—S. 5—Review—Exclusion of time—Application for additional evidence in appeal made in time—Effect.

Where an application was made in time to the appellate court for admitting additional evidence on the ground that the same was not within the knowledge of the applicant at the time of the decree, but the court was of opinion that the proper procedure was by way of review.

*Held*, the time for filing the review application could be extended under S. 5 Limitation Act, (*Freemanile J. M.*) SWAMI DIN v. QAMAR JAHAN SINGH. L. R. 3 All. 12 (Rev.)

—S. 5—Second appeal—Delay in filing Judgment of trial Court—Excusing delay.

The presentation of a second appeal without a copy of the first court's Judgment is not a valid presentation and in the absence of sufficient cause, the delay cannot be excused. (*Le Rossignol, J.*) MUSSAMMAT RAJAN v. KURIA.

4 Lah. L. J. 475 : 39 P. L. R. 1922.

—S. 5—Sufficient cause—Appeal—Originally filed as revision petition—Conversion into appeal—Court-fee—Delay—Re-opening, at the hearing before Division Bench. See (1921) DIG. COL. 719. UMED ALI v. THE MUNICIPAL COMMITTEE JHANG MAGHIANA. (1922) Lah. 233.

—Ss. 5 and 14—Sufficient cause—Appeal presented to wrong court.

In exercising its discretion under S. 5 of the Limitation Act in excusing delay in the presentation of an appeal the Court will be guided by the provisions of S. 14 though it does not in terms apply to appeals, 23 C. 325 ; 23 C. 526 ; 21 B. 352 Ref. (*Mookerjee and Panton, JJ.*) KUMUDINI RAY v. KAMALA KANT SEN. 35 C. L. J. 106 ;

(1922) Cal. 247 : 68 I. C. 575.



## LIMITATION ACT (1908), S. 5.

—S. 5—*Sufficient cause—Delay in preparation of decree.*

When a considerable interval passes between the delivery of judgment and the preparation of the decree some latitude is allowed to parties if they have made their application not in unreasonable time. Where however there is nothing to show that the appellant had applied for the copy of the decree within the period of limitation or that he had any knowledge that the decree had not been prepared and that he was keeping back his application for copy on this account, the Court is right in refusing to extend the limitation (*Burn, J. M.*) *MENDAL v. MANNU*,  
L. R. 3 A. 102 (Rev.)

—S. 5—*Sufficient cause—Mistaken legal advice.*

A mistake due to erroneous advice from a counsel is good cause within the meaning of S. 5 of the Lim. Act but the party has to prove the points (*Stuart, J.*) *KHAIRATI LAL v. DEBI DAYAL*,  
L. R. 3 A. 151 (Rev.)

—S. 5—*Sufficient cause—Mistake of legal adviser—Extension of time.* See (1921) DIG. COL. 721 S. C. DEY v. MT. RAJWANTI KUER.  
3 P. L. T. 96

—S. 5—*Sufficient cause—Mistaken advice of pleader—Excusing delay.*

Though the courts would ordinarily insist upon legal practitioners giving correct advice, nevertheless it may be that to demand at the present time a normal standard of efficiency would impose hardship upon litigants. An honest mistake made by a litigant upon incorrect advice of counsel, is a sufficient cause for excusing delay under S. 5 of the Limitation Act. Where in ignorance of the rules of procedure of the High Court, a mofussal pleader did not procure copies of judgment and decree to be filed along with the second appeal and these copies were filed after the time prescribed. Held there was sufficient cause within S. 5 of the Lim Act for excusing delay. (*Meers C. J., Banerji and Stuart, JJ.*) *SHIB DAYAL v. JAGANNATH PRASAD*. 44 All. 637. L. R. 3 A. 413.  
20 A. L. J. 674 : (1922) All. 490 : 68 I. C. 812.

—S. 5—*Sufficient cause—Time taken in filing review—Appeal.*

An appellant is entitled to deduct the period during which an application for review was pending. 45 C. 94 Rel. (*Woodroffe and Ghose, JJ.*) *PURNA CHANDRA CHHATOPADHYA v. SHEIKH MABUD BUKSH*. 63 I. C. 200.

—S. 5—*Sufficient cause—Time taken for review—When excused.*

Where a litigant files an application for review on totally insufficient grounds, the time taken by him cannot be deducted under S. 5 of the Lim. Act. 33 C. 1323, 183 P. R. 1888; 45 C. 94 Rel. (*Maung Kin, J.*) *MAUNG DAW NA v. MA KAYA*.  
64 I. C. 516.

—S. 5—*Sufficient cause—What is—Presentation of appeal on the last day.*

It is not possible to lay down any hard and fast rule as to what is sufficient cause for not preferring an appeal within S. 5 of the Lim. Act.

## LIMITATION ACT (1908), S. 6.

Every case must be decided on the merits in the judicial discretion of the court. But where an appellant deliberately delays the presentation of the appeal until the last day of limitation he accepts the risk of any accident or misadventure which may prevent its presentation within time. (*Hopkins S. M. and Burn, J. M.*) *MOOL CHAND v. ILAHI BAKSH*.  
L. R. 3 A. 351 (Rev.)

—S. 5—*Time required in taking copy of trial Court's judgment.*

Delay due to the obtaining of copy of trial Court's judgment may be excused, if the appellant had not obtained the copy at the commencement of the period of limitation and had been compelled to obtain it towards the end of the period. (*Broadway and Abdul Qadir, JJ.*) *GURDIT SINGH v. CHARAN DAS*.  
(1922) Lah. 415.

—Ss. 6 and 7—*Joint Hindu family—Alienation by father—After born son—Right to impeach alienation—Limitation—Starting point* See LIM. ACT, ART. 125. 9 O. L. J. 45.

—Ss. 6, 8, 9 and Art. 144—*Lunatic—Adverse possession against—Legal representative a widow—Right of reversioners when barred.*

Lunacy by itself does not prevent limitation running against a lunatic. Where the person entering into possession was in no fiduciary relationship to the lunatic, but entered into possession on his own behalf and in assertion of a hostile title to the lunatic, limitation runs from the date of possession, though the lunatic would be entitled to sue within 3 years from the cessation of his disability—If he dies a lunatic leaving his widow, she could sue within the same period; but if she fails to do so, the reversioners would also be barred and they cannot reckon limitation from the death of the widow. (*Kumaraswamy Sastry and Devadoss, JJ.*) *KALIDINDI SEETARAMARAJU v. VEGESANA SUBBA RAJU*.  
45 Mad. 361. 42 M. L. J. 262;  
(1922) M. W. N. 156 : 30 M. L. T. 128 :  
15 L. W. 382 : (1922) Mad. 12.

—Ss. 6 and 7—*Scope—Minority—Extension of time.*

S. 7 of the Limitation Act refers to S. 6 of that Act, to which it serves as an appendix, and the disability referred to in S. 7 means a disability of a kind which is of the nature and existed at the time, referred to in the preceding section.

33 All., 654 and 23 O. C., p. 320 ref. (*Daniels and Lyle, JJ.*) *CHOKHEY SINGH v. HARDEO SINGH*.  
24 O. C. 330 : 4 U. P. L. R. (J. C.) 10 :  
64 I. C. 757.

—S. 6—*Minority—Personal privilege—Transferee from minor—Institution of Suit.*

Minority is a personal privilege and a transferee from the minor is not entitled to avail himself of the special provisions of S. 6 of the Lim. Act. The transferee cannot maintain a suit even if he brings it on the same day on which the transfer takes place, if it is otherwise barred. 9 C. 663; 5 O. C. 197, 42 M. 637 Rel. 186 C. 34 diss. (*Daniels and Lyle, A. J. C.*) *MAHOMED NURKHAN v. LACHMI NARAYAN*,  
9 O. L. J. 88 :  
(1922) Oudh 31 : 66 I. C. 101.

## LIMITATION ACT (1908), S. 7.

—S. 7—Joint Hindu family—Disability of one of the members—Suit for redemption—Period of limitation. *See* (1921) DIG. COL. 722 BAI KEVAL v. MADHU KALA 46 Bom. 535 : (1922) Bom 319 64 I C 972.

—S. 9—Cause of action—Limitation—Adjustment of claim—Re-opening of—Fresh cause of action.

Plff. realised the money due to him from the debt on an award which had merged in a decree of court. Subsequently the award was set aside and the plff directed to refund the money realised by him.

In a suit by plff. for recovery of the amount due *Held*, that when the plff's original claim was satisfied in execution, limitation ceased running against him. On the annulment of that satisfaction a fresh cause of action arose and the suit was within time 43 M 845 foll. (*Broadway and Abdul Qadir, JJ*) KARTAR SINGH v. BHAGAT SINGH. 2 Lah. 320 . 4 U. P. L. R. (L) 25 64 I. C. 454.

—S. 9—Execution of decree—Time spent in obtaining probate—Deduction of

The time spent in proving a will and obtaining probate cannot be deducted in computing limitation for execution of a decree. (*Duckworth, J.*) BURN v PAUL. 1 Bur. L J 192.

—S. 10—Applicability of—Express trusts—Constructive trusts.

S 10 of the Limitation Act is limited in its operation to "express trusts" and has no application to the case of a constructive trust or an obligation in the nature of a trust falling under chapter IX of the Trusts Act, S 10 of the Limitation Act does not apply to a suit for accounts by the plff. against the defendant. (*Krishnan and Odgers, JJ.*) KRISHNA PATTAR v. LAKSHMI alias AMMU AMMAL. 45 Mad 415 42 M L J. 119 30 M. L. T. 238 . (1922) Mad 57 : 16 L W. 886 : 66 I. C. 858 : (1922) M. W. N 117

—S. 10—If controls Art 134.

S 10 of the Lim Act controls Art. 134 of the Act and gives the clue to its meaning. (*Scott-Smith, J.*) DIVAN SINGH v. SHAM DAS. (1922) Lah. 271 : 65 I. C 722.

—S. 10—Scope of—Express trust—Following trust property—Suit to avoid trust and recover on intestacy—Straits Settlements Limitation Ordinance, Ss. 4 and 10.

Under S. 10 of the Straits Settlements Limitation Ordinance corresponding to S. 10 of the Indian Limitation Act no suit against a person in whom property has become vested in trust for any specific purpose for the purpose of following in his hands such property shall be barred by any length of time. A Chinese resident of the Straits died in 1882 setting apart by his will a specified share of his residuary estate for certain religious and other sacrifices. In 1916 one of the next of kin of the deceased sued for rateable distribution of the estate on the ground that the gift was void and he was met by the plea of limitation. *Held*, that the suit was barred by limitation. S. 10 of the Ordinance did not apply to the suit as the purpose of following the property in the hands of the trustees referred to in

## LIMITATION ACT (1908), S. 12.

that section must be the purpose of restoring it to the trust which is specified in the earlier part of the section. In S 10 a specific purpose means a purpose which is either specifically defined in the will or settlement itself, or a purpose which, from the specified terms, can be certainly altered 6 A 1 appr : *Satter v Cavanagh* (1838) 1 Dr. and Wal. 668 dist (*Lord Buckmaster*) KHAW SIN TEK v CHUAH HOOI GNHO

(1922) 1 A. C. 120 . 30 M. L. T. 160 : 26 C W. N 495 (1922) P C. 212 : 49 I. A 37 (P. C.)

—S. 10—Specific trust—Executors—Vesting of property—Adverse possession.

Where the testator by his will dedicated two of his properties to his family deity and at the same time appointed his two wives and adopted son as shebais, executrixes and executor, it is incumbent on the persons so nominated to take out probate of the will and to carry out the religious trust created by the testator. They are persons in whom the estate becomes vested in trust for a specific purpose within the meaning of S. 10 of the Lim Act. They could not by breach of trust continued for a period of 12 years confer a statutory title on themselves in derogation or extinction of the trust. 34 M. 257 Ref. Time would be no bar to an action against the shebais themselves in such circumstances for recovery of the debutter properties from their hands 33 C. 511 Ref. (*Mookerjee and Cumming, JJ.*) CHARU CHANDRA PRAMANICK v. NAKUSH CHANDRA KUNDOO. 36 C. L. J. 35.

—S. 10—Suit against trustee—Failure of trustee to reduce trust property to possession—Liability for acts on default of predecessors—Failure to account—Limitation.

A suit based on the failure of a trustee to reduce trust property into possession is barred under the Lim. Act notwithstanding S. 10. Further, a trustee is not liable for the acts or defaults of his predecessors. If the trustee himself had actually received money for which he had not accounted, S. 10 prevents any period of limitation running, and if he held money in another capacity which he ought to have held as trustee, he could not be heard to say that he held it in the other capacity and not in the capacity of a trustee, and therefore in such a case S. 10 would apply and prevent him from relying on the Lim. Act, (*Sir Walter Schwabe, C. J. and Odgers, J.*) DORAIVELU MUDALIYAR v ADIKESAVALU NAIDU. (1922) M. W. N 620 . (1922) Mad. 409.

—S. 12—Copies sent by post—Time for obtaining copies—Mode of computing.

Where in accordance with the rules, copies are despatched by post, the period intervening between completion and despatch of the same is also excluded in computing the time for filing appeals (*Scott-Smith, J.*) GHULLA SINGH v. SOHAN SINGH. 3 Lah. 280 : (1922) Lah 219.

—S. 12—Absence of decree—Copying time.

The appellant may be entitled to exclusion of time from date of application to date of preparation of copy or even from date of judgment but is not entitled to exclusion of time between the date of preparation of copy and application for

## LIMITATION ACT (1908), S. 12.

copy of decree. (*Shadi Lal, C. J. and Martineau, J.*) THE MUNICIPAL COMMITTEE, CHINOT v BASHI RAM (1922) Lah. 170.

— S. 12—Copy of judgment—Time taken—Deduction of—Intervention of vacation.

Where the judgment of the trial Court was pronounced on the last day before the Civil Court vacation and the copy of the judgment was applied for on the day on which the Court re-opened after the vacation, *held*, that under these circumstances the appellant was entitled to include the vacation as part of the time requisite for obtaining the copy under S. 12 sub section (2) of the Limitation Act, 27 Mad. 21, 20 C. W. N. 1303; 13 C. I. 544, 43 Mad. 640 ref. (*Daniels, A. J. C.*) ABDUL GHAFAR v. RASUL-UN-NISSA 25 O. C. 71 : 9 O. L. J. 436 : (1922) Oudh 39 : 68 I. C. 250.

— S. 12—Time for despatch.

From the day when copy is ready, to the day when it is despatched, the time is excluded (*Broadway and Abdul Qadir, J.J.*) GURDIT SINGH CHARAN DAS. (1922) Lah. 415

— S. 12—Time taken in obtaining copy of decree and judgment—Interval between date of Signing judgment and decree.

Where there is delay after the delivery of judgment in signing a decree, the interval between the date of delivery of judgment and signing of decree cannot be deducted unless, an application for copy having been made, the applicant is actually and necessarily delayed through the decree not being signed, 12 A. 461 Ref. (*Hopkins, S. M.*) BEHARI v. MT. MAHDEI.

4 U. P. L. R. (B. R.) 34

— S. 12—Time requisite for obtaining copies—Computation of.

In computing the time taken for obtaining copies under S. 12 of the Lim. Act the time spent between the date of decree and the date of application for copies cannot be deducted. The question as to the time requisite for obtaining copies is one of fact. (*Martineau, J.*) BAWA SINGH v. THAKUR SINGH. 4 U. P. L. R. (L) 80 : (1922) Lah. 423. 67 I. C. 478

— S. 12—Time for obtaining copies of decree and judgment—Exclusion of See (1921) DIG. COL. 725. S. C. DEY v. MT. RAJWANTI KUER. 3 P. L. T. 96

— S. 12—Time taken in obtaining copies—Deduction of—Extent of time permissible—Practice.

Under S. 12 of Lim. Act no period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain the order appealed against. Where the appellant did not apply to have the order drawn up within a reasonable time after judgment, and even after the draft was drawn up he did not return it after approval, he cannot claim to deduct the whole of the time occupied in obtaining a copy of the order (*Lord Buckmaster*) PRAMATHANATH ROY v. LEE 43 M. L. J. 765 : (1922) P. C. 352. 4 U. P. L. R. (P. C.) 103 : 27 C. W. N. 156 : 68 I. C. 900 : 31 M. L. J. 193 : 49 I. A. 307 (P. C.) :

## LIMITATION ACT (1908), S. 14.

— S. 12 (2) and (3)—Appeal—Time spent in obtaining copies of decree and judgment—Deduction of both periods. See (1921) DIG. COL. 725 VALLAIAMMAL BIBI v. KOOLAYAMMA, 66 I. C. 23.

— S. 12 (3)—Extension of time—Time taken in obtaining copies of decree and judgment.

Under S. 12 (3) of the Lim. Act both the time requisite for obtaining copies of the decree and judgment could be deducted. (*Hopkins, S. M. and Burn, J. M.*) BALDEO v. WARIS ALI. 4 U. P. L. R. (B. R.) 37.

— S. 12 (3) and Art. 179—Leave to appeal to Privy Council—Time for obtaining copy of judgment—If to be deducted.

In computing the period of 90 days fixed by Art. 179 of the Lim. Act for applying for leave to appeal to His Majesty in Council, the time for obtaining a copy of the judgment can be deducted. (*Miller, C. J. and Ross, J.*) MAHABIR PRASAD TEWARY v. JAMUNA SING 1 Pat. 429 : 3 Pat. L. T. 289. (1922) Pat. 193 : 4 U. P. L. R. (Pat.) 33 : (1922) P. 255 : 68 I. C. 88.

— S. 12 (3)—Second appeal—Time for obtaining copies of first Courts judgment—If excluded.

S. 12 (3) of the Lim. Act allows to be excluded only the time requisite for obtaining a copy of the judgment against which the appeal is preferred. Even where the rules of the court require the filing of the judgment of the Court of first instance in a second appeal, the time requisite for obtaining it does not fall under S. 12. (*Abdul, Raof J.*) MADAN GOPAL v. MALAWA RAM. 68 I. C. 777.

— S. 13—Foreign territory—Territory under temporary military occupation—Basra

Basra was not a territory under the administration of the Government of India within the meaning of S. 13 of the Lim. Act. The fact that the troops which took part in the campaign in Mesopotamia were known by the name of the Indian Expeditionary force, and the despatches relating to its operation were published in the Gazette of India is not sufficient to show that Basra was under the administration of the Government of India. The occupation was military occupation for the purpose of proceeding with the expedition and protecting the army on its way on ward and securing its safety and support. The territory was, except for those purposes, not under the administration of the Government of India. Consequently a plaintiff is entitled to deduct the time during which the debt had been absent in Basra. (*Kanhaiya Lal and Salaman, J.J.*) FAKHRULLAH KHAN v. RAM SARUP. 20 A. L. J. 786 : L. R. 3 A. 529 : 4 U. P. L. R. (A) 218 : 68 I. C. 978.

— S. 14—Applicability of—Strict interpretation—Misconception of remedy.

Where a person misconceived his remedy and instead of proceeding by an application to set aside an execution sale brought a suit which was eventually dismissed, the time taken in prosecuting the suit and an appeal therefrom cannot be deducted under S. 14 of the Lim. Act in

## LIMITATION ACT, (1908) S. 14.

computing the period of limitation for an application, 22 A. 248 not foll., 23 M. 121 foll. (*Oldfield and Venkatasubba Rao, JJ.*) GANAPATHI MUDALIAR v. KRISHNAMA CHARI.

43 M. L. J. 184 16 L. W. 178  
31 M. L. T. 135 (H. C.) : (1922) M. W. N. 514  
(1922) Mad 417.

———Act, S. 14—If applicable to appeals See  
LIM. ACT, Ss. 5 AND 14. 35 C. L. J. 108.

———Ss. 14, 15—*Debt due—Insolvency—Period of pendency of proceedings—Exclusion of time.*

Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudged insolvent, but the order cancelled later if the creditor institutes a suit thereafter against the debtor to recover the debt the time during which the insolvency proceedings are pending cannot be deducted in computing the period of limitation (*Macleod, C. J. and Shah, J.*) SIDHRAJ BHOJRAJ v. ALI HAJI.

24 Bom. L. R. 509 : 67 I. C. 757.

———S. 14—Deduction of time—first suit against Hindu manager—Second suit against subsequently born members also—Effect. See LIM. ACT, Ss. 2 AND 14. 66 I. C. 945

———Ss. 14 and 15—Exclusion of time of proceeding in another Court—Exclusion of time during which proceedings are suspended. See (1921) DIG. COL. 727 GREENBURGH v. XAVIER.

64 I. C. 50.

———S. 14—Extension of time—Proceeding bona fide in a Court without jurisdiction—Order for return of plaint for presentation to the proper Court—Plaint returned a few days later—Calculation of time. See (1921) DIG. COL. 727 NAGINDAS KAPURCHAND v. MAGANLAL PANA CHAND.

46 Bom. 211 : 64 I. C. 160 : (1922) Bom. 160.

———S. 14 and Arts. 62 and 97—Patni sale set aside—Suit for recovery of money—Limitation—Deduction of time spent in proceedings for assessment of mesne profits See (1921) DIG. COL. 728 JANAKI NATH SINHA ROY v. BIJOY CHAND MAHATAB BAHADUR, 26 C. W. N. 271.

64 I. C. 315.

———S. 14—Scope of.

The time during which a Court holds up a case while it is discovering that it ought to have been presented in another Court, is time which ought to be excluded in computing the period of limitation which is applicable as provided by S. 14 of the Limitation Act. It cannot be said that a Plff. is not prosecuting a suit with due diligence in a court of first instance when the delay is caused by the action of the court itself. (*Walsh, J.*) MT. MARYAM BIBI v. RAM DAS. (1922) All. 404.

———S. 14 (2)—“Other causes of a like nature”—If includes “res judicata”. See (1921) DIG. COL. 729 BRAJA GOPAL MUKHERJEE v. TARA CHAND MARWARI. 6 Pat. L. J. 593.

———S. 14 C, (2)—*Proceedings infructuous—Misconception as to law—Deduction of time.*

## LIMITATION ACT, (1908) S. 15.

Where relying upon a decision of the High Court a decree holder institutes proceedings in a Civil Court for a relief which according to a later decision of the High Court is to be sought in the Revenue Court, the time during which the proceedings were pending in the Civil Court would be deducted under S. 14 cl. (2) of the Act. (*Piggott and Walsh, JJ.*) PARBATI v. RAJA SHYAM RIKH.

44 A. 296.  
L. R. 3 A. 73 (Rev.) 20 A. L. J. 147 :  
(1922) All. 74 : 66 I. C. 214.

———S. 14 Expln. III.—*Execution proceedings—Non joinder of party—Rejection of application.*

One of several plaintiffs decree-holders applied to execute the decree without impleading the other decree-holders as parties. The application was allowed by the lower courts but dismissed by the High Court. On a subsequent application for execution properly presented, Held that the time occupied in prosecuting the earlier application in good faith should be allowed under S. 14 of the Limitation Act and the application made more than three years after the original application was not barred by limitation.

There is nothing in S. 14 of the Limitation Act which requires the Court to make an absolute distinction between cases of misjoinder and non-joinder in regard to S. 14 of the Limitation Act. They are on the same footing in so far as in consequence thereof the Court is barred from deciding a suit or application on its merits and in this respect they are on the same footing as a defect affecting jurisdiction (*Fawcett, J. C. and Raymond, A. J. C.*) SETH IBRAHIM v. FIRM OF GHULAM HUSAIN

15 S. L. R. 11.

———S. 15—*Applicability of—Limitation prescribed by S. 48 C. P. Code.*

S. 48 C. P. Code contains an unqualified prohibition against execution of decrees more than 12 years old and this section is not controlled by S. 15 of the Limitation Act. 10 L. W. 156; 40 A. 198; 42 A. 118 Ref. 54 I. C. 279 foll. Consequently in computing the period of 12 years under S. 48 C. P. Code it is not open to the decreeholder to deduct the time during which execution was stayed. S. 15 of the Lim. Act speaks only of the computation of periods of limitation with reference to the periods prescribed in the schedule to the Act, (*Spencer and Ramesam, JJ.*) MINOR SUBBARAYAN v. MINOR NATARAJAN

45 Mad 785 :

43 M. L. J. 168 : (1922) M. W. N. 424 :

16 L. W. 68. 31 M. L. T. 140 (H. C.) :  
(1922) Mad. 268.

———S. 15 and Art. 182—*Execution of decree—Sale—Suit to set aside decree—Injunction—Stay of execution—Subsequent application for execution.*

An application for execution of a final decree in a mortgage suit was made on 16-11-1908 and a sale was held on 3-5-1909 in which the decree holder was the purchaser. The sale was set aside on 14-2-1911 at the instance of the judgment-debtor. On 18-3-1913 a second application for execution was made but as the judgment debtor's son had instituted a suit and obtained an injunction restraining the decree holder from selling his share of the property, the execution court stayed

## LIMITATION ACT, (1908) S. 15.

the entire proceedings. The suit was decreed on 23-5-1915 and the decree-holder applied on 12-1-1917 for execution.

*Held*, that the application of 18-3-1913 made after the setting aside of the execution sale, was one to revive and continue the earlier application and was not barred by limitation.

As regards the third application, the decree-holder could under S. 15 of the Lim. Act deduct the time between the date when the order for stay was made and the date when it ceased to be operative. (*Mukerjee and Pantan, JJ.*) JIRA BIBI v. MAJIRUDDIN CHOWDHURY.

35 C. L. J. 135 : 64 I. C. 849.

— S. 15—Insolvency—Period of pendency of proceedings—If can be deducted—Suit by creditor for sum due. See LIM. ACT, SS. 14 AND 15.

24 Bom. L. R. 509.

— S. 15—Order staying further proceedings—Mortgage suit—Preliminary decree—Appointment of receiver.

Where pending an appeal from the preliminary decree in a mortgage suit, a receiver is appointed with direction to pay the mortgagee the interest due on his mortgage, the order of the appellate court is one in effect staying further proceedings and the period during which it was in force should be excluded in calculating the time for applying for a final decree. (*Das and Adam JJ.*) CHHOTAY NARAIN SINGH v. KEDAR NATH SINGH.

3 Pat. L. T. 565 : 66 I. C. 97 :

(1922) P. 201 : 1 Pat. 435 : (1922) Pat. 342.

— S. 15 (1)—Limitation—Suspension of—Execution of decree—Injunction. See (1921) DIG COL. 730 GOBINDA NATH CHAUDHURY v. BASIRUDDIN MONDAL.

64 I. C. 594

— S. 15 (2)—Exclusion of time—Single suit against several defendants—Notice under S. 77 of the Railways Act to one deft.

Where a plff. brings a suit against three railways one of which is owned by the Secretary of State he is entitled to deduct the period of 2 months notice given to the Secretary of State. If in a single suit against several defendants the plff. is entitled to a deduction of time as against one deft. he is entitled to a deduction against all the defendants under S. 15 (2) of the Lim. Act. (*Coutts and Adams, JJ.*) B. AND N. W. RAILWAY Co. v. RAM SARUP LAL CHAUDHURY.

(1922) Pat. 254 : 3 Pat. L. T. 643 :

4 U. P. L. R. (Pat.) 66 : (1922) P. 549.

— S. 16 and Arts. 137, 138, 144—Applicability of—Auction purchaser obtaining symbolical possession; but kept out of actual possession—Suit for possession—Limitation.

Where art. 144 of the Limitation Act. applies, no deduction of time under S. 16 can be allowed either in law or under the general principles of equity.

An auction sale was confirmed on 13-9-1902 and symbolical possession obtained on 12-1-1904. An application was made to set aside the sale on 21-6-1905, but was dismissed on 8-4-1906. A suit for possession was instituted on 11-7-1914 but the contesting defendants were added as parties only on 27-3-1916.

## LIMITATION ACT, (1908) S. 18,

*Held*, (1) the sale became absolute on 13-9-1902 when the sale was confirmed and not on 8-4-1906 on the dismissal of the application for setting aside the sale, as the confirmation of a sale cannot be kept in abeyance when proceedings are not taken to set it aside before confirmation.

(2) Art. 137 cannot apply to the case, as the judgment-debtor was in possession at the date of sale; (3) Nor would art. 138 govern, as it evidently refers to a case where the purchaser has not obtained delivery of possession: even if it applies, the suit is barred even after deducting the period during which the application to set aside the sale was pending;

(4) the proper provision applicable is art. 144, and from the date symbolical possession was delivered, the possession of the judgment-debtor was adverse to the purchaser. (*Chatterjee and Pantan, JJ.*) BROJENDRA KUMAR ROY CHOWDHURY v. ASUTOSH ROY.

26 C. W. N. 364.

— S. 18 and Arts. 91, 95 and 120—Deed of instrument void ab initio—Suit to set aside—Limitation.

Plaintiff brought a suit for a declaration that a deed of gift executed by her was void and inoperative as she signed the deed believing, on account of the fraud and misrepresentations of the defendant, that it was only a power of attorney. She also sued for a declaration of title in the properties gifted. *Held* that on the averments made in the plaint, the deed of gift was void ab initio and did not require to be set aside. Consequently the suit was governed not by article 91 or 93 but Art. 120. Under S. 18 of the Act limitation would not run until the fraud of the defendant became known to the plaintiff. 14 I. A. 148; 25 B. 337 dist. (*Sanderson, CJ and Richardson, J.*) SARAT CHANDRA GUPTA v. KANAI LAL CHAKRAVARTY.

26 C. W. N. 479.

— S. 18—Discovery of void sale

When the true nature of rights was not discovered by the Plff. earlier than the time at which his demand for possession was resisted. *Held* limitation began from the date of resistance. (*Sir Lawrence Jenkins, J.*) THAKURAIN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH.

(1922) P. C. 403

— S. 18—Fraud—Knowledge—Proof of

To bring his case within S. 18 of the Lim. Act the plaintiff must allege when the fraud pleaded came to his knowledge. (*Lord Phillimore*,) RAI RADHA KRISHNA v. BISHESHWAR SAHAY.

16 L. W. 190 : 3 Pat. L. T. 529 (P. C.)

31 M. L. T. 209 (P. C.): (1922) P. C. 336 :

67 I. C. 914 : 49 I. A. 312.

— S. 18—Fraud—Proof of—Exemption from limitation.

Where a person in order to bring a suit barred on the face of it within time, relies on S. 18 of the Lim. Act, he must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period

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of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. It is not sufficient for the defendant to show that the plaintiff had some clues and hints, which, perhaps, if vigorously and actually followed up, might have led to a complete knowledge of fraud. (*Mookerjee, Walmsley and Pearson, JJ*) *BIMAN CHANDRA DATTA v. PRAMATH NATH GHOSH.* 36 C. L. J. 295

49 Cal 886 : (1922) Cal. 157 : 68 I. C. 94.

—S. 19—*Acknowledgment—Barred debt—Promise to pay—Contract Act, S. 25.*

An acknowledgment of a debt to be effective for the purpose of saving limitation must be made before the enforcement of it by suit is barred. An acknowledgment of a barred debt is of no avail to save limitation. (*Sulrawardy and Cuming, JJ*) *PANCHANAN PODDAR v. KHITISH CHANDRA* 67 I. C. 298

—S. 19—*Acknowledgment of debt—Promise to pay—English and Indian law.*

In English law it is quite clear that an acknowledgment of debt has always been understood to connote and imply a promise to pay, but in India a mere acknowledgment of debt has never been held to justify the implication of a promise to pay. (*Le Rossignol and Martineau, JJ.*) *NAND LAL v. PARTAB SINGH.* (1922) Lah 425 : 3 Lah 326.

—S. 19 and Art 64—*Acknowledgment of liability—Account stated—Ruzukhata—Implied promise to pay.* See (1921) DIG. COL 732 *CHUNI LAL RATANCHANDRA v. LAXMAN GOVIND.* 46 Bom. 24. (1922) Bom 183

—S. 19—*Acknowledgment of liability—Authority—Mukhtar-i-am.*

An acknowledgment by the mukhtar-i-am of a person not specifically empowered to make such acknowledgment is not valid under S. 19 of the Lim. Act. (*Ryves and Gokul Prasad, JJ.*) *NARAIN RAO KALIA v. MT. MANNI KUER.* 44 A. 546 : (1922) A. 230 : 20 A. L. J. 359 : 66 I. C. 394

—S. 19—*Acknowledgment—Co-mortgagors—Statement in a plaint in a suit for redemption by one co-mortgagor.*

Where in a suit for redemption instituted by a co-mortgagor, he admits in the plaint the rights of the other mortgagors not joined as parties to redeem, the statement is an acknowledgment of the other mortgagors' right to redeem within S. 19 of the Lim. Act. 36 A. 408 toll : 11 A 423 Ref. (*Ryves and Gokul Prasad, JJ.*) *MAQSUD HUSSAIN v. KARIMUDDIN.* 64 I. C. 979

—S. 19—*Acknowledgment—Essentials of Agency—Inference.*

An acknowledgment need not specify every legal consequence of the thing acknowledged. From an acknowledgment of a debt follow the legal incidents, which flow from the existence of a liability. In fact an admission by a mortgagor of his liability under the mortgage carries with it an admission of all the remedies to which the mortgagee is entitled under it. 25 C. 844 : 6 O. L. J. 248 Ref.

If a member of a joint Hindu family makes an acknowledgment in a statement made before a court and the circumstances indicate that he was

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making the statement on behalf of the other members of the family, the latter would be liable on the strength of that acknowledgment. (*Kanhaiya Lal, J. C.*) *RAM AUTAR v. BENI SINGH.* 25 O. C. 89 : (1922) Oudh 135 : 68 I. C. 196.

—S. 19—*Acknowledgment of liability—Essentials of—Signature of debtor*

Oral evidence is admissible to prove the identity of the debt, property or right in respect of which an acknowledgment is made, or the name of the creditor or of the person entitled to the right or property, or the date of an acknowledgment, and these need not appear on the face of the writing, but the writing itself must import an acknowledgment of an existing liability. Such liability cannot be read into it by proof aliunde or by subsequent admissions of the acknowledgor. If the writing does not contain any acknowledgment of personal liability or of a debt this cannot be imported into it by referring to statements of the parties or to other writings. The writing sought to be used as an acknowledgment should in itself import that the person making the acknowledgment is under an existing liability. 26 Mad. 34 : 31 Cal 195 ref. The signature need not appear at any particular part of the writing and the person authorised to give an acknowledgment may sign his own name or that of his principal. 1 All. 683 : 10 Bom 71 : 6 Cal. 340 ref. (*Dhobley, A. J. C.*) *ONKARLAL v. RAJ MAHOMED.* 17 N. L. R. 209 : 65 I. C. 279.

—Ss 19 and 20—*Acknowledgment of liability—Joint mortgagors.*

Under the Lim. Acts of 1871 and 1877 an acknowledgment of the right of redemption must be made by all the mortgagees and if not so made, it did not save limitation even against the shares of those who signed it, if the mortgage was indivisible. (*Martineau, J.*) *NADAR SHAH v. ISHAR DAS.* 67 I. C. 463

—S. 19—*Acknowledgment "Prescribed"—Meaning of.*

The word "prescribed" in S. 19 of the Lim. Act means prescribed by the Schedule, 26 B 782, (*Batten, J. C.*) *NANDRAM v. RAN CHHODDASS* 6 N. L. J. 178 (1922) Nag 250 : 65 I. C. 716.

—S. 19—*Acknowledgment—Rent decree—Limitation—Beng Ten. Act, ss. 184 and 185.* See (1921) DIG. COL 733, *PARESH NATH PAL CHAUDHURY v. ISMAIL SARDAR.* 26 C. W. N. 486 : 64 I. C. 993 (1922) Cal. 187.

—S. 19—*Acknowledgment—Requisites of Mortgage.* See (1921) DIG. COL 733 *PRASANNA KUMAR ROY v. NIRANJAN ROY* 48 Cal. 1046 : 26 C. W. N. 213 : 64 I. C. 988.

—S. 19—*Acknowledgment of right—Sub mortgage—Acknowledgment of—Effect on original mortgage*

An acknowledgment to whomsoever made is a valid acknowledgment only if it points with reasonable certainty to the liability in dispute. The acknowledgment need not be express, it may be left to implication. But it must be a necessary implication from the words used that the person acknowledging was referring to and admitting the liability in dispute and not any dispute. An

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acknowledgment of a submortgage by the sub-mortgagee in a rent note executed by him does not involve an acknowledgment of the original mortgage or of a liability to be redeemed by the original mortgagor. 11 B. M. L. R. 318 Ref. (*Macleod, C. J. and Coytee, J.*) BHAGWAN GANPATI MANKESHWAR v. MADHAV HANKAR.

24 Bom. L. R. 713 (1922) Bom. 356.

—S. 19 Acknowledgment—Suit for possession of land mortgaged—Acknowledgment contained in bonds—Part of consideration entered being interest due on mortgage.

Pliffs sued for possession on certain land which had been mortgaged to them and claimed an extended period by reason of the existence of certain acknowledgments by the mortgagor. This extension was claimed on the basis of acknowledgments contained in bonds, dated 1899 and 1903 executed by the mortgagor in the plaintiff's favour. In these bonds part of the consideration was entered as being the interest due to the plaintiffs on the mortgage in the suit.

*Held*, that the admission of liability to pay interest under the mortgage in the bonds of 1899 and 1900 amounts to an acknowledgment of liability under the mortgage including liability to give possession to the mortgagee. 25 Cal. 84; 54, I. C. 985 1011. (*Leslie Jones and Dundas, JJ.*) ANAND RAM v. INAYAT ALI KHAN

2 Lah. L. J. 549. 68 I. C. 188

—S. 19—Acknowledgment—What amounts to—Admission of execution of hypothecation deed in plaint—Effect.

Where in a plaint in a former suit defendants mentioned the execution of a hypothecation deed, by them to the plaintiff but under circumstances in which it was immaterial whether the deed had then been discharged or not, *held* in a suit on the bond by the plaintiff the statement in the plaint in the former suit was an acknowledgment of a subsisting liability within the meaning of S. 19.

An admission of past liability unaccompanied by an allegation of discharge should not in all cases be interpreted as an admission of a subsisting liability. (*Ayling and Venkatasubba Rao, JJ.*) KANDASWAMI REDDY v. SUPPAMMAL.

45 Mad. 443 : 15 L. W. 325. (1922) M. W. N. 168  
42 M. L. J. 263. (1922) Mad. 104.

—S. 19—Plaint barred—Acknowledgment—Onus.

A plaintiff who is, prosecuting a suit which is on the face of it barred by limitation and who is trying to bring it within limitation by proving an acknowledgment under S. 19 Lim. Act must give cogent proof of his allegation. (*Rafique and Lindsay, JJ.*) THE COLLECTOR JAUNPORE v. JAMNA PRASAD.

44 A. 360 : 4 U. P. L. R. (A) 50 :  
(1922) All. 37 : 20 A. L. J. 140. L. R. 3 A. 134.  
66 I. C. 171.

—S. 19—Starting point.

The date fixed for payment in the later deed acknowledging the liability under the former deed is not the date from which fresh period commences. (*Kotval and Pradeaux A. J., C.*) WAMAN v. DEORAO.

(1922) Nag. 256.

## LIMITATION ACT (1908), S. 20.

—S. 20—Acknowledgment—Part payment—Distinction between—Settlement of accounts—Accounts stated.

It is open to a borrower to make a promise in writing signed by himself, to pay a debt of which his creditors might have enforced payment but for the law of limitation of suits. If the entry be construed as a promise to pay, such promise is applicable quite as much to the sum borrowed on that day as to the sum round due on adjustment of account. 18 C. L. J. 269, 18 C. L. J. 329; 23 M. 94; 31 A. 495; 33 M. 159 Ref. The distinction between an acknowledgment and promise to pay is sometimes difficult to draw, specially as an unconditional acknowledgment, has always been held to imply a promise to pay because that is the natural inference. If no thing is said to the contrary, it is what every honest man would mean to do. The case is clear where the entry is made in respect of an aggregate sum, with regard to a portion whereof there could only be a promise to pay and not an acknowledgment. 6 Bom. 683, 8 B. 405 Ref. It is not necessary that the payment should be actually made in money, for any arrangement between the parties intended to have the effect of discharging *pro tanto* the party indebted, will have the same effect as a payment of money. L. R. 2 Ex. 158 Ref. Thus where there are debts due on both sides and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment of the amount of the smaller debt. But it is the striking of the balance that constitutes the payment, not the mere existence or even statement in writing of gross demands. An agreed statement of accounts where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment will not be allowed to support an action on an account stated in respect of items which are statute barred. (*Mookerjee and Chutener, JJ.*) GULJAR MANDAL v. SRIMAN MANDALINI.

36 C. L. J. 228.

—S. 20—Execution—Saving of limitation—Part payment—Certification—Limitation for See C. P. CODE, O. 21, R. 2.

64 I. C. 72

—S. 20—Part payment of principal—Agent duly authorised—Meaning of payment by court—Mortgage decree—Some items of mortgaged property acquired under the Land Acquisition Act—Compensation paid into court. See 1921 DIC. COL. 735. GOVINDASAMI PILLAI v. DASAI GOUNDAN.

68 I. C. 100.

—S. 20—Part payment—Vendee—Authority to keep debt alive

A vendee had no authority to keep a debt alive by making a part payment when he was asked to pay it by the sale-deed. (*Kumaraswami Sastry and D. Vadoss, JJ.*) SRI DANTARU RAMACHANDRA RAJU v. MANUKONDA PURUSHOTTAM.

(1922) Mad. 401.

—S. 20—Payment towards principal—Extension of limitation.

Limitation under S. 20 cannot be extended, unless the payment towards the principal is in the handwriting of the debtor. (*Coutts, J.*) AMBIKA PRASAD v. GAYA LOAN OFFICE, LTD.

(1922) P. 446.

## LIMITATION ACT (1908), S. 20.

—S. 20 — Receipt of rents and profits by sub mortgagee—Effect on original mortgage.

The purpose of S. 20 sub S. (1) of the Limitation Act is clear. Where interest on a debt or legacy is paid by the person liable to pay the debt or legacy or where part of the principal of a debt is paid by the debtor, the person entitled to the debt or legacy acquires the benefit of a fresh period of limitation. Under S. 20 sub S. (2) the receipt of the rent or produce of mortgaged property by the mortgagee in possession is deemed to be a payment for purposes of sub S. (1). The scope of sub S. (2) is limited: it extends the period of limitation allowed to a mortgagee for suing on the mortgage debt; it does not confer a like indulgence on a mortgagee suing to redeem the mortgage. The effect of any other view of S. 20 would be practically to exclude suits for redemption of usufructuary mortgages from the operation of the Limitation Act. In any event receipt of rents by a sub mortgagee does not extend the time for redemption of the original mortgage. (*Sadlood, C. J. and Coyajee, J.*) BHAGWAN GANPATI MANKESHWAR v MADHAV SHANKAR. 24 Bom. L. R. 713 : (1922) Bom 356

—S. 20 (2)—Saving of limitation—Intention of the parties—Appropriation of the proceeds.

S. 20 (2) of the Limitation Act does not refer expressly to the intention of the party who receives the rent or produce and can be construed to apply wherever mortgaged land is, in fact, in the possession of the mortgagee. In such an event the receipt of the rent and produce of the land may be deemed a payment for the purpose of sub sec. (1). (*Mookerjee and Pantou, JJ.*) BAMA CHARAN CHAKRABARTI v NIMAI MANDAL. 35 C. L. J. 53 : 64 I. C. 903 : (1922) Cal. 114.

—S. 20 Sub S. (2)—Suit for recovery of mortgage money—Applicability of the section

S. 20 cl. (2) of the Lim. Act applies to a suit for recovery of the mortgage money by the mortgagee under S. 68 of the I. P. Act. (*Lindsay, J. C.*) MAHADEO TEWARI v. SITLA BAKISH SINGH. (1922) Oudh 102 : 65 I. C. 408.

—S. 22—Addition of parties after limitation—Whole suit when barred.

Where the addition of a defendant is not essential to the maintainability of the suit but is merely made to protect the interests of the defendant already impleaded, the fact that he is added as a party after the expiry of the period of limitation prescribed for the suit does not entail the dismissal of the suit as barred by limitation. 33 Cal. 1079, 33 All. 272; 28 B. 11 Ref (*Suhrawardy and Cumings, JJ.*) SITAL PRASHAD PODDAR v KAIFUT SIEIKH (1922) Cal. 149 26 C. W. N. 488 : 65 I. C. 367

—S. 22—Addition of plaintiff—Transposition of proforma debt as plaintiff—Limitation.

Where a proforma debt is transferred from the category of a defendant to that of a plaintiff there is no introduction of a new plaintiff within S. 22 of the Lim. Act. 35 C. 1065; 31 B. 91 : 38 C. 342 Ref. Consequently even though the suit would be time barred if instituted on the date of such transposition, it does not affect the suit already instituted.

## LIMITATION ACT (1908), S. 26.

(*Raymond, A. J. C.*) FIRM OF GERIMAL HARISAM, v FIRM OF RUGHUNATH KALIANJI. 66 I. C. 873.

—S. 22—Ex parte decree—Application to set aside—Addition of parties—Limitation. See (1921) DIG. COL. 738 CHANDRIKA RAY v. RAMKUMAR THAKUR. (1922) Pat. 75.

—S. 22—Necessary and proper parties—Distinction between—Addition of necessary party after period of limitation—Effect—Mortgage suit—Addition of puisne mortgage in prior mortgagee's suit—Limitation. See C. P. CODE, O. 31, R. 1. (1922) Pat. 326.

—S. 22—Scope of—Addition of parties—Suit—Appeal.

S. 22 of the Lim. Act does not prescribe any period of limitation for the joinder of a party to a suit under O. 1 R. 10 C. P. Code or to an appeal under O. 41, R. 20, C. P. Code and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. S. 22 applies undoubtedly to appeals as much as to suits in principle, it not in words. But there is a difference in the result arising out of the application of S. 5 of the Lim. Act to appeals and not to suits. A suit in which a defendant is joined after the period of limitation has expired must necessarily be dismissed against him. In an appeal, however, there may possibly be reasons justifying its admission after time under S. 5 (*Halliday, A. J. C.*) LUKSA v. DAJIBA BAHU. 5 N. L. J. 192 : 66 I. C. 217 : (1922) Nag. 213.

—S. 22 (2) — Partnership—Contract — Enforcement of—Change in the constitution of the partnership—Retirement of some partners and addition of strangers — Suit by new firm — Members of old firm substituted after period of limitation—Bar. See C. P. CODE, O. 30 R. 1. 65 I. C. 26.

—S. 23—Applicability—Suit for a declaration of public right of way—Continuing obstruction. See LIM. ACT. ARTS. 144, 120 ETC. 26 C. W. N. 587.

—S. 23 and Art. 120—Dissolution of marriage—Suit for—Divorce—Cause of action.

A suit for dissolution of marriage or for a declaration as to an accomplished divorce is essentially different in cause of action from a suit for restitution of conjugal rights. The cause of action for a suit for restitution of conjugal rights is founded on a breach of the contract of marriage and the breach continues so long as the person of the wife is withheld from the husband and he is denied the undoubted legal rights of her conjugal society. The same cannot be predicated of a cause of action for a suit for dissolution of marriage or for a declaration on that a divorce had taken place between the parties. The latter suit is governed by Art. 120 of the Limitation Act and S. 23 has no application to the case (*Wazir Hasan, A. J. C.*) MAHOMED HAMIDULLAH KHAN v. FAKHRJAHAN BEGAM. (1922) Oudh 109 : 65 I. C. 452.

—S. 23 and Art. 144—Fishery—Immovable property—Adverse possession.



## LIMITATION ACT (1908), S. 26.

A right of fishery is an interest in land and falls under art 144 of the Lim. Act. It is not necessary for the plff. to prove user for 20 years under S. 26 of the Lim. Act. (*B. K. Mullick, and Ross JJ.*) *MESSRS HENRY HILL AND Co v. S. JEOBAJ RAI.* 3 Pat. L. T. 53 : 64 I. C. 346. (1922) P. 9.

—S. 26—Fishery rights—Nature of—How acquired—Limitation—Section if bars operation of S. 28 and art 144 See LIM. ACT, ART. 144. (1922) Pat. 195.

—S. 26—'Person', meaning of—If includes predecessors—Acquisition of easement.

To establish a right under the provisions of S. 26 the plaintiff must prove that it has been enjoyed peaceably and openly as an easement and as of right.

The term 'person' cannot be limited to the narrow meaning of individual, but when a claim to a right of way is made in virtue of the occupation of a piece of land, the term means and includes the person in occupation of the land whether that person is the same individual throughout the period of twenty years or not (*Brown, A. J. C.*) *MAUNG PO HLA v. MAUNG PO SEIN,* 1 Bur. L. J. 99.

—S. 26—Requisites of—Customary right.

A customary right of way for all the villagers is not a case of acquisition by prescription and is not governed by S. 26 of the Limitation Act. (*Chatterjee and Panton, JJ.*) *MAHOMED NURAL HUG v. BAKSU MANDAL.* 65 I. C. 509

—S. 26—Right to take water—Prescription—Lost grant.

S. 26 of the Lim. Act does not govern a claim to take water from a tank where that claim is based on a lost grant. It applies only to cases of easements claimed by prescription. (*Greaves and Panton, JJ.*) *GURU PRASANNA ROY v. FUL CHAND MONDAL* 67 I. C. 244

—S. 26—Right of way—Customary right—Length of user and enjoyment—Lost grant.

A customary right of way is not an easement in the legal sense of that term, and even if it were an easement it is not necessary for the party claiming it to rely on S. 26 of the Act, if the existence of the right could be otherwise established. A right based on custom is established by proof of the custom and it is not necessary that there should be evidence from which a lost grant may be presumed. (*Richardson and Suhrawardy, JJ.*) *ALI MAHOMED v. SHEIKH KATU,* 36 C. L. J. 280

—S. 26—User of intermittent nature—Absence of assertion of right—Acquisition of rights

User of an intermittent nature unaccompanied by assertion of right is very common and arouses no opposition. A pond is not susceptible of actual physical possession by the legal owner and possession follows title, unless the usurper can prove long and continuous exclusion of rightful owner. (*Le Rossignol, J.*) *BHURU v. DATU RAM.* (1922) Lah. 59 : 4 Lah. L. J. 461.

## LIMITATION ACT (1908), ART. 11-A.

—S. 28—Fishery rights—Acquisition of, by adverse possession—Rights of true owner—Extinction of. See LIM. ACT, ART. 144. (1922) Pat. 195.

—Art. 7—Suit for recovery of wages—Fresh contract—Consideration.

Plff. sued the defts. for wages due to him for work done in 1918 as field labourer to deft. No. I. In 1919 plff. made a demand for wages and deft. No. II stood surety promising to pay the amount due in 1919. The trial court held that the suit was time barred against both. On appeal it was held that the suit was not time barred and the claim was decreed. *Held,* in revision that the claim as against the principal debtor was time barred under Art. 7 of the Lim. Act. (*Maung Kim, J.*) *SHWE HLA GYI v. SAN DEVE.* 64 I. C. 361.

—Arts. 10 and 120—Pre-emption—Limitation for—Intended and actual sale.

Art. 120 of the Lim Act applies to suits for pre-emption in respect of a contemplated sale while Art. 10 applies where the sale has actually taken place. (*Halifac, J. C.*) *RAI v. SIDAKALLI.* (1922) Nag. 14. 65 I. C. 959.

—Art. 10—Pre-emption—Share in undivided joint property—Limitation

*Obiter :* A mere share in joint undivided property is not capable of physical possession and Art. 10 of the Lim. Act is inapplicable to such cases. (*Le Rossignol, J.*) *SARDAR ALI v. FAZIL.* 68 I. C. 895.

—Art. 10—Pre-emption suit—Time when begins.

Limitation against the pre-emptor begins from the date of the physical possession of the purchaser and not symbolical possession. (*Coutts and Bucknill, JJ.*) *ACHUTANANDA PARSAT v. BIRI PIRI* (1922) P. 601

—Art. 11—Applicability of—Claim petition by mortgagee—Order declining to adjudicate on the petition—Effect of—Suit on mortgage—Limitation Act art. 11 not applicable but only art. 132 See C. P. CODE O. 21 R. 58, 63. 43 M. L. J. 467.

—Art. 11—Dismissal for default—a Bar of suit

Dismissal of an objection for default bar a suit beyond a year. (*Henderson and Panton, J.*) *HARIPADA (BERMAN) v. SURENDRA NATH SAMANTHA* (1922) Cal. 164.

—Art. 11—Order of attachment before judgment—No attachment actually effected—claim by mortgagee of attached properties—Order disallowing claim—If binding and conclusive. See (1921) DIG. COL. 711. *MUTHIAH CHETTI v. PALANIAPPA CHETTI.* 45 Mad. 90 : 15 L. W. 190. (1922) Mad. 447

—Art. 11 (A) — Auction purchaser—Adverse order under O. 21, R. 99, C. P. Code—Suit for possession—Limitation.

Where an application to be placed in actual possession by an auction purchaser, is disallowed under O. 21, R. 99, C. P. C. a suit for possession,

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must be brought within one year from the date of the order disallowing the application (*Lord Dunedin.*) *BALDEO v KANHAIYALAL.*

3 P. L. T. 33. (P. C.)

———**Art. 11 A—Order under O, 21, R, 98, 99 and 101—Dismissal for default**

Art. 11 A of the Limitation Act applies to an order under O, 21 Rr, 98, 99 or 101 C, P. Code where such order has been made on investigation. An order dismissing an application for default is not an order passed upon investigation. 6 C. L. J. 362 foll, 45 C. 785; 41 M. 985; 31 M. L. J. 247, 26 C. W. N. 126 dist. (*Chatterjee and Pearson, JJ.*) *NIRODE BARANI DAS v MANINDRA NARAYAN CHANDRA.* 35 C. L. J. 537.

26 C. W. N. 853. (1922) Cal. 229; 68 I. C. 524

———**Art. 11 A—Scope of—Suit by decree holder against a third person obstructing possession—Limitation.**

The words 'a person against whom' in art. 11 A of the Lim Act include a decreeholder. 15 C. 521; 19 A. L. J. 53 foll. Where therefore a decree holder brings a suit for declaration of his title against a third person in whose favour an order under O, 21 Rr, 98, 99 or 101 C P C has been made his suit is governed by art. 11 A of the Lim. Act. (*Ryves and Stuart, JJ.*) *BHIKARI DAS v. ABDULLAH.* 44 All. 607; 20 A. L. J. 578.

L. R. 3 A 359 (1922) All 403; 68 I. C. 241.

———**Art 12—Applicability—Execution proceedings against minors—No proper appointment of guardian—Failure to represent—Suit to declare sale null and void—Limitation.** See C. P. CODE, S. 47. 67 I. C. 547.

———**Art 12—Applicability of—Sale voidable and not void—Setting aside.**

Where a decreeholder purchases at an execution without having obtained leave to bid and in spite of a refusal by the court to grant leave the execution sale is not void but merely voidable and an application to set it aside is governed by art. 12 of the Lim Act. (*Lord Phillimore.*) *RAI RADHA KRISHNA v. BISHESHWAR SAHAY.*

16 L. W. 190; 3 Pat L. T. 529; 31 M. L. T. 209 (P. C.) (1922) P. C. 336; 67 I. C. 914; 49 I. A. 312 (P. C.)

———**Art. 12—Applicability of—Execution sale—Suit by strangers to set aside—Limitation.**

Art 12 applies to suits brought by parties to the decree which resulted in the sale or by parties to the proceedings in which the sale took place or by persons claiming through them and does not apply to suits brought by persons who are not bound by the sale. Nor does the article affect a defence set up by a party in possession. (*Broadway and Martineau, JJ.*) *TARA CHAND v. ABDUL AHAD* 67 I. C. 894

———**Art 12 and 96—Execution Sale—Setting aside—Property included by mistake in decree sold in execution—Limitation.**

Where property outside the suit had been included by a mistake in the decree as being liable to be sold in satisfaction of the decree and was sold in execution and two years after the sale the Judgment debtor sued to recover the property,

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*Held* (1) that the execution sale was not a nullity and had to be set aside within thirty days from its date; (2) that plff. having allowed the sale to become final could not sue to recover the property; and (3) that art 12 of the Lim Act barred the suit. (*Macleod, C. J. and Coyajee, J.*) *NAGABHATTA v. NAGAPPA.* 24 Bom. L. R. 423; 67 I. C. 857.

———**Arts. 14 and 120—Suit for amendment of settlement entries—Limitation for C. P. Land Rev. Act (XVIII of 1881) S. 83.**

Art 14 and not Art 120 of the Limitation Act governs a suit for amendment of settlement entries and the period of limitation is one year from the date on which the Record of Rights is made and attested and the assessment is offered (*Hallifax and Dholey, A. J. C.*) *ONKARLAL v. SHALIGRAMLALA* 65 I. C. 970; 5 N. L. J. 199; (1922) Nag. 76.

———**Art. 23—Malicious prosecution—Suit for—Limitation from date of discharge—Revision petition if suspends period**

The period of limitation for a suit for malicious prosecution is one year from the time the plaintiff is acquitted or the prosecution is otherwise terminated. The cause of action would not be suspended because further proceedings might be taken either by Government or the complainant to get the order of discharge set aside. (*Macleod, C. J. and Kanga, J.*) *PURSHOTTAM VITHALDAS SHET v. RAVJI HARI ATHAVLE.* 24 Bom. L. R. 507; (1922) Bom. 209; 67 I. C. 754

———**Art. 29 and 36—Illegal attachment—Standing crops—Suit for damages—Limitation.**

A suit for damages for illegal attachment of standing crops is governed by Art 29 and not by Art 36 of the Lim Act, standing crops being treated as immoveable property for the purposes of the Act. 32 C. 459, 4 N. L. R. 49, 54 Ref. 25 M. L. J. 447 foll, 36 C. 141 dist. (*Kolwal, A. J. C.*) *SURAJMAL GANESHDAS v. PRALHAD.*

18 N. L. R. 96; (1922) Nag. 212; 65 I. C. 665.

———**Art. 29—Seizure under writ—When wrongful—Damages.**

Where a seizure is under a writ of court it is prima facie not wrongful and unless it is shown that the court issuing the writ had no jurisdiction over the subject-matter or that the writ was executed against a person not a party to the decree, a suit for compensation for seizure would not fall within Art. 29 of the Lim. Act. 19 M. 80, 38 M. L. J. 314 foll; 31 M. 431; 42 C. 85; 31 M. L. J. 257 dist. (*Chatterjee and Pearson, JJ.*) *ARJAN BISWAS v. ABDUL BISWAS.*

35 C. L. J. 480; 64 I. C. 513.

———**Arts. 30 and 31—Carriage of goods by railway—Loss—Suit for damages—Limitation.**

Art. 30 of the Lim. Act applies to suits for compensation for losing or injuring goods and the period is one year from the date when the loss or injury occurs. The article refers to losing or injuring goods by the carrier and not by the consignee, that is to say, limitation runs from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. 19 I. C. 47 Ref. Art. 31 of the Lim. Act fixes one year from the date when the goods ought to have been delivered and

## LIMITATION ACT (1908) ART. 31.

applies to suits for compensation for non-delivery. Where no time is fixed for the delivery of the goods, the suit may be instituted within a year after the expiry of a reasonable time for the delivery of the goods. (*Stuart and Sulaiman, JJ.*)  
JUGAL KISHORE v. G. I. P. RAILWAY  
20 A. L. J. 792 L. R. 3 A. 569.  
4 U. P. L. R. (A) 219: 63 I. C. 931

—Art 31, 115—Non delivery of goods consigned—Suit for compensation against carrier—Limitation.

A suit against a carrier for compensation for non delivery of goods consigned to him is governed by Art. 31 and is liable to be dismissed if brought after the lapse of one year from the time the goods ought to have been delivered. Art. 115 of the Act applies only to suits for compensation for breach of any contract specially provided for in the Act. (*Ghose, J.*) LAL MOHAN HAZRA v. E. I. RY AND CO. (1922) Cal 330.

—Arts 81 and 62—Railway—Consignment of goods—Non-delivery owing to defect in address—Sale of goods—Suit for proceeds—Limitation. See (1921) DIG. COL. 743 TARACHAND v. M. & S. M. RAILWAY CO.

30 M. L. T. 21.

—Art. 32—Easement—Perversion.

The appellants who had a right by way of easement to support a thatch against a wall belonging to the plaintiff substituted for the thatcher masonry building and supported the beams necessary for its construction upon the wall in question, thereby increasing considerably the burden upon the wall. *Held* it was a clear case of perversion of a right, and where the perversion first became known to the plaintiff more than two years before the date of the suit, the suit must fall under the provisions of Article 32. (*Stuart, J.*) BISHAMBAR SAHAI v. FANKI DAD (1922) All. 320

—Art 44—Applicability—Hindu minor—Alienation by person who is not a guardian in fact or law. See LIM. ACT, ARTS. 144 AND 44.

68 I. C. 731.

—Arts. 44, 91 and 144—Transfer by guardian—Suit to recover property—Limitation.

A suit to recover property alienated by the de facto as well as de jure guardian of the properties of a minor is governed by art. 44 of the Limitation Act and not by art 91 or art. 144. Among the Gonds of the Central Provinces, a step brother is the de jure guardian of a minor's properties in preference to the mother. (*Halifax A. J. C.*) KOLHU v. BELSINGH, 17 N. L. R. 183: 66 I. C. 303: (1922) Nag 201.

—Art. 45—Crown—Property held under periodical settlement—Variation of revenue—Partition—Order for, by Civil Court—Suit for possession—Limitation. See (1921) DIG. COL. 745 MUDNAPORE ZAMINDARI COMPANY v. NARESH NARAYAN ROY. 30 M. L. T. 279: 61 I. C. 231: (1922) P. C. 241.

—Art. 46—Order under S. 40 (1) of the Bengal Survey Act—Limitation law—Rule of construction. See (1921) DIG. COL. 746 MAHARAJA

## LIMITATION ACT (1908) ART. 52.

OF COOCH BEHAR v. RAJA MAHENDRA RANJAN RAI CHAUDHURI, 66 I. C. 923.

—Art. 47—Applicability of—Possession proceedings initiated under S. 145, Cr. P. Code by younger brother in a joint family—Suit by elder brother—Limitation.

Where a junior member of a joint Hindu family starts proceedings under S. 145 Cr. P. Code ends in an adverse order against him, a suit by his brother more than 3 years after the order for recovery of the property is not barred under art. 47 of the Lim Act. There were nothing to show that the person who started the proceedings under S. 145 Cr. P. Code acted as manager of the joint family and as on his death, the other members got the property by survivorship they could not be said to claim under the person against whom the adverse order was made. 23 C 731. 29 A. L. R. (Lyle, A. J. C.) RAM LAL v. TAKUR DIN. 66 I. C. 678.

—Art 48—Executor—Deposit of minor legatee's money in bank—Breach of trust—Liability of Bank—Basis of—Conversion—Limitation. See EXECUTOR.

24 Bom. L. R. 513.

—Art 49—Scope of—Deposit Suit for recovery. See LIM. ACT, ARTS. 145 AND 49.

26 C. W. N. 772.

—Arts. 49 and 120—Steam launch—Suit for declaration of title and possession—Limitation.

Where there was a prayer in the plaint for a declaration of title to a steam launch and for possession of the launch, the suit was in substance one to recover possession of specific moveable property governed by art 49 and not by art 120 of the Lim Act. The prayer for declaration was unnecessary or at any rate ancillary to the main relief (i.e.) possession. In dealing with an entire estate there are no different periods of limitation for moveable and immoveable property 15 I. C. 545 (1911) 36 M. 383; 21 C 157 (1911) (Pratt and Duckworth, J.J.) PUN AUNG v. BRIJI LAL. 1 Bur L. J. 85.

—Art 52, 56 and 115—Suit for recovery of money due under a contract for supply of materials and construction of flooring—Limitation Act Art 115 applicable. See LIM. ACT ART. 115, 52 and 56. 2 Lah. 376.

—Art 52—Suit for price of goods supplied from time to time—Limitation.

Where a trader has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous one, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. If all the items form but one cause of action, it cannot be contended that a part of it can be barred by limitation and that the rest may not be so barred. (*Mulla, J.*) NAJAN AHMED HAJI ALI v. SALEMAH-OMED PEER-MAHOMED. 24 Bom. L. R. 998.

## LIMITATION ACT, (1908) ART. 52.

—Arts. 52 and 115—*Suit for recovery of price of articles—Limitation*

Where the plaintiff is suing for a sum of money as representing the price of certain articles sold by him to the defendant art. 52 and not art. 115 of the Lim. Act applies to the case. (*Rattigan C. J. GANGA RAM v. NANDA* 65 I. C. 637)

—Art. 52—*Suit for the recovery of price of fruits standing in a garden and sold to defendant—Limitation.*

A suit for recovery of the price of fruits standing in a garden and sold to the defendant is governed by art. 52 of Lim. Act the words "goods" in that article being wide enough to include fruit even before it has been gathered, (*Chevis, J.*) *WASU RAM v. RAHIM BAKHSI* 66 I. C. 120,

—Arts. 52, 65, 115 and 120—*Suit for recovery of the value of grain advanced—Limitation.*

Art. 52 of the Limitation Act refers to suits for the price of goods sold and delivered, and when grain is advanced on a contract that it should be repaid in kind, it is not a case of goods being sold for the words "goods being sold" refer to a case in which the contract is to pay for the price of the goods in money and not to return them in kind 49 I. C. 231 Ref. 2 Lah. L. J. 191 f. ll. To such a case art. 115 of the Limitation Act or art. 65 would apply. (*Chevis and Broadway, JJ.*) *MAHOMED DIN v. SOHAN SINGH* 4 Lah. L. J. 263 : (1922) Lah. 271 : 65 I. C. 691.

—Arts. 57, 64 and 85—*Suit on balance struck—Subsequent advance—Limitation.*

A suit for the recovery of a lump sum due on a book account consisting of a sum in respect of which a balance had been struck and of a further advance in cash is governed by either Art. 57 or 64 of the Limitation Act and not by the Art. 85. 119 P. R. 1908 : 7 P. L. R. 1917 Ref. (*Broadway and Moti Sagar, JJ.*) *NANAK SINGH v. MIHAN SINGH* 4 Lah. L. J. 69 : (1922) Lah. 204.

—Arts. 59 and 60—*Applicability of—Money kept in deposit for safe custody—Liberty to deposit to hand money to others—Form of demand, See (1921) DIG, COL, 747 JOGENDRA NATH CHAKRABARTY v. DINKAR RAM KRISHNA CHETTEL,* 66 I. C. 702,

—Arts. 59, 61 and 120—*Suit for reimbursement under S. 70 of the Contract Act—Limitation Act—Art. 120 applicable. See CONTRACT ACT, S. 70.* 31 M. L. T. 164

—Art. 60—*Banker—Fixed deposit—Due date—Demand and refusal—Limitation.*

Before the expiry of the date shown in a fixed deposit receipt given by bank, the money does not remain in the bank "under an agreement that it would be payable on demand" Once the date fixed as the due date expires, the amount becomes recoverable and the period of limitation is 3 years from when a demand is made (*Kanhaya Lal and Sulaiman, JJ.*) *THE OUDH COMMERCIAL BANK, LTD. v. RAI BAHADUR B GANGA PRASAD* L. R. 3 A. 507.

## LIMITATION ACT, (1908) ART. 61.

—Arts. 61, 99 and 120—*Contribution—Co-sharer—Right to be reimbursed in respect of money realised by creditor by coercive process.*

The plaintiff and the defendants were owners of five different jotes. In execution of one of the decrees obtained by the landlord in respect of the jotes one of them was put up to sale and purchased by the plaintiff. The landlord took out the amount of his dues in respect of that jote out of the sale proceeds and in respect of the other jotes he attached the balance and ultimately withdrew it. The sale of the first jote was set aside, but the plaintiff failed to obtain restitution of the sale proceeds. The plaintiff thereupon sued the defendants for contribution.

Held that the joint liability of the Plaintiff and the defendants having been discharged by the money of the former there was no doubt that the defendants obtained the benefit of the same.

Though under Sec. 174 of the Bengal Tenancy Act, the plaintiff being one of the judgment-debtors could not purchase at the sale, the plaintiff and the defendant having bid for the jote and the plaintiff's bid having been accepted, the purchase by the Plaintiff was not void but only voidable. In any case after the sale was set aside the money deposited became the money of the plaintiff alone and should be treated as having been lawfully paid or appropriated in payment of the decree for rent.

So far as the right of contribution against co-sharers is concerned it does not matter whether the money is actually handed over by the party seeking contribution or is realised from him by coercive process by the creditor. In either case the right to contribution arises from the fact that one of the co-sharers has paid in excess of his share and the joint liability of all the co-sharers has been discharged.

The suit was not barred under Arts. 61 or 99 of the Limitation Act, having been brought within three years of the setting aside of the sale or under Art. 120, having been brought within six years of the date of payment (*Chatterjee and Panion, JJ.*) *GOPENATH MOONSHI v. CHANDRANATH MOONSHI,* 26 C. W. N. 340.

—Art. 61—*Fine for using land for non-agricultural purposes—Suit for recovery—Limitation. See LIMITATION ACT, ARTS 120 AND 61.* (1922) Bom. 257

—Art. 61—*Purchase—Part consideration—Sum to be paid to a third person—Failure to pay.*

Part of the consideration in a case of purchase of a property was a sum of money to be paid by the vendee to the creditor of the vendor. The vendee failed to pay. On being sued by the creditor for the debt the vendor had to pay double the amount, principal and interest included. In a suit by the vendor for compensation Held, the plaintiff's cause of action accrued to him on the date he was obliged to pay to his creditor the sum of money which the defendant was himself under an obligation to pay (*Lindsay, J.*) *BRIKANT PANDE v. PANDIT JAMNA DHAR DUBE,* (1922) All. 409.

## LIMITATION ACT, (1908) ART. 61.

— — — — — Arts. 61 and 115—*Suit for contribution—Share of costs and money due in redemption—Commencement of time.*

In the absence of a finding of a contract to pay at the conclusion of a litigation, defendant's liability to pay cannot be postponed till the conclusion of the litigation. The suit for the recovery of a share of costs and money due for the redemption is barred under Art. 61 or 115 if brought more than three years after payment. 3 C. L. J. 93 distinguished. (*Newbold and Panton, JJ.*) *SHAIK JAMAL v SHAIK CHAND* (1922) Cal 79

— — — — — Arts. 61 and 81—*Suit by surety against principal debtor—Limitation.*

A suit by the sureties against the principal debtor for recovery of the moneys paid by the former on behalf of the latter is governed by art 81 and not by art 61 of the Lim Act. (*Le Rossignol and Campbell, JJ.*) *KUNJ LAL v GULAB RAM*, 55 P. L. R. 1922. 67 I C 364

— — — — — Art. 62—*Executor—Deposit of minor legatee's money in bank—Drawing out of money by executor—Liability of Bank—Money had and received—Limitation* See EXECUTOR.

24 Bom. L. R. 513.

— — — — — Art. 62—*Money had and received—Suit for—Limitation*

Art 62 of the Lim Act is applicable where the defendant has received money which in justice and equity, belongs to the plaintiff under such circumstances as in law renders the receipt of it a receipt by the defendant to the use of the plaintiff. The article most nearly approaches the formula of money had and received, by the defendant for the plaintiff's use, it read as description and apart from the technical qualifications imported in English law and procedure 32 C. 527; 2 C. 393, 46 C. 670 P. C. Ref. (*Mookerjee, Walmsley and Pearson, JJ.*) *BIMAN CHANDRA DUTTA v. PRAMATHA NATH GHOSE*, 49 Cal 886. 36 C. L. J. 295: (1922) Cal, 157: 68 I. C. 94.

— — — — — Arts. 62, 89, 109, 120 and 127—*Joint family—Partition—Collection of debts and profits of immoveable property by one member—Suit by another for account of the same and for his share—Limitation.*

Three brothers had been members of an undivided Hindu joint family. In 1905 they separated and appointed arbitrators to divide the ancestral properties. Before division was complete disputes arose and the properties remaining undivided were left in the hands of different members of the family as tenants in common until in 1917 the suit was brought for partition and for account. Moneys were received from debtors in respect of debts which were owned in common and rents and profits partly in money and partly in kind were received in respect of lands thus held in common. The defendants set up limitation in the suit for account and for payment of the shares of the plaintiff.

Held by the Full Bench that Art. 62 of the Limitation Act does not apply to such a suit in respect of the moneys collected by the defendant. A suit for money had and received does not lie by

## LIMITATION ACT, (1908) ART. 64.

one tenant in common against another who has received more than his share. The only appropriate action would be one for an account in which the tenant in common who collected the money would be entitled to all just expenses such as the expense incurred by him for the collection.

If the tenant in common who collected did so under an express or implied agency for all tenants in common, the proper article applicable would be article 89 of the Limitation Act.

The cause of action does not come into being until there has been something done which shows that the person who got the money into his possession is holding it adversely to the plaintiff.

Art. 109 of the Limitation Act does not apply in respect of the profits of the immoveable properties in the case because receipt of profits by one of several tenants in common is not wrongful.

Art. 127 of the Limitation Act does not apply to the case as regards the money and the profits received. That article applies only to a suit for share of the property which is the property of a joint family at the date of suit and is in terms inapplicable to property which by reason of a division prior to suit has ceased to be the property of a joint family and is held by the members of the family as tenants in common.

The case law on the point discussed. (*Schwabe C.J. Ayling, Coutts Trotter, Kumaraswami Sastri and Devadass, JJ.*) *YERUKOLA v. YERUKOLA*.

45 Mad. 643. 42 M. L. J. 507:

(1922) M. W. N. 215. 30 M. L. T. 279:

15 L. W. 595 (1922) Mad. 150 (F. B.)

— — — — — Arts. 62 and 120—*Suit by one co-sharer landlord against another for share of rent collected.* See (1921) DIG. COL. 750. *BHUBANESWAR BHATTACHARJEE v. DWARKESHWAR BHATTACHARJEE* 66 I C. 876

— — — — — Art 62 — *Suit for money drawn by pleader—Limitation*

A suit for money received by the pleader of the plaintiffs for their use is governed by Art. 62 of the Lim Act. (*Greaves, J.*) *RAMHARI KAPALI v ROHINI KANTA CHAKRAVARTY* 35 C. L. J. 330: (1922) Cal. 499. 67 I C. 943

— — — — — Arts. 64 and 85—*Open and Current account*

Where there was a current account and a mutual one, and the plaintiffs had claims against the defendants for money advanced plus interest and the defendants could set against those claims, their share of any profits made in the transaction in which the parties had a common interest, but the account was not open and current at the time of the suit and the account had been closed and had been settled by the striking of a balance. Held, the article applicable is Art. 64 which applied to a suit for money payable for money found to be due on accounts stated. (*Le Rossignol and Abdul Quadir, JJ.*) *THE FIRM OF GURUDAS RAMKOTURAM v. BHAGWAN DAS*.

(1922) Lah 182: 68 I C. 815.

— — — — — Art. 64 — *Ruzukhata* — Several khatas between parties—Khatas treated as one transaction. See (1921) DIG. COL. 750 *NARAYAN LAXMAN ADHIKARI v. CHAPSI DOSA* 46 Bom. 419:

(1922) Bom. 168: 64 I C. 1002.

## LIMITATION ACT (1908), ART. 64.

—Arts. 64, 106 and 115—*Suit on a balance of account—Account stated—Limitation—Novation.*

Having regard to the fact that the parties were partners and there must have been debit and credit entries between them and the transaction sued on represented a balance struck between them in supersession of the detailed debit and credit entries in the earlier account, the entry in question in the case was treated as an account stated and the suit thereon was held to be governed by art 64 and not by art. 106 of the Lim Act. (*Le Rossignol and Martineau, JJ*) **NAND LAL v PARTAB SINGH** 3 Lah. 326 : (1922) Lah. 425

—Art 64—*Suit on balance struck—Subsequent advance—Limitation. See LIM. ACT, ARTS, 57, 64 AND 85.* 4 Lah. L. J. 69.

—Arts 65 and 115—*Contract of loan—Grain advanced on condition that it should be repaid in kind—Suit for recovery—Limitation Act Art 65 or 115 applicable. See LIM. ACT, ART 52, 5 AND 115.* 65 I. C. 691.

—Arts 65 and 115—*Suit for recovery of debt payable in kind with claim for money—Limitation*

The period of limitation for a suit for recovery of a debt in kind payable in kind is three years and such a debt cannot be combined with one repayable in money so as to make the longer period of limitation applicable to both. 41 P. R. 1914 Foll (*Broadway and Harrison, JJ*) **LABH SINGH v. THE FIRM OF RURCHAND TULSI RAM.**

4 Lah. L. J. 64 : (1922) Lah. 122.

—Art. 66—*Applicability of —“Single bond”—Meaning of.*

A bond merely for the payment of a certain sum of money, without any condition in or annexed to it is called a simple or single bond. The term “single bond” is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more. Where under a bond power is given to the creditor to demand the whole of the money due under the bond whenever default is made in payment of the interest for any two years consecutively it is impossible to predicate of the bond that there is any certain “day specified for payment” within art. 66 of the Lim. Act. (*Wazir Hasan, A. J. C.*) **HORI LAL v. THAMMAN LAL.**

90, L. J. 416.  
4 U. P. L. B. (O. C.) 103.

—Art. 66, 68 and 75—*Mortgage—Provision for payment of interest annually—Default—Option to claim whole amount—Suit to enforce bond—Limitation. See LIM. ACT, ART. 80 AND 116.* 20 A. L. J. 819.

—Art. 75—*Cause of action.*

When the whole money is to be paid on the non-payment of two or three instalments, the cause of action arises on the default of two instalments. Acceptance of payment of first instalment beyond the time fixed, though amounting to a waiver, does not affect the cause of action arising by subsequent non-payment of two instalments. (*Prideaux, A. J. C.*) **WACHHI v. MAROTI.** (1922) Nag 184

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## LIMITATION ACT (1908), ART. 80.

—Art. 75—*Instalment bond—Default—Running of time.*

Art 75 of the Limitation Act applies to every suit on a bond payable by instalments containing a default clause. It is immaterial whether the payment of the whole of the amount springs from a single default or from more than one default. 47 P. R. 1903, 38 Mad 374 rel. (*Shadi Lal, C. J. and Abdul Kadir, J.*) **SIBA SINGH v. SUNDAR SINGH** 3 Lah. L. J. 522.

—Art. 75—*Instalment bond—Default—Suit for recovery of money.*

Where the money due under an instalment bond is payable in three annual instalments and on default of payment of one of them the whole of the money due was to be immediately payable, a suit by the creditor for recovery of the money more than three years after the date of the first default is barred by limitation under Art. 75 of the Lim. Act. 13 C. W. N. 1010; 36 Cal. 394 foll. (*Pearson, J.*) **SYAMA CHARAN BARMAN v. NARATTAM BORMAN.** 65 I. C. 257.

—Art. 75—*Instalment bond—Suit for recovery of money due—Default—Waiver.*

Where in a suit on an instalment bond the question arises whether the suit is barred on account of default in payment of a prior instalment, the point to consider is whether the plaintiff had an option to waive his right to bring a suit at once on the happening of the default and whether, as a matter of fact, he did exercise his right of waiver. The test of waiver may be found in the prayer in each suit—did he claim the whole amount, if so there was no waiver, or only the amount due on unpaid instalments not timebarred. 11 A. L. J. 89; 35 A. 455, 16 A. L. J. 929, 30 A. 123 Ref. (*Ryves, J.*) **JIWAN MAL v. JAGESHAR KASONDHAN.**

L. R. 3. A. 237. (1922) All. 113 : 66 I. C. 655.

—Arts. 80 and 66—*Bond—Money to be repaid with interest after fixed period—Default in payment of interest entitling creditor to call for whole amount—Suit to enforce bond—Limitation.*

Under the terms of a bond, the principal sum was Rs. 500, interest was agreed to be paid at the rate of 6 p. c. per annum every year and in default of payment of interest for any year compound interest was to be paid. The whole amount of principal and compound interest was agreed to be paid within a period of 7 years. The bond further provided that the lender would have the liberty to demand the repayment of the entire sum due under the bond on the happening of default in payment of the interest due for any two consecutive years. There was a default in payment of interest for 2 consecutive years. In a suit on the bond it was contended that it was barred by limitation. *Held* that the suit was governed by art. 80 and not by art. 66 of the Lim. Act. The creditor under the terms of the bond acquired merely an option to recall the whole of the money due thereunder on the happening of default in payment of the interest for 2 consecutive years and the breach of the original promise for the repayment of the money within 7 years gave another remedy to him to enforce at the end of

## LIMITATION ACT (1908), ART. 80.

that period (*Wazir Hasan, A. J. C.*) HORI LAL  
v. THAMAN LAL. 90 L. J. 416

4 U P L. R., (O. C.) 103.

—Art. 80 and 116—Bond payable in twelve years—Provision for periodical payment of interest—Default—Effect of.

Under a mortgage the period fixed for redemption was 12 years but the mortgagor was to pay interest annually. In case of default it was open to the mortgagee either to add the interest due to the principal and charge compound interest or to sue for the principal at once. *Held*, that the bond fell under art. 80 read with art. 116 of the Lim. Act and time began to run against the mortgagee from the date of the first default in payment of interest. Consequently a suit for sale on the mortgage or for a simple money decree against the mortgagor brought beyond the first date of first default, would be barred by limitation. (*Mears C. J. Piggott and Walsh, Ryves and Sulaiman, JJ.*) SHIB DAYAL v. MEHARBAN. 20 A L. J. 819

—Art. 81—Principal and surety—Payment by surety—What constitutes—Starting point of limitation.

Under Art. 81 of the Lim. Act time begins to run from the time when the surety pays the creditor and the principal debtor remains liable to be sued for three years only after this payment has been made. Payment may be made in more ways than one and if moneys in court deposit are placed to the credit of the decree-holder, limitation against the principal debtor starts from that date and not from the date when the creditor actually draws out the money. (*Swinhoe, A. J. C.*) YINKE SUPAYA v. MAUNG KIN. 60 I. C. 23.

—Art. 81—Suit by surety against principal debtor—Limitation. See: LIM. ACT, ARTS. 61 AND 81. 67 I. C. 364

—Arts. 83, 116 and 132—Contract to indemnify—Charge—Enforcement of—Limitation. See (1921) DIG. COL. 750 RAMASWAMI IYENGAR v. KUPPUSWAMI IYER. 66 I. C. 554.

—Art. 83—Suit by agent against principal for recovery of loss—Contract of indemnity—Date of payment—starting point—Limitation. See (1921) DIG. COL. 751 FIRM OF KADARI PERSHAD CHHEDDI LAL v. HAR BHAGWAN. 66 I. C. 900.

—Arts 83 and 116—Vendor and purchaser—Indemnity—Breach of contract—Limitation.

A suit to recover compensation for the breach of a contract to indemnify the vendee against the claims of a mortgagee is governed by Art. 83 to the Limitation Act or if the contract is registered by Art. 116 of the Act. The starting point is the date when the purchaser was compelled to pay off the mortgagee. (*Broadway and Abdul Kadir, JJ.*) ABDUL AZIZ KHAN v. MUHAMMAD BAKSH. 2 Lah. 316 : 3 Lah. L. J. 542 : 64 I. C. 431.

—Art. 85—Applicability—Test of.

The test of applying Art. 85 is mutuality and reciprocity; therefore where there are entries on one side showing cash advances, price of cloth sold, payment made to third person on behalf of

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the defendants for things supplied and commission charged, for purchases made by plaintiff for defendants and on the other side there are entries showing that the plaintiff firm received various kinds of grains from the defendant and having sold them in the market credited the proceeds to the defendants, the suit comes under Art. 85 of the Limitation Act. Nature of mutual open and current accounts fully considered (*Abdul Raoof and Harrison, JJ.*) ABDUL HAQ v. THE FIRM SHIVJI RAMU KHEM CHAND. (1922) Lah. 338.

—Art. 85—Mutual account—Advance of money by plaintiff—Grain sent by debt. See (1921) DIG. COL. 751, FIRM OF RATAN CHAND JOWALA DAS v. ASA SINGH. 4 Lah. L. J. 217 : (1922) Lah. 188

—Art. 85—Mutual open and current account—Limitation for suit on.

Under art. 85 of the Lim. Act the Court has to consider whether the account between the parties was mutual, open and current indicating reciprocal demands between the parties. It is not essential that the balance should in fact have been in favour of one party at some stage. It is enough if the dealings are such that the balance might have been in favour of either party. 23 Bom. L. R. 540 Ref (*Shah A. C. J. and Crump J.*) SATAPPA JAKAPPA v. AUNAPPA. 24 Bom. L. R. 1284.

—Art. 85—Mutual, open and current account—Nature of.

Where in respect of transactions between the parties no balance was struck and payments were made by one party not in respect of any particular transaction, but in respect of the account generally and hundies were drawn from time to time by one party at a time when the balance was decidedly in the other party's favour. *Held* that the transactions constituted a case of mutual open and current account with reciprocal demands within the meaning of Art. 85 of the Limitation Act (*Daniels, A. J. C.*) BANKE LAL v. KANHAIYA LAL. (1922) Oudh 124.

—Arts. 85 and 64—Mutual open and current account—Striking of balance—Suit for recovery of money—Limitation.

Where there were mutual dealings between the parties, though balances were struck from time to time, they were merely acknowledgments and not agreements to pay. The case is one not of a stated account but of a mutual, open and current account where there have been reciprocal demands between the parties and a suit for recovery of money due on such account would be governed by art. 85 and not by art. 64, 16 P. R. 1916; 32 A. 11; 22 B. 606 Foll. (*Chevis and Harrison, JJ.*) JAWALA DAS v. HUKAM CHAND. (1922) Lah. 316 : 66 I. C. 387.

—Art. 85—Mutual open and current account—Test of.

The fact that the balance of an account was always in favour of the same party does not prevent the account from being mutual. The test is the intention of the parties. (*Hallifax, A. C. J.*) PANDURANG v. KALLUDAS. 65 I. C. 881

## LIMITATION ACT (1908), ART. 85.

———Arts. 85 and 115—*Mutual open and Current account—Test of mutuality—Adjustment when effective to save limitation.*

Unless the account is a mutual open and current account an adjustment in the presence of the parties does not furnish a fresh starting point of limitation. An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. From this it follows that such an account comes under the term of open account, in so far as it is running unsettled or unclosed. The test of mutuality, is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. 42 C. 1043; 15 C. W. N. 882; 6 C. L. J. 158; 17 M. 293, 5 C. 759 Rel. (*Coutts and Ross, JJ.*) *GOPAL RAI v. HARCHAND RAM ANANT RAM.*

3 Pat. L. T. 492; 66 I. C. 30 (1922) P. 364

———Art. 85—*Mutual, open and current accounts—Test of.*

Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only though made of debits and credits.

Where one party only makes payments to or for or on account of, the other and that other only from time to time makes payments in repayment, the accounts cannot be said to be mutual within the meaning of art. 85. (*Robinson, C. J. and Macgragor, J.*) *ARUNACHELLAM CHETTY v. SANDERSON.*

11 L. B. R. 369  
1 Bur. L. J. 240. 68 I. C. 928.

———Art. 85—*Mutual, open and current account—What constitutes—Mutual demands.*

Although the account between the parties is a current and open one yet to render Art. 85 of the Lim. Act applicable it is also necessary that each party must have a demand against the other. Where however it has not been shown that the defendants-respondents could have made any such demand during the currency of the account the requirements of Art. 85 have not been fulfilled.

6 C. L. J. 158; 17 M. 293; 34 M. 513; 27 I. C. 879; 22 B. 606; 21 I. C. 773. 32 A. 11 and 17 I. C. 69 Ref. (*Shadi Lal and Broadway, JJ.*) *THE SHOP HARDILAL-RAM v. POKHAR DAS.*

3. Lah. L. J. 362.

———Art. 89, 109 and 120 — Co-sharers—Hindu joint family—Division in status—Collection of outstandings by one member—Suit by other members for recovery of their share—Limitation. See LIM. ACT. ART. 62, 89, ETC.

(1922) M. W. N. 215.

———Art. 89 and 120—*Suit against agent after death of principal—Position of agent—Trustee—Limitation.*

Where a person acted as *gomastha* of J until J's death in July 1912, and then he acted as agent under J's widow, in a suit more than three years after her husband's death, against the agent for accounts from 1894 to 1915.

Held, that Art. 89 of the Lim. Act applied to the case and the claim for accounts for the

## LIMITATION ACT (1908), ART. 91.

period up to the death of J. was barred by limitation as the agency was terminated on J's death and as the suit was brought more than three years after J's death. 43 Cal. 248, 44 Cal. 1 foll. As the agent was not sued for any act done by him after the death of his late principal, which he might have done as a trustee, neither S. 209 of the Contract Act nor Art. 120 of the Limitation Act applied to the case. (*Chatterjee and Panton, JJ.*) *SM SARASHIBALA DASI v. CHUNI LAL GHOSH.*

26 C. W. N. 320; 65 I. C. 219 (1922) Cal. 53.

———Arts. 89, 115 and 116—*Suit for accounts against a rent Collector—Omission to render accounts, when amounts to a refusal—Applicability of Arts 115 and 116 See (1921) DIG. COL. 752 PRAN RAM MOOKERJEE v. MAHARAJ KUMAR.*

49 Cal. 250; 35 C. L. J. 111; (1922) Cal. 355; 68 I. C. 562.

———Art. 91 — Acknowledgment — Requisites of—Mortgage. See (1921) DIG. COL. 733 PRASANNA KUMAR ROY v. NIRANJAN ROY

48 Cal. 1046; 26 C. W. 213. 64 I. C. 988.

———Art. 91—*Deed ab initio void—Suit to set aside—Limitation.*

Art. 91 of the Limitation Act has no application to a suit to avoid a document which is *ab initio* void and invalid. (*Bucknill, J.*) *ABDUL RAHMAN v. WALI MAHOMED.*

65 I. C. 224.

———Arts. 91, 95 and 120 — Deed void ab initio—Suit to set aside—Limitation—Arts. 91 and 95 not applicable. See LIM. ACT. S. 18 AND ARTS. 91, 95, AND 120. 26 C. W. N. 479.

———Arts. 91 and 120 — Registered document admitting adoption—Suit to set aside and for declaration.

Where a person executes a registered document declaring he had adopted another, a suit for a declaration of its invalidity would fall under Art. 91. If it is for declaring that it never took place art. 118 would apply.

Quaere whether art. 120 would apply at all in the circumstances (*Rafique and Piggott, JJ.*) *KUMAR UDIT NARAYAN SINGH v. DIWAN RANDHIR SINGH.*

20 A. L. J. 945; L. R. 3 A. 642.

———Arts. 91 and 144—*Scope of—Suit by co-sharer for setting aside lease by lambardar—Limitation.*

Where a co sharer sues for a declaration that a lease granted by a *lambardar* is invalid against him the suit is in time so long as the co-sharer's right to the property subsists. Art. 91 of the Limitation Act applies only where the plaintiff or his predecessor-in-title was a party to the instrument sought to be set aside. 1 N. L. R. 129; 83 P. R. 1916 Ref. (*Drake Brockman, J. C.*) *KUNJILAL v. CHANDRA SINGH.*

17 N. L. R. 169; 64 I. C. 775.

———Art. 91—*Suit to set aside gift for undue influence—Starting point of limitation—Cessation of undue influence—Onus of proof. See (1921) DIG. COL. 753 RAJA RAJESWARA SETHUPATHI AVERGAL v. KUPPUSWAMI AIYAR.*

68 I. C. 352.



## LIMITATION ACT (1908), ART. 91.

—Arts. 91, 120—*Suit to set aside sale deed—Limitation—Money decree holder—No attachment made—Suit if lies.*

Art. 91 of the Lim. Act can only be applied to cases where the person who wants to set aside the sale deed is himself or through his predecessors in title a party to the instrument. Where the suit by mortgagee is in effect one for a declaration that a sale by his mortgagor to a third party is null and void, Art. 120 applies to the case.

Where on account of the invalidity of the mortgage deed, the mortgagee obtained only a money decree and without attaching the property he sued for a declaration that the sale of the property to another was invalid.

*Held*, the proper relief in the case would be to attach the property and wait till the attachment had been removed and then sue to have his right to attach declared (*Praet and Ducworth, JJ*) *MI SAN MA KHAING v. SHUE BA.*

1 Bur L J 106.

—Arts. 91—*Transfer by tenant in contravention of statute—Suit by a landlord to avoid transfer—Limitation.*

A suit by a landlord to avoid a transfer made by a tenant in contravention of S. 43 of the C. P. tenancy Act is not governed by Art. 91 of the Limitation Act. (*Mitra A. J. C.*) *SETH SAGUN-CHAND v. LALA CHHABILIRAM,* 18 N. L. R. 11: (1922) Nag. 60.

—Art. 95—*Mortgage—Holding not alienable—Simple money decree claimed—Fraudulent representation of alienability—Effect. See LIM. ACT, ART. 116 AND 95.* 9 O. L. J. 171

—Arts. 96, 97—*Pre-emption—Mutation—Failure of consideration*

The plaintiff impleaded in a pre-emption suit one of the vendees, who realised the entire pre-emption money under a mistake of fact that he alone was the vendee. The pre-emptor's claim for mutation after formal possession was resisted by the other vendees on the ground that they were not impleaded in the pre-emption suit. In a suit by the pre-emptor for the possession of the property released in favour of the vendees not impleaded in the pre-emption suit or in the alternative for the proportionate refund of the consideration held the cause of action arose when the pre-emptor's claim for mutation was resisted i. e. when the consideration failed or when the mistake of fact was discovered. 24 M. 27 Ref. (*Kanhaya Lal J.*) *RAM BALI SINGH v. SHIAM SUNDER MISIR.* (1922) All. 475.

—Art. 97—*Suit on consideration that fails—Vendor and purchaser—Limitation.*

Where a person is entitled to sue for specific performance of a contract for sale of land he can also sue for refund of the purchase money whether it has been paid in cash or has been set off against debts due by the vendor. In either case the starting point of limitation under art. 97 of the Lim. Act is three years from the date of the payment or set-off. 9 A. 47, 57 Ref. (*Maung Kin, J.*) *MAUNG AUNG BA v. MAUNG AUNG PO.*

1 Bur. L. J. 198

## LIMITATION ACT (1908), ART. 105.

—Arts. 97 and 120—*Suit for damages—Breach of covenant for title—Limitation—Starting point*

Where an execution sale is declared a nullity for want of any saleable interest in the judgment debtor a suit by the purchaser for recovery of the purchase money is governed either by art. 97 or by art. 120 of the Lim. Act and in either case the starting point is the date of the decree of the first court declaring the sale to be invalid and not of the appellate court confirming that decree (*Phillips and Ramesam, JJ.*) *NADU KANDEELA KATH PAKURAN v. KUVATTIL KANDAN KUTTY.*

16 L. W. 285 · 31 M. L. T. 169 (H. C.). (1922) M. W. N. 561.

—Art. 97 and 120—*Suit to recover amount paid under legal process—Limitation. See (1921) DIG. COL. 754 FIRM OF BALKISHEN DAS v. DEVI SARAN.* 4 Lah L. J. 164: (1922) Lah. 103.

—Art. 97—*Suit by vendee for purchase money—Limitation—Starting point—Date of dispossession.*

Where a vendee under a deed of sale had been given possession and was subsequently dispossessed under a decree of court obtained by a third person, a suit for damages by the vendee against the vendor is governed by art. 97 of the Lim. Act. The starting point of limitation is not the date of the decree of court but the date of actual dispossession of the vendee 46 C. 670 distinguished 14 M. L. T. 524; 30 M. L. J. 449 38 M. 887; 32 I. C. 176 Relied on. (*Ayling and Odgers, JJ.*) *HARI HARAMANGALATH SANKARA VARIYAR v. CALATHIL UMMAR* 43 M. L. J. 721: (1922) M. W. N. 634: 16 L. W. 684.

—Arts. 99 and 120—*Cosharers—Money realised by coercive process from one—Suit for reimbursement—Limitation. See LIM. ACT ART. 61, 99, ETC.* 26 C. W. N. 340.

—Art. 103 104 and 116—*Suit for dower debt—Registered agreement:*

Where dower is payable under a registered instrument executed by the husband in favour of the wife a suit for dower whether it is brought by the wife during her life time or whether it is brought by her heirs after her death is a suit for compensation for breach of contract in writing registered within the meaning of art. 116 of the Lim. Act. The distinction between prompt and deferred dower seems immaterial in this connection. The wife may sue the husband for her prompt dower at any time even during the continuance of the marriage. The wife may also sue the husband for her deferred dower in the event of the marriage being dissolved by divorce. Where the suit for dower is brought by the heirs of the wife after her death it is still a suit on the contract the contract being one which the heirs are entitled to enforce. (*Richardson and Suhrawardy, JJ.*) *ASISTULLA v. DANISA MAHOMED.* 36 C. L. J. 379.

—Art. 105—*Mortgagor and mortgagee—Suit for recovery of surplus collections—Limitation. See (1921) DIG. COL. 755, PRASONNA KUMAR MANDAL v. NILAMBAR MANDAL.*

(1922) Cal. 189: 64 I. C. 75.

## LIMITATION ACT. (1908) ART. 106

—Art 106—*Partnership of two persons—Death of one—Whether partnership continued by the widow of the deceased partner—Contract Act, S. 253.*

The principle underlying S. 253 (10) of the Contract Act is that where the parties to a contract agree expressly or by necessary implication to continue the partnership as if no dissolution has taken place upon the death of one of the original partners the suit for accounts and dissolution would not be barred under Art. 106 of the Limitation Act even though brought more than 3 years after the death of the original partner. 101 P. R. 1914 followed. (*Abdul Ruof and Abdul Quadir JJ.*) *HARJCHAND OF DELHI v JUGAL KISHORE OF DELHI* (1922) Lah 349. 68 I. C. 722

—Art 109—*Mesne profits—Calculation of—Limitation. See (1921) DIG C.O.L. 756 SURAJ PRASAD PANDEY v SOMRA MAHTO,*

68 I. C. 903.

—Arts. 109 and 120—*Suit on mortgage—Profits received by transferee pendente lite—Suit by purchaser at mortgage sale to recover the same.*

The words "wrongfully received" in art. 109 of the Limitation Act include receipts of profits that cannot be legally substantiated. It was held in a suit between the purchaser at a mortgage sale and the holder of a usufructuary mortgage granted by the mortgagor after the passing of the mortgage decree that the usufructuary mortgage was void as against the purchaser owing to the application of the doctrine of *us pendens*. The purchaser having sued the usufructuary mortgagee to recover rents realised by the latter from certain tenants of the property before the plaintiff obtained possession under the purchase. *Held*, that art. 109 of the Limitation Act applied to the case. (*Chatterjee and Pantou, JJ.*) *NAGENDRA NATH PAL v. SARAT KAMINI DAS,*

26 C. W. N. 386 : (1922) Cal 235 : 66 I. C. 873

—Arts. 113 and 132—*Award—Creation of charge—Enforcement of—Limitation.*

A suit to redeem a charge declared by an award is not a suit to enforce specific performance of a contract and is not governed by art. 113 of the Lim. Act (*Lindsay and Kanhaiya Lal, JJ.*) *SURAT SINGH v. UMRAO SINGH.*

(1922) All. 410 : L. B. 3 A. 383 : 20 A. L. J. 611

—Art 113—*Contract—Specific performance—Suit by one alleging himself to be beneficially entitled.*

The terms of art. 113 of the Lim. Act relate to the performance of any contract. A suit by the plff to enforce specific performance of a contract for conveyance of immoveable property is governed by art. 113 even though the defendant was prior to the execution of the contract for conveyance, bound to hold the property for the benefit of the plaintiff or his predecessor in title. The contract for conveyance having treated defendant as the legal owner, the plaintiff was bound to sue for enforcement of the contract within the time limited by art. 113 (*Lord Carson,*)

## LIMITATION ACT, (1908) ART. 116.

*SUBBARAYA PILLAI v. RAJAKUMARA VENKATA PERUMAL RAJA BAHADUR.* 16 L. W. 169.

(1922) P. C. 345. 45 Mad. 641. 49 I. A. 335. 68 I. C. 172 : 13 M. L. T. 146 : (P. C.)

—Art. 113—*Specific performance—suit for starting point of limitation.*

In the absence of a date fixed for performance of the contract time does not commence to run till there has been a demand and refusal. 5 C. 175 Rel. (*Duckworth, J.*) *MA MA GYE v. MA NYO PO.* 1 Bur. L. J. 171.

—Art 115—*Contract of loan—Grain advanced on condition that it should be paid in kind—Suit for recovery—Limitation. See LIM. ACT. ARTS. 52, 65 AND 115.* 65 I. C. 691.

—Art. 115, 52 and 56—*Materials supplied and work done by Contractor—Suit for money due on contract—Compensation. meaning of—*

Where plff. agreed to supply marble for a flooring and also to construct the flooring in consideration of his being paid a certain sum of money for every square foot of the flooring done, which rate included the price of materials supplied as well as the work done, a suit for balance of the money due to him on the basis of the contract is governed by art. 112 of the Lim. Act and not by art. 120.

The plaintiff's claim as laid was an indivisible one and could not be split up into two portions. Therefore neither art. 52 nor art. 56 of the Lim. Act was applicable to the case.

Art. 115 of the Lim. Act is a general provision applying to all actions *ex contractu* not specially provided for otherwise, and the present claim certainly arose out of a contract entered into between the parties. The word "Compensation" in art. 115 as well as in art. 116 has the same meaning it has in S. 73 of the Contract Act and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract, 6 C. 94 : 3 A. 600 foll. (*Shadi Lal, C. J. Chatterjee and Harrison, JJ.*) *MAHOMED GHASITA v. SIRAJ-UD-DIN* (1922) Lah. 198. 2 Lah. 376 : 66 I. C. 490 (F. B.)

—Arts. 116 and 95—*Mortgage—Holding not saleable—Simple money decree claimed—Fraud—Effect.*

A suit for sale being brought on a mortgage of a cultivatory holding, the defendant pleaded it was not saleable, whereupon plaintiff claimed a simple money decree, also alleging that there was a fraudulent misrepresentation about the alienability of the holding :—

*Held* if fraud is established, the suit will be governed by art. 95 ; if not, by Art. 116. (*Dalal, A. J. C.*) *THAMMAN SINGH v. DALCHAND.*

9 O. L. J. 171 : 4 U. P. L. B. (O. C.) 40 : (1922) Oudh. 113. 67 I. C. 595.

—Art 116 and 132—*Mortgage by manager of joint Hindu family—No necessity—Personal decree—Limitation.*

Under a mortgage executed by the manager of a joint Hindu family the mortgage money was repayable in 3 years at the end of which period the mortgage was liable to be foreclosed. The

## LIMITATION ACT. (1908) ART. 116.

mortgage money was not paid and in an action for foreclosure it pleaded that the mortgage was void not having been made for any legal necessity and that a prayer for a simple money decree was also barred.

*Held* that the mortgage was void from its inception and that the cause of action for a simple money decree having arisen on the date of the mortgage, the prayer to that effect could not be granted as more than 6 years had elapsed from the date of the mortgage. (*Wazir Hasan, A. J. C.*) *RAM NARAIN v. NAND KUMAR.*

25 O. C. 164 : (1922) Oudh 257.

—**Art. 116—Registered Sale—Breach of covenant for title—Suit for damages—Limitation—Starting point.**

A registered deed of sale executed in 1905 by two persons, after reciting the receipt of consideration therefor, stated "If there is any dispute in respect of the property by relations and others etc, we shall settle them at our own expense and we shall be bound to carry out this sale without obstruction." The son of one of the vendors sued to set aside the sale as regards the share of his father and obtained a decree in 1913 for possession of that share. In a suit by the vendee in 1917 within 3 years from the date of dispossession in pursuance of the decree of 1913, for the recovery of the part of the purchase money corresponding to the share of the property recovered from him, *Held* that, assuming that the clause in the sale-deed set out above did not amount to a covenant for quiet enjoyment, there was clearly a covenant for title and on breach of that covenant that the vendee had 6 years to sue under art 116 of the Lim. Act from the date when the covenant was broken and that the suit was not barred. (*Kumaraswami Sastri and Devadoss, JJ.*) *SISTLA SUBBAYA v. PATA PICHANNA.* (1922) M. W. N. 420 : 43 M. L. J. 64 : 68 I. C. 190.

—**Art 116—Suit for dower—Suit by heirs of Mahomedan lady—Registered agreement—Suit governed by art 116 of the Lim. Act and not by art. 103 and 104. See LIM. ACT. ART 103, 105 AND 116.** 36 C. L. J. 379.

—**Art. 116 and 110—Suit for rent—Registered document.**

A suit for rent under a registered document is governed by art 116 of the Lim. Act (*Scott Smith and Harrison, JJ.*) *ABDUL SAMAD v. THE MUNICIPAL COMMITTEE, DELHL.* 67 I. C. 939

—**Art. 116—Vendor and purchaser—Indemnity—Breach of contract registered—Starting point of limitation. See LIM. ACT, ARTS. 83 AND 116.** 2 Lah. 316.

—**Art. 118—Adoption—Suit for possession of property which involves displacing an alleged adoption.**

*Held*, by the Full Bench *Macleod, C. J. and Fawcett, J. Shah, J.* dissenting that Article 118 of the Indian Limitation Act does not govern suits for possession where the plaintiffs cannot succeed except by displacing an alleged adoption;

The decision in 24 Bom. 260 is overruled by the Privy Council decision in L. R. 33 I. A. 156.

## LIMITATION ACT, (1908) ART. 120.

(*Macleod, C. J. Shah and Fawcett, JJ.*) *DODDAWA PUNSHYA v. YELLAWA MALLAPPA BENI.* 24 Bom. L. R. 158 : (1922) Bom. 223 : 67 I. C. 134. (F. B.)

—**Art. 118—Suit for possession of property Article if applicable.**

Art. 118 does not bar a suit for possession of immoveable property on the ground that an adoption is invalid. The article applies to a suit for a declaration that an adoption is invalid. (*Stuart and Sulaiman JJ.*) *RADHA DULAIYA v. RASHIK LAL.* L. R. 3 A 544 20 A L J 814.

—**Art. 120—Applicability—Suit for a declaration of public right of way See LIM. ACT, ARTS. 144, 120, ETC.** 26 C. W. N. 587.

—**Art. 120—Cause of action—Declaratory suit—Interference with graveyard—cultivation of portions of graveyard—Interference with repairs.**

In a suit for declaration that certain lands were a grave yard it was found that portions of the land were, from time to time cultivated, that in the settlement of 1904 - 1905 no part of the land was shown as a grave yard, a portion being entered as cultivated and the rest as waste. In 1915 there was an active interference when certain masons who entered upon the land in order to repair the old tombs were obstructed. *Held*, that the suit was in time, being brought within 6 years after 1915. The plffs. might very well have disregarded the fact that parts of the land were cultivated so long as their rights were not actively interfered with. The obstruction of repairs to the tomb was an overt act which interfered with the plaintiff's right of user. Therefore time did not begin to run against the plaintiffs until 1915 (*Scott Smith, J.*) *JAI GOPAL v. MAHOMED BAKHS.* 4 U.P.R. (Lah.) 46 : 65 I. C. 647.

—**Art. 120—Cause of action—Declaratory suit—Refusal to enter name of applicant—Revenue register—Successive orders—Starting point of limitation.**

Where the cause of action for a suit for declaration of title is the refusal of Revenue authorities to enter the plaintiff's name in the revenue register, the starting point of limitation under Art. 120 of the Limitation Act is the date of the order of refusal by the Revenue authority. A subsequent application for the same relief and a subsequent order of refusal by the Revenue authority does not give a fresh cause of action for the suit. 11 C. W. N. 186 rel ; 31 All. 9, 22 C. L. J. 283, 36 All. 492, 36 Mad 383 and 41 Cal 244 dist. (*Kumaraswami Sastri and Devadoss, JJ.*) *CHATHU v. NEELAKANDHAN.* 42 M. L. J. 457 : 15 L. W. 478 : (1922) M. W. N. 260 : 30 M. L. T. 266 (H C) : (1922) Mad. 194 : 67 I. C. 600.

—**Art. 120—Cause of action—Entry in revenue papers—Date of knowledge—Subsequent knowledge of plaintiff.**

The starting point of limitation for a suit for declaration of title consequent on an adverse entry in the revenue papers is the date when the plff. has knowledge of the entry and not the date

## LIMITATION ACT, (1908) ART. 120.

when it was made. (*Rafique and Lindsay, JJ.*)  
*GOPAL DAS v. SRI THAKUR GANGA.*

20 A. L. J. 231 : L. R. 3 A. 215 (1922) A. 115  
 66 I. C. 148.

— — — — — Arts 120, 89 and 62—Co-shareis—joint Hindu family—Division in status—Collection of outstandings by one member—Suit by other members for recovery of their share—Limitation. See LIM. ACT. ART. 62, 89, ETC.

(1922) M. W. N. 215.

— — — — — Art. 120—Cosharers—Money realised by coercive processes from one cosharer—Suit for reimbursement—Limitation. See LIM. ACT, ART. 61 99 AND 120.

26 C. W. N. 340

— — — — — Art. 120—Declaratory suit—Limitation—Starting point—Application for review. See (1921) DIG. COL. 758. *BHAGWAN BAKHSH SINGH v. MANRAJI KUNWAR*

(1922) Oudh 148.  
 66 I. C. 205

— — — — — Art. 120—Declaratory suit—Limitation when begins—Successive invasions.

A man is not bound to bring a declaratory suit on any and every possible invasion of his title, and such suits are not encouraged by courts unless they are clearly necessary.

Where plaintiff's share in a *shamilat* was disputed in 1895, but his joint possession was not disturbed, and in 1914 in another partition proceeding his rights were again disputed : *Held*, a suit for declaration of title within 6 years of the latter event, is in time, (*Scott-Smith and Harrison, JJ.*)  
*MUHAMMAD HANIF v. RATAN CHAND.*

3 Lah. 43 : (1922) Lah. 94 : 67 I. C. 990.

— — — — — Art. 120—Deed void *ab initio*—suit to set aside, See LIM. ACT S. 18 AND ARTS. 91, 95 AND 120.

26 C. W. N. 479.

— — — — — Art. 120—Execution sale void—Suit for purchase money

Where after an execution sale, the judgment debtor is found to have had no saleable interest in the properties, and a suit is brought to recover the purchase money Art. 120 will govern the case, (*Mookerjee and Chotzner JJ.*)  
*MAKAR ALI v. SARFADDIN.*

36 C. L. J. 132.

— — — — — Art. 120—Executor depositing minor-legatee's money in Bank—Drawing out of money—Breach of trust—Liability of Bank—Limitation. See EXECUTOR. 24 Bom. L. R. 513

— — — — — Arts. 120 and 125—Gift of land and house—Declaratory suit by a reversioner—Limitation. See (1921) DIG. COL. 758 *MT. AMIR BEGAM v. MT. HUSSAIN BIBI*

(1922) Lah. 98.

— — — — — Arts 120 and 141—Hindu reversioners—Suit to recover moveable property on death of Hindu female—Limitation. See (1921) DIG. COL. 758 *PRAMATHA NATH BOSE v. BHUBAN MOHAN BOSE*, 49 Cal. 45 : 64 I. C. 980 ; (1922) Cal. 321.

— — — — — Arts. 120 and 141—Hindu widow—Moveables—Liability for waste—Suit by reversioner—Limitation, See (1921) DIG. COL. 759. *GOKULA VENKANNA v. GOKULA NARASIMHAM.*

66 I. C. 10.

## LIMITATION ACT, (1908) ART. 120.

— — — — — Art. 120—Money decree-holder—No attachment of property—Suit for declaration of invalidity of sale to stranger—Limitation. See LIM. ACT, ARTS. 91 AND 120

1 B. L. J. 106.

— — — — — Art. 120—Pre-emption—Date of registration or execution—Registration Act, S. 47.

In a pre-emption suit the limitation runs from the date of registration and not from the date of execution of the deed of sale and the article applicable is 120. S. 47 of the Registration Act does not apply to the case. (*Kotwal A. J. C.*)  
*RAGHO v. SAKHARAN.*

(1922) Nag. 200 : 68 I. C. 715.

— — — — — Art. 120—Pre-emption—Limitation—Contemplated sale

Art 120 of the Lim Act applies to suits for pre-emption in respect of a contemplated sale, while Art 10 applies where the sale has actually taken place. (*Hallifax, J. C.*) *RAI v. SIDAKALLI.*

(1922) Nag. 14 : 65 I. C. 959.

— — — — — Art. 120—Record of rights—Publication—Suit for rectification—Cause of action—B. T. Act. S. 111 A.

Where plaintiffs are in possession of the property a suit for a declaration that the record of rights did not correctly describe their status as tenants is governed by Art 120 of the Lim. Act and the suit can be brought within 6 years of the final publication of the Record of Rights (*Newbould and Panton, JJ.*)  
*BADARUDDIN MUNSHI v. SARAPADDIN BEPARI.*

68 I. C. 489.

— — — — — Arts 120, 68 and 59—Suit for contribution under S. 70, Contract Act—Limitation—Art 120 applicable. See CONTRACT ACT, S. 70.

31 M. L. T. 164.

— — — — — Art. 120—Suit for declaration of title—cause of action—Starting point of limitation.

In a suit by the plff in 1919 for declaration of their title as *adna maliks* of certain land forming part of the *shamilat*, it was found that the defts. denied their title in 1912, that the Assistant Collector refused mutation of their names in 1912, that on appeal the Collector reversed the order of the Assistant Collector and ordered mutation of the plff's names in 1913 and that the order of the Collector was reversed by the Commissioner in 1913. *Held*, that though the denial of the plff's title in 1912 gave them a cause of action, the order of the Commissioner in 1913 gave a fresh cause of action and that the suit was within time. 10 A. L. J. 413 foll. 36 A. 493 ref. (*Scott-Smith J.*)  
*LORIND CHAND v. ALLAH BAKHSH.*

65 I. C. 124 : 33 P. L. R. 1922 : (1922) Lah. 125.

— — — — — Art. 120—Suit for declaration of title to immoveable property—Limitation—Starting point. See (1921) DIG. COL. 760 *JOYNARAYAN SEN UKIL v. SRI KANTA ROY.*

26 C. W. N. 206 : 65 I. C. 8 : (1922) Cal. 8.

— — — — — Art. 120 and 142—Suit for declaration of title—Proceedings under S. 145—Attachment by magistrate—Effect of.

Where in proceedings under S. 145, Cr. P. Code, a magistrate attaches the property in dispute, a suit for possession of the property is in truth and in substance one for declaration of title to the

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properties and is governed by art. 120 of the Limitation Act and not by art. 142. 20 A. 120; 26 M. 410; 20 C. W. N. 481; 17 Cal. 814 Referred. The position of the magistrate was that of a stake holder and during the continuance of the attachment the property was in legal custody which must be held to be for the benefit of the party who is eventually declared to be the true owner. 32 C. 856, 5 All. 1, 30 M. 12, 29 C. 518; referred to. (*Chatterjee and Cuming, JJ.*) PANNA LAL BISWAS v. PANCHU RUIDAS.

49 Cal 544 : (1922) Cal. 419 : 26 C. W. N. 432 : 65 I. C. 200.

—Art. 120—Suit for dissolution of marriage or declaration of divorce—Cause of action for—Limitation. See LIM. ACT S. 23 AND ART. 120.

65 I. C. 452

—Arts. 120 and 123—Suit by Mahomedan for his share of inheritance—Moveable and immoveables.

A suit by one of the heirs of a deceased Mahomedan for his or her share of the moveable and immoveable property of the deceased is governed by Art. 120 and not by art. 123, 21 Cal. 157 foll. (*Mears, C. J.*) MT. BASHIR-UN-NISSA BIBI v. ABDUL RAHMAN.

44 A. 244 : I. R. 3 A 108 : 20 A. L. J. 71. 64 I. C. 974

—Arts. 120 and 61—User for non-agricultural purpose—Fine—Suit to recover

Where the plaintiff sued to recover from defendant the amount of fine paid by him for the use of land belonging to the plaintiff for non-agricultural purposes by the defendant; Held Art. 120 and not Art. 61 applied to the case. (*Macleod C. J. and Shah, J.*) PARNAMACHAND CHANDIRAM v. KASHINATH DERAM LONARI.

(1922) Bom. 257.

—Art. 123, 120 and 62—Legacy when payable—Suit for the estate.

V mother of N. after his death brought a suit for possession of his property. Pending the suit she died in 1899, but the suit was continued by defendants. By her will she had bequeathed her certain legacies which were to be paid out of the accumulation of the estate. The property was in the possession of a Court of Wards and the income was accumulating. During the pendency of the suit the accumulated income was in 1905 permitted by the Court to be divided among defendants and P. who claimed adversely to V. They all undertook that the money would be brought in if the Court so ordered. The suit was decreed in favour of V in 1913. Defendants by the decree alone became entitled to the estate. The one-third of the income which had been handed over to P was therefore ordered to be refunded to defendants in 1915 and was refunded in 1917. In legatees' suit within 3 years of this for the payment of legacies, the defendants contended that the suit was time barred as it was brought after more than 12 years from 1905. Held, the defendants did not receive any money which could be considered as available for the legacies until 1915 and further, as regards that part which they received from P and which was to satisfy these claims, they did not receive it until 1917. The legacies are not payable until there are available assets to pay them and, therefore, time under

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the statute of limitation does not begin to run until there are available assets. An executor *de son tort* takes all the liabilities of an executor and it would be a curious thing, if claims to legacies against an executor were not barred until the lapse of 12 years but claims against executors *de son tort* were barred in a shorter period. Art. 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. Art. 62 barring suits for money received in 3 years and Art. 120 are not applicable to the case. (*Schwabe C. J. Coutts Trotter and Kumaraswami, JJ.*) ZEMINDAR OF BHADRACHALAM v. SRI RAJAH VENKATADRI APPA RAO.

43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.) : (1922) Mad. 457.

—Art. 123—Suit against person in possession.

A suit for a legacy or for a sharer of a residue bequeathed by a testator can fall under Art. 123 not only if it is against an executor but also if it is against one in possession of the assets which are liable for payment of the legacies (*Schwabe, C. J. and Coutts Trotter and Kumaraswami Sastri, JJ.*) ZEMINDAR OF BHADRACHALAM v. SRI RAJAH VENKATADRI APPA RAO.

(1922) Mad. 457 : 43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.)

—Art. 124—Suit by trustee of choultry for recovery of possession of the building—Limitation.

A suit by a person alleging himself to be the trustee of a choultry for recovery of possession of the building is governed by Art. 124 of the Lim. Act. 14 I. C. 168 Ref. (*Spencer and Venkata-Subba Rao, JJ.*) SINGARAVELU MUDALIAR v. CHOKKA MUDALIAR.

43 M. L. J. 737 : 16 L. W. 544 : (1922) M. W. N. 676.

—Art. 125—Adverse possession—Female heir—Purchasers from—Suit for possession—Limitation.

The two daughters of a deceased Hindu inherited his estate as joint tenants. Defendants Nos. 1 to 3 purchased the property from one of the daughters on 23-4-1888 and that daughter died in 1889. The other daughters conveyed the same property in favour of the plaintiffs on 4-2-1911, with the concurrence of debts 4 and 5. The surviving daughter died in 1915. On 12-6-1916 the plffs sued for recovery of possession of land upon establishment of title. Held that the suit was barred under art. 125 of the Lim. Act. (*Mookerjee and Cuming, JJ.*) JAGABANDHU SAHA v. HARIS CHANDRA SIL.

36 C. L. J. 92 : (1922) Cal. 459.

—Art. 125—Suit to declare mortgage and decree thereupon void—Limitation—Starting point. See (1921) DIG. COL. 761.

18 N. L. R. 42.

—Art. 126—Alienation by father—Setting aside—Right of sons born and unborn—Cause of action—Limitation—Starting point

A son born in a joint Hindu family acquires by birth an interest in ancestral property but does not acquire any interest in any right to sue. The cause

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of action accrues after an alienation when the purchaser takes possession and a new cause of action does not accrue upon the subsequent birth of a son in the family. The after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In the case of an after-born son the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and under no disability on that date he cannot obtain the benefit of the provisions of S. 6 of the Lim Act. When he cannot save limitation for himself he can give no benefit under S 7 to his elder brothers. (*Dalal and Wazir Hasan, A J.C.*) **RANODIP SINGH v. RAMESHAR PRASAD,** 9 O. L J 45 : 66 I. C 938.

—Art. 126—Alienation by Hindu father—Sut by sons to set aside—Cause of action—Afterborn sons

A suit by the sons for setting aside alienation made by their father as not being for legal necessity and therefore not binding on them and asking a decree for possession of the mortgaged property on payment of the binding portion of the debt is governed by art. 126 of the Lim. Act.

The cause of action under art. 126 of the Lim. Act arises when the alienee takes possession of the property and after-born sons can take advantage of the cause of action which accrued to the sons living but they acquire no fresh cause of action on their birth. (*Daniels and Lyle, A J.C.*) **CHOKHEY SINGH v. HARDEO SINGH**

24 O. C. 330 : 4 U P. L. R. (J. C.) 10 : 64 I. C 757.

—Art. 127—Applicability.

A suit for the recovery of money realised by one member of the family to the exclusion of another is not governed after separation or partition by Art 127. In a case where the realisation had been made while the family was still joint the suit ought to be brought within three years from the date of separation or partition. (*Kanhaya Lal, J. C.*) **JAGAT SINGH v. ACHABAR SINGH,** (1922) Oudh 15

—Arts. 127 and 144—Joint family property—Sale to stranger—Possession taken—Suit to recover property—Limitation—Knowledge of exclusion from properties not necessary. See LIM. ACT, ARTS 144 AND 127.

42 M. L. J. 364.

—Art. 127—Scope of See LIM. ACT, ART. 62, 89 ETC 42 M. L. J. 507.

—Art. 132—Applicability of—Claim by subrogation—Payment of prior mortgage by purchaser under invalid sale—Suit to enforce prior mortgage—Limitation.

A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside. 22 W. R 409 : 21 M. 143 Ref.

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**LIMITATION ACT (1908), ART. 132.**

A subsequent mortgagor paying off a prior mortgage does not acquire a fresh charge on the property. He acquires the rights and powers of the prior mortgagee one of which is to enforce the charge already existing subject to the law of limitation.

A right to re-imbursement is a different thing from a right to subrogation. The right to reimbursement arises on a contract, express or implied, to reimburse, and the party who claims the right enforces it in his own right and not in the right of another. Consequently the right does not arise until he has discharged the debt of another. But the right to enforce a security by virtue of subrogation is a right which equity concedes to a person who, not being primarily liable to discharge an obligation, does discharge it and it is a right to demand the performance of the original obligation and the application thereto of all securities held by the creditor. It is a claim which is enforced in the right of the original creditor and only because the person discharging the obligation becomes clothed with the rights and powers of the original creditor.

It may be that the right to enforce the security in his own name arises on the date of the assignment to the person claiming the right of subrogation. But the limitation which has already commenced to run will not cease to operate just because the creditor has assigned the security to another person. An equitable assignee stands on no better footing and can only enforce the security in the right of the creditor and therefore subject to the law of limitation that would affect the creditor. (*Coutts and Das, JJ.*) **SIBANAND MISRA v. JUGMOHAN LAL**

3Pat. L. T. 533 : 68 I. C. 707.

—Art. 132—Cause of action—Postponement—Property subject to prior usufructuary mortgage—Covenant to redeem.

Where in executing a simple mortgage of certain properties the mortgagor covenants to redeem certain prior usufructuary mortgages on the same properties in order that the lands might be ample security for the simple mortgage, the cause of action for a suit on the simple mortgage is not postponed to the date of redemption by the mortgagors of the prior usufructuary mortgages. (*Sadasiva Aiyer and Spencer, JJ.*) **JAGANA SANYASIAH v. M. P. ATCHANNA NAIDU.**

42 M. L. J. 339 : 15 L. W. 289.

—Art. 132—Charge—Enforcement of—Limitation.

Art 132 of the Lim. Act is wide enough to apply to all cases where there is an effective and binding charge upon immoveable property whether created under the T. P. Act, or otherwise. (*Scott Smith and Harrison JJ.*) **ABDUL SAMAD v. MUNICIPAL COMMITTEE, DELHI.**

67 I. C. 939.

—Arts. 132 and 148—Co-mortgagors—Redemption by one—Suit by other mortgagors—Limitation

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Where one of several co-mortgagors redeems a mortgage, the other co-mortgagors can bring a suit for redemption against the redeeming mortgagor within 60 years from the date of the original mortgage. 14 A. 1 foll. (*Lindsay and Kanhaiya Lal, JJ*) *SURAT SINGH v. UMRAO*

L. R. 3 A. 383 : 20 A. L. J. 611 :  
(1922) All. 410

—Art. 132—Limitation—Starting point—“Become due”—Meaning of—Mortgage bond providing a period for re-payment—Stipulation empowering creditor to sue for whole amount on default of payment of interest. See (1921) Dig. COL. 763 *NATHI v. TURSI*. 43 All. 671.

—Art. 132—Loan of paddy—Interest payable in paddy—Suit to enforce security—Limitation.

Where there is a loan of a certain quantity of paddy with a provision for payment of an additional quantity of paddy as interest, and both the principal and interest are secured on immovable property a suit to enforce the security is governed by Art. 132 of the Limitation Act 25 C.W.N. 57 F. B. foll. (*Tunon and Richardson, JJ*) *JOY NARAIN GOLE v. MANGOBINDA BERA*.

64 I. C. 210.

—Art. 132—Money charged on immovable property by a decree—Suit to enforce—Limitation

A suit to enforce payment of money charged on immovable property under a decree is governed by Art. 132 of the Lim. Act. (*Leslie Jones and Moti Sagar, JJ*) *NARAIN SINGH v. NARANJAN*.

4 Lah. L. J. 398.

—Arts. 132, 120 and 116—Mortgage—Debt, partly cash and partly grain—Suit filed more than six years after the accrual of cause of action—Claim in respect of grain debt if barred.

Where a bond hypothecates property to secure payment of grain, the suit brought upon it is a suit to enforce payment of “money” charged upon immovable property, and consequently Art. 132 of the Limitation Act would be applicable and a suit brought within 12 years after the accrual of cause of action, would not be barred. Neither Art. 116 nor 120 of the Act applies to such a case. 13 C. W. N. 174; 22 C. W. N. 790; 23 C. W. N. 951; 23 C. W. N. 919; 29 Cal. L. J. 348 Referred to; 24 Cal. L. J. 348 not followed (*Dhobley, A. J. C*) *SHAM LAL v. DHANWA JHABBOOLAL*.

18 N. L. B. 111 : 5 N. L. J. 224 :  
65 I. C. 697 : (1922) Nag. 23.

—Art. 132—Mortgage—Suit on—Provision for annual payment of interest—Default Right to claim whole amount—When limitation begins.

Where under the terms of a mortgage, interest is payable on every *Jeth Purnamashi*, and on

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default the mortgagee could at once sue for sale of the property for both principal and interest, held limitation ran from the date of first default. (*Rafique and Lindsay, JJ*) *THE COLLECTOR OF JAUNPUR v. JAMNA PRASAD*. 44 A. 360 :

20 A. L. J. 104 : L. R. 3 A. 134 :  
4 U. P. L. R. (A) 50 (1922) All. 37 :  
66 I. C. 171,

—Art. 132—Suit on mortgage—Property mortgaged converted into money by execution sale—Suit governed by Art. 132 of the Lim. Act. See C. P. CODE, O. 21, RR. 58 AND 63.

43 M. L. J. 467.

—Art. 132—Payment of money charged on property—Cause of action—Right to sue for money on default in payment of interest

Under a mortgage deed the principal amount was payable within 3 years and interest was to be paid year by year. In default of payment of the annual interest the mortgagee was empowered, without waiting for the due date to sue to realise the principal and interest from the property. Held that the cause of action for the recovery of the principal amount and interest arose on the date of the first default in payment of the interest. The privilege of deferring payment of the principal for 3 years was conditional on the punctual payment of interest annually (*Lindsay and Stuart JJ*) *RAMDAS v. MAHOMED SAID KHAN*.

20 A. L. J. 343 : 67 I. C. 160.

—Art. 132—Security—Paddy loan—Enforcement.

A suit to recover the value of paddy charged upon immovable property by sale of the latter is governed by art. 132 of the Limitation Act. 48 C. 625 foll. (*Newbold and Suhrawardy, JJ*) *GNANENDRA NATH GHOSE v. PANCAKOURI NARAIN*.

64 I. C. 310.

—Art. 132—Suit to enforce security of the prior mortgagee against the mortgagor—Limitation when starts.

In the case of an assignment for value, it cannot be argued that, though the right to enforce the security in the hands of the creditor may be barred by limitation still an assignee may proceed to enforce it if he brings his suit within 12 years from the date of the assignment. It may be that the right to enforce the security in his own name arises on the date of the assignment; but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. For an action by a subsequent mortgagee to enforce the security of the prior mortgage against the original mortgagor, limitation starts from the date when the cause of action of the prior mortgagee arises against the mortgagor for the mortgage debt and not from the date when the subsequent mortgagee pays off the prior mortgage

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39 Cal. 527 (P. C.), Fol. 63 I. C. 604 doubted (*Coutts and Das, J.J.*) SIBANAND MISRA v. BABU JUAGMOHAN LAL. (1922) Pat. 331 : (1922) P. 499.

—Art. 132—*Suit for money due on subsequent mortgage—Limitation.*

A suit to enforce a second mortgage executed in consideration of a prior mortgage and a fresh advance is governed by art. 132 of the Lim Act. (*Scott Smith and Leslie Jones, J.J.*) UDHO KAM v. GOBIND LAL. 4 Lah. L. J. 478.

—Art. 132—*Suit for recovery of money—Starting point.—Date fixed for redemption.*

Where a deed of further charge entitles the mortgagor to pay the mortgage money within the time fixed for redemption of a prior mortgage, limitation for the recovery of the money due on the further charge runs not from the date of the execution of the deed but from the period fixed for redemption of the prior mortgage. (*Lindsay, J. C.*) MAHADEO TEWARI v. SITLA BAKSH SINGH. (1922) Oudh 102 : 65 I. C. 408.

—Art. 133—*Executor—Minor legatee—Money deposited in Bank—Executor committing breach of trust—Bank if liable—Limitation. See EXECUTOR.* 24 Bom. L. R. 513

—Art. 134—*Alienation by mahant—Suit to set aside—Limitation.*

The endowments of a Hindu Mutt are not "conveyed in trust" to the head, save as to any specific property proved to have vested in him for a specific and definite object. Art. 134 does not therefore apply where the head of a Math has alienated the properties not proved to be subject to a specific trust (*Das and Baccnill, J.J.*) MAHANT RAMRUP v. LAL CHAND MARWARI. 1 Pat. 475. 3 Pat. L. T. 352 : (1922) P. 243 : 67 I. C. 401

—Art. 134—*Applicability of—Transfer by trustee—Delivery of possession—Simple mortgage.*

The first portion of Art. 134 of the Limitation Act refers to a case where the transfer by the trustee is accompanied by delivery of possession to the transferee so as to render possible and necessary the institution of a suit for recovery of possession, for instance, in cases of sale, usufructuary mortgage, lease and exchange. It has no application to a case of simple mortgage. The second half of art. 134 of the Limitation Act provides only for a case where the debt's vendor purports to transfer full ownership when in fact he has only a mortgage right to transfer; it does not refer to the case of a purchaser from a mortgagee of the interest of the mortgagee as mortgagee. 21 Mad. 151 foll. Art. 134 of the Lim. Act does not apply to sales in execution of decrees. 25 M 99 foll. (*Mookerjee and Cumming, J.J.*) CHARU CHANDRA PRAMANICK v. NAHUSH CHANDRA KUNDUO. 36 C. I. J. 35.

—Art. 134 and 144—*Endowed property—Alienation by mahant—Suit to set aside—Limitation.*

S. 10 of the Limitation Act controls Art. 134 of the Act and gives the clue to its meaning. Art. 134 refers to cases of "specific trust". Neither under the Hindu nor the Mohammedan law is any property conveyed to a shebait or mutwalli in the

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case of a dedication, nor is any property vested in him. Consequently a suit to recover property dedicated to a religious endowment but improperly alienated by him is governed by art. 144 and not by art. 134 of the Lim Act.

44 M 831 P. C. Rel. 51 I. C. 795 dist. (*Scott Smith, J.*) DIWAN SINGH v. SHAM DAS. (1922) Lah. 271 : 65 I. C. 722.

—Art. 134—*Mortgagee—Transferee from—Bona fide belief as to absolute ownership—Knowledge of limited character of transferor's title.*

Where a person in possession as mortgagee transfers the property as owner and the transferee also obtains possession bona fide believing that his transferor was absolute owner a suit for possession by the mortgagor from the transferee is governed by art. 134 of the Lim Act. The mere fact that within 12 years of the transfer the transferee obtains knowledge of the limited character of his transferor's title does not stop limitation or give rise to a fresh starting point. (*MacLeod, C. J. and Coyajee, J.*) KESHAV RAGHUNATH JOSHI v. SAFURKHAN DAIMKHAN. 24 Bom. L. R. 319 : (1922) Bom. 234 : 67 I. C. 308.

—Art. 134—*Mortgage by mortgagee as absolute owner—Rights of mortgagor—Redemption.*

Where a mortgagee of immoveable property represents himself to be the absolute owner thereof and mortgaged the property the case comes within Art. 134 of the Limitation Act. If the mortgagor wants to redeem after the expiry of 12 years then he will have to redeem both the mortgages before he can get possession. This however can be done in one suit. (*MacLeod, C. J. and Coyajee, J.*) THE TALUKDHARI SETTLEMENT OFFICER v. AKUJI ABHRAM MUSI. 24 Bom. L. R. 762 : (1922) Bom. 350 : 68 I. C. 487.

—Arts. 134 and 144—*Mutt—Permanent lease of endowed property by head of the mutt—Suit by successor to set aside lease—Limitation—Adverse possession. See (1921) DIG. COL. 766—VIDYA VARUTHI THIRTHA SWAMIGAL v. BAI U-SWAMI IYER.* 15 L. W. 78 : 30 M. L. T. 66 : 26 C. W. N. 537 : (1922) Pat. 245 : 20 A. L. J. 497 : 24 Bom. L. R. 629 : (1922) P. C. 123 : 63 I. C. 161 (P. C.)

—Art. 134—*Scope of—Purchase from mortgagee—Effect—Knowledge—Burden of proof.*

A person who purchases from a mortgagee with full knowledge that the latter has only a mortgagee right cannot claim the benefit of Art. 134 even though the sale may ostensibly be one of full proprietary right.

A person who purchases a right which he honestly believes to be full proprietary right and which is so described in the deed of sale can claim the benefit of the title, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee. Mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of the Article.

The burden of proof is on the person who asserts that a transaction was something different



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from what it purports to be to substantiate that assertion. If the pliffs, seek to take the case out of the Article by alleging knowledge on the part of the transferees that the vendor's title was that of a mortgagee, they must prove it as a fact. (*Daniels and Lyle, A. J. C.*) *BIJAI PARTAB SINGH v. RAGHURAJ SINGH*, 90 L. J. 173 : 4 U. P. L. R. (J. C.) 33 : 25 O. C. 115 : (1922) Oudh 7 : 67 I. C. 572.

———Arts. 134 and 141—Scope of—Suit by reversioner—Limitation—Conflict between arts. 134 and 141. See (1921) DIG. COL. 767 *NARAYANASWAMI NAICKER v. PERIASAMY ODAYAR*, 68 I. C. 734.

———Arts. 136 and 144—Property belonging to tenants-in-common—Possession of one tenant-in-common—Ouster—Limitation. See (1921) DIG. COL. 768. 64 I. C. 552.

———Art. 137—Applicability of—Judgment debtor in possession at the date of sale. See LIMITATION ACT, S. 16 and ARTS. 137, 138, AND 144 26 C. W. N. 364

———Arts. 138 and 142—Applicability of—Suit by purchaser in execution sale for possession.

A suit by decree holder auction purchaser against a person who has not acquired a title from the judgment debtor is not governed by Art 138 of the Lim Act, (*Richardson, and Suhrawardy, JJ.*) *JANOKI NATH SAHA v. BAIKUNTHA NATH GHATTACK*, 36 C. L. J. 140 : (1922) Cal. 176.

———Art. 138—Scope of—Deduction of time under S. 16—Applicable only to cases where purchaser has not obtained possession. See LIM. ACT, S. 16 and ARTS. 137, 138, 144. 26 C. W. N. 364.

———Art. 139—Applicability—Lease of math lands—Non-payment of rent for 12 years after expiry of lease—Suit for possession

Where after the expiry of a lease of Math lands, the tenant remained in possession for more than 12 years without paying rent, a suit for possession will be barred. (*Lord Shaw*) *MOHUNT BHUGWAN RAMANUJ DAS v. RAMAKRISHNA BOSE*, 26 C. W. N. 722 (P. C.) : (1922) P. C. 185

———Art. 139—Suit by landlord to recover possession.

While it is true that a tenant who holds over cannot set up an adverse title to the landlord, still the landlord can recover possession only if he sues within 12 years of the expiry of the period of lease (*Ryves and Stuart, JJ.*) *DEBI PRASAD v. MUSSAMMAT GUJAR*, 20 A. L. J. 696 : (1922) All. 433 : 68 I. C. 750.

———Art. 139—Tenant holding over—Non-payment of rent—Suit in ejectment more than 12 years after expiry of lease.

Deft. was a tenant of pliff's premises for three years. After the expiration of the period he continued in possession without paying rent and without in any way recognising the pliff's title as landlord. In a suit by pliff. to eject deft. more than 12 years after the expiry of the lease, *Held*, that under art. 139 of the Lim. Act the suit was

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barred. 24 Bom. 504 foll, 37 A. 557 dist. (*Ryves and Stuart, JJ.*) *BISHESHWAR NATH v. KUNDAN*, 44 A. 583 : L. R. 3. A 386 : 20 A. L. J. 593 : (1922) All. 318.

———Arts. 140 and 141—Right to sue—Reversioner.

The reversioner's right to sue accrues due from the time of the death of the widow and possession for 12 years as a gift from the widow during her life time does not bar the suit. (*Gokul Prasad, J.*) *RAMJAS v. MT. SARTAJI* (1922) All 401.

———Art. 140—Sale of land under Ss. 87 and 88. Cr. P. C.—Death of absconder—Starting point of limitation.

Where lands belonging to an absconder are sold under Ss 87 and 88 Cr. P. Code, a suit by a person claiming the estate after the death of the absconder is governed by article 140 of the Limitation Act. The starting point of limitation is the date of the death of the absconder and the plff. must prove the date of death (*Broadway and Abdul Qadir, JJ.*) *HIRA SINGH v. LAL SINGH*, 4 Lah. L. J. 59 : 66 I. C. 1 : (1922) Lah. 124.

———Arts. 140, 142 and 144—Suit by the remainderman—Rights not those of remainderman—Dispossession—Meaning of See (1921) DIG. COL. 769. *PROMOTHA NATH ROY CHAUDHURI v. DINAMANI CHUDHURANL*, 65 I. C. 826;

———Arts. 141 and 144—Alienation by widow—Suit for possession after death of widow—Limitation.

A suit by a reversioner for recovery of possession of property alienated by the widow is governed by Art 141 of the Lim. Act and time runs from the date of the death of the widow. If the reversioners rely on art 144 they must prove that adverse possession started in the life time of the proprietor and continued for 12 years up to date of suit. (*Chevis, J.*) *CHOANAN SINGH v. SALIG RAM*, 36 P. L. R. 1922. 68 I. C. 177

———Art. 141—Hindu widow—Settlement in favour of daughters—Alienation by daughters—Suit by grand-sons as reversioners—Maintainability—Limitation.

Under a settlement by a Hindu widow in favour of her two daughters each of them purported to take absolutely a moiety of the estate. They subsequently made various alienations of the property without any justifying necessity. The elder daughter died first in 1905 and the younger daughter died in 1908. In a suit instituted in 1918 by the grandsons of the last male owner for recovery of the property from the alienances on the ground that the alienations were not supported by legal necessity *Held*, that under art. 141 of the Lim Act, the period of limitation began to run only from the date of the death of the surviving daughter and that the suit was not barred. (*Spencer and Devadoss, JJ.*) *JOGA YERRAYYA v. NAKINA SALLAYYA*, 16 L. W. 752.

———Art. 141—Reversioner—Right to sue.

Art 141 of the Limitation Act allows the reversioner a period of 12 years from the widow's death to bring his suit and it is neither in her power nor in the power of any person claiming through

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or against her to abbreviate that period (*Scott-Smith and Dundas, JJ.*) *NAND SINGH v. MUSSAMMAT DHAN KUAR.* 2 Lah. L. J. 573 : 68 I. C. 299.

— Art. 141—*Suit for possession by reversioner—Limitation—Suspension of.*

Once limitation begins to run it does not stop except in the cases specially provided for by the Lim. Act. In 1894 plaintiff's father sued for a declaration that certain alienations by a Hindu widow were invalid but the suit was dismissed on the ground that there was a nearer reversioner one Balusamy. On the death of the widow in 1897 Balusamy sued for possession but his suit was dismissed in 1916 on the ground that his adoption was invalid and he was not a reversioner. Plff. sued for possession in 1919.

Held that the suit was barred by limitation. It could not be said that at any time the plaintiff's right was satisfied and that on account of the annulment of that satisfactions a fresh cause of action arose. 12 M. I. A. 244; 43 M. 815; 35 C. 209; 43 C. 660 Dist. (*Phillips and Ramesam, JJ.*) *RANGANATHA RAO v. RAMA PANDITHAR.*

16 L. W. 529

— Art. 142—Adverse possession—Interruption of—Delivery of symbolical possession—Effect of, against persons not bound by the decree See C. P. CODE, O. 21, R. 36.

24 Bom. L. R. 499.

— Art. 142 and 144—Discontinuance of possession—Submersion and reappearance of land—Rights of true owner—Trespasser—Interruption of possession

Where land becomes submerged it is constructively in the possession of its lawful owner. Consequently where a trespasser has been in possession of lands which at intervals of 4 or 5 years become submerged, there is an interruption of the possession of the trespasser and a revival of the possession of the true owner during the period of submersion. Consequently the trespasser's possession is not continuous and he cannot acquire a title by adverse possession. (*Gokul Prasad and Sulaiman, JJ.*) *RAM NAIN MISIR v. DEOKI MISIR.* 20 A. L. J. 756 : 4 U. P. L. R. (A) 129 : L. R. 3 A. 552.

— Art. 142—Dispossession—Meaning of—Discontinuance.

Art. 142 of the Lim. Act refers to dispossession or discontinuance of possession. Dispossession implies the coming in of a person and his driving out another from possession. Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another. (*Mookerjee and Cuming, JJ.*) *CHARU CHANDRA PRAMANICK v. NAHUSH CHANDRA KUNDOO.* 36 C. L. J. 35.

— Art. 142—Dispossession—Successive trespasser in continuous possession for 12 years in all.

Where a number of independent trespassers are continuously and successively in possession of immovable property for over twelve years, the rightful owner is thereafter barred from suing to recover the property although not even one of the

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trespassers has been in adverse possession of the property for over twelve years. (*Kumaraswami Sastri and Deva Doss, JJ.*) *VENNAM RAMAYYA v. KOSURU KOTAMMA.*

45 Mad. 370 : 42 M. L. J. 319 : (1922) M. W. N. 132 : 30 M. L. T. 143 : (1922) Mad. 59 : 67 I. C. 246.

— Art. 142—Dispossession—What is—Acts done on portions of property—Effect of.

There is no dispossession within the meaning of Art. 142 of the Lim. Act unless there is termination of the possession of the rightful owner followed by the actual possession of another. As long as reliable evidence of acts of ownership is forthcoming there is no difference between the proof of possession on the case of jungle or uncultivated lands and that in the case of cultivated lands. 5 C. L. R. 481. I. C. W. N. 277 Ref. (*N. R. Chatterjee and Pearson, JJ.*) *BEHARI LAL NANDI v. NRITYANANDA.*

(1922) Cal. 224 : 67 I. C. 1005.

— Art. 142—Formal possession—Limitation—When begins to run.

One R left a widow P and two daughters J & K. P made a gift of the estate of R to K. J. sued for her half share and got formal possession. J's legal representatives brought a suit for possession. Held that limitation began against her from the date of her taking formal possession. (*Mears, C.J. and Banerji, J.*) *MT. PURNA KUAR v. MANGAT RAI.* (1922) All. 55.

— Art. 142—Onus of proof in suits for possession—Case of jungle lands and diluviated lands—Principles applicable to.

In a case where plaintiff sues for possession, alleging dispossession by the defendant the onus is on him to prove his possession and the factum of dispossession within twelve years of suit. Even if he proves title there is no onus on the defendant to show that plaintiff has lost his title by adverse possession. Case-law fully considered.

Possession is not necessarily the same thing as user. The nature of possession to be looked for, and the evidence of its continuance must depend on the character and condition of the land in dispute. Where the land is incapable of actual enjoyment, as in the case of diluvion by a river, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue so long as the lands continue to be submerged. In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurrence as is often the case with jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or cultivated field. All that can be required is that plff. should show such acts of ownership as are natural under the existing conditions of the land and in such cases his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed.

In waste and jungle lands possession may be exercised by grazing of cattle, putting up boundary marks, fences etc. They form no exception to the general rule that plaintiff must prove

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possession and dispossession within 12 years. In such a case, where plff. proves title, there is a presumption in his favour where having regard to the nature of the land, possession cannot be expected to be proved by actual acts of user and enjoyment.

But in such a case where plff. comes to court alleging an exercise by him of acts of ownership which he fails to prove, he cannot be allowed to turn round and rely on a presumption arising from title. For that would apply only to cases where from the nature of the land no definite acts of possession are possible. (*Chatterjee and Pantun, JJ.*) *RAKHAI CHANDRA GHOSE v. DURGADAS SAMANTA.*

26 C. W. N. 724 : 67 I. C. 673.

## —S 142—Permissive possession—Meaning of.

Where defendant got possession of joint property under a mortgage decree against some of the co-parceners on a mortgage executed by them and where the co-parceners were *pro forma* defendants to a suit by the other co-parceners, the possession of the decree-holder is not necessarily permissive, simply because the co-sharers were *pro forma* defendants. (*Coutts and Ross, JJ.*) *NEKHARI BALL v. LAKSHMI KANT*

(1922) P. 33

—Arts. 142 and 120—Proceedings under S. 145, Cr. P. Code—Attachment by magistrate—Suit for possession—Limitation—Art. 120 and not art. 142 applicable. See LIM ACT., ARTS. 120 and 142.

26 C. W. N. 432.

—Art 142—Sale under Public Demands Recovery Act—Nullity—Suit for possession. See BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 10

36 C. L. J. 203.

## —Arts. 142 and 144—Suit for possession—Dispossession within 12 years—Vacant land

Where the plaintiff establishes his title to the property he could rely upon the presumption that possession goes with the title. If there is no satisfactory evidence in rebuttal the presumption must be given effect to. No doubt if the suit comes under Art. 142 of the Lim. Act time begins to run from the date of the dispossession. But if the plff. alleges he is dispossessed within 12 years of the suit, then the question must arise, according to the circumstances of each case, how far the plff. has correctly fixed the date of dispossession, and how far the onus lies on the deft. to show that that date was wrong. 43 I. A. 192 ; 48 I. A. 395 Rel. It is for the plaintiff, in a suit for ejectment to prove possession prior to the dispossession which he alleges. At the same time on the question of evidence the initial fact of plaintiff's title comes to his aid, with greater or less force according to the circumstances established in evidence.

Where plff. purchased two open spaces of land in a court sale and was placed in possession of them and more than 12 years after the delivery of possession sued to eject the deft a person claiming to be a subsequent purchaser from the judgment debtor. Held, that the plaintiff having established his title to the property could rely on the presumption that possession follows title in the

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absence of strong and clear evidence to rebut it. Possession of open spaces goes naturally with the possession of the property which they adjoin. (*Muleed, C. J. and Coyajee, J.*) *MAHAMMAD SAHIB IBRAHIM SAHIB v. TILOKCHAND.*

24 Bom. L. R. 373 : (1922) Bom. 243 : 66 I. C. 764.

## —Art. 142—Suit for possession—Onus on plaintiff to prove subsisting title on date of suit.

In a suit for possession under art. 142 of the Lim. Act the onus is on the plaintiff to prove not merely his title but also a subsisting title to the property in dispute. 16 C. 437 P. C. Rel. (*Broadway and Abdul Qadir, JJ.*) *DUNI v. MALERI RAM.*

4 Lah. L. J. 332 : (1922) Lah. 432.

## —Art 142—Suit for possession—Proof of possession within 12 years of suit.

Where a plaintiff sues for possession, he must prove not only his title but also possession within 12 years if the case falls under art. 142 of the Lim. Act. Where there is evidence adduced as regards possession and the land is capable of possession, the plaintiff must succeed on the strength of the evidence and not on the mere presumption that possession follows title. (*Chatterjee and Pantun, JJ.*) *RAM RATAN MANDAL v. NILMONI CHOWDHURY.*

66 I. C. 914.

## —Art. 142—Suit for possession—Proof of title—Delivery of symbolical possession—Adverse possession—Tacking—Independent trespassers.

Where it is proved that the true title to land is on the plff. and that the possession of the defendant commenced within 12 years before suit, the suit is in time under art. 142 of the Lim. Act. Independent trespassers not claiming under one another cannot tack on their possession for the purposes of art. 142 of the Lim. Act. When possession passed from the first to the second trespasser there is a constructive restoration even if a momentary rest to one of the true title to possession. As against the judgment debtor delivery of symbolical possession is enough to interrupt his adverse possession. 5 C. 584 F. B. ; 16 Cal. 530 ; 22 C. W. N. 330 Rel. (*Richardson and Suhrawardy, JJ.*) *JANOKI NATH SAHA v. BAIKUNTHA NATH GHATTACK.*

36 C. L. J. 140 : (1922) Cal. 176

## —Art. 142—Suit for removal of trees—Possession of land—Limitation.

Art. 142 of the Lim. Act applies to a suit for the removal of trees planted on lands alleged to belong to the plff. but which is in the possession of the deft. 6 O. L. J. 323, 10 A. 634 dist. (*Daniels, J. C.*) *GHAFOR KHAN v. LALA PRAG NARAYAN.*

9 O. L. J. 17 : (1922) Oudh 47 : 66 I. C. 799.

## —Art. 143—Starting point—Knowledge of lessor not essential.

Under Art. 143 of the Limitation Act, the starting point of limitation is the forfeiture itself; there is nothing in the article about the knowledge of the lessor. (*Ayling and Krishnan, JJ.*) *ZAMORIN OF CALICUT v. UNIKAT KARNAVAN SAMU NAIR.*

15 L. W. 164 : (1922) Mad. 23

## LIMITATION ACT (1908) ART. 144.

—Art. 144—Adverse possession — Alienation by Mahant — Position as regards properties vested in idol and mahant—Distinction.

Where property is in a juridical person and such property is transferred by a person who is only representative and manager of that juridical person then there is adverse possession to the right of the juridical person from the date of the alienation. The act of alienation in such a case is a direct challenge upon the title of the idol.

But where the title is in the mahant or shebait the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive, and possession becomes adverse only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation (*Das and Bucknill, JJ*) MAHANT RAMRUP v. LAL CHAND MARWARI 1 Pat. 475.

3 Pat. L. T. 352. (1922) P. 243.  
67 I. C. 401.

—Arts. 144 and 148—Adverse possession—Mortgage—Redemption. See (1921) DIG. COL. 775. RAM NARAYAN RAI v. RAM DENI RAI.

6 Pat. L. J. 680 : (1922) Pat. 129.

—Art. 144—Adverse possession — Plaintiff proving title—Both parties having uncertain possession. See (1921) DIG. COL. 775 KUTHALI MOOTHAVAR v. PERINGATI KUNHARANKUTTY.

30 M. L. T. 42 : L. R. 3 P. C. 9 :  
24 Bom. L. R. 669 : (1922) P. C. 181 :  
66 I. C. 451 (P. C.)

—Art. 144—Adverse possession—Suit for possession—Death of plaintiff—Successor's right.

A Meikkavalgar was in possession of Manibham lands since his dismissal i.e. 5th September 1895 till 1912 when a suit for the recovery of the land was instituted by the subsequent office holder. Held, that the suit was time barred. When on the death of the plaintiff his successor continued the suit, held his right was also extinguished by adverse possession. (*Ayling, O. C. J and Odgers, J*) MADURA DEVASTHANAM v. SAMIA PILLAI. (1922) Mad. 406.

—Art. 144—Application of Act to Buddhist monastery—Adverse possession.

The Limitation Act applies to suits for possession of Buddhist monasteries.

Possession by a Pargyi of a monastery adverse to the true owner for more than 12 years conveys to him a good and complete title, and the death of the Pargyi does not give the owner a right to sue again. (*Maung Kin, J*) WISEIKTA v. PARAMA. 1 Bur. L. J. 108.

—Art. 144—Applicability—Execution proceedings against minors—No proper guardian appointed—Suit to declare sale a nullity—Limitation. See C. P. CODE, S. 47. 67 I. C. 547.

—Art. 144—Co-heirs—Suit for possession of joint property.

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Where a Mahomedan brings a suit for recovery of his share of certain immoveable property alleged to have descended upon him and defendant jointly as co-heirs 50 years ago and it is proved that the lands were joint ever since, the suit is not barred by limitation. 34 Mad. 511; 97 P. R. 1890, 89 P. R. 1898; Raf. (*Broadway J.*) HASHAM ALI, v. UMAR HAYAT 4 Lah. L. J. 57. (1922) Lah. 193.

—Art. 144—Co-tenants—Suit for possession by one tenant against another—Limitation—Starting point.

In the absence of proof of ouster, possession of one joint tenant is not adverse to other joint tenants. An assertion of exclusive title in mutation proceedings may be evidence of ouster but not the institution of a suit by one joint tenant in his or her own name (*Stuart, J.*) JAGRANI MISRANI v. MUST. SHEO DULARI SHUK-LAIN. 64 I. C. 462.

—Art. 144—Deduction of period under S. 16 not allowable. See LIM. ACT, S. 16 AND ARTS. 137, 138, 144. 26 C. W. N. 364.

—Art. 144—Endowed property—Alienation by mahant—Suit to set aside—Limitation. See LIM. ACT, ARTS. 134 AND 144. 65 I. C. 722.

—Art. 144—Hindu Law—Reversioner—Possession adverse to nearest reversioner—Effect on remote reversioner.

As a remote reversioner's right is not derived from or through the nearer reversioner, possession adverse to the latter will not be adverse to the former, and adverse possession will begin as against him only when his right to possession accrued i.e. the date of the death of the nearer reversioner. (*Scott-Smith, J.*) HASTI v. HIRA. 4 Lah. L. J. 201 : (1922) Lah. 37.

—Art. 144—Lunatic—Adverse possession against—Right of widow as legal representative—Reversioners if barred by inaction of widow. See LIM. ACT, SS. 6, 8, 9 AND ART. 144.

42 M. L. J. 262

—Arts. 144 and 44—Minor—Alienation of property—Suit to recover after attaining majority—Limitation.

Where the property of a minor member of a Hindu family is alienated during his minority by a person who is not his guardian, either in fact or law, a suit by him to recover possession after attaining majority would be governed by Art. 144 and not Art. 44 of the Lim. Act. (*Abdul Raoof and Abdul Qadir, JJ.*) SUNDER V. SHIAMAN. (1922) Lah. 386 : 68 I. C. 731.

—Art. 144—Planting of trees on another person's land—Active trespass—Adverse possession.

The planting of trees on another person's land is an active trespass and the owner is entitled to treat it as such if he wishes to do so. The period for bringing a suit for possession is twelve years. (*Walsh, J.*) MD. SHAFI v. BINDESHART SINGH. (1922) All. 50.

## LIMITATION ACT, (1908) ART. 144

—Art 144—*Religious endowment—Debtor property—Adverse possession—Succeeding trustees.*

Where a person trespasses upon endowed property and holds adversely, limitation against the trust begins to run from the date of the trespasser entering into possession. Each succeeding manager of the endowed property cannot get a fresh start of limitation for ejecting the trespasser. Though a succeeding manager does not derive his title from the previous manager yet they form a continuing representation of the endowed property 23 C. 536 ref. (*Lindsay, J. C.*) MAULVI ABDUL RASHID v. JANKI DAS. 90 L. J. 2

4 U. P. L. R. (O. C.) 61: (1922) Oudh 24: 66 I. C. 941

—Art. 144—*Right of fishery—Nature of—Acquisition—Limitation.*

A right of fishery of whatever nature is not strictly an easement—It is either an interest in immoveable property or a *profit a prendre* which may be either in gross or appurtenant to a dominant tenement.

The question of acquisition of such rights must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a *profit a prendre*, it has also the distinctive features of an interest in immoveable property. Even if S. 26 of the Limitation Act applies, it would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions. (*Miller, C. J. and Mullick J.*) MESSRS. HENRY HILL AND CO. v. SHEORAI RAI. (1922) Pat 195: 3 Pat. L. T. 477: 4 U. P. L. R. (Pat.) 38: 67 I. C. 954.

—Arts. 144 and 120—*Suit for declaration of public right of way—Continuing wrong—Limitations.*

Art. 144 and not Art 120 applies to a suit for a declaration that a certain pathway is a public one and that nobody is entitled to obstruct it. To such a case S. 23 will apply. (*Panton, J.*) HARISH CHANDRA SAHA v. PRAN NATH CHAKRABARTY. 26 C. W. N. 587.

—Arts. 144 and 127—*Sale of joint family properties—Stranger purchaser taking possession—Suit to recover property—Limitation—Starting point—Knowledge.*

The plaintiff's undivided uncle and another uncle's son sold in 1898 certain properties of the joint family to the first defendant. Some of the properties sold were leased to the vendors, but in 1901 they relinquished the same. In 1902 some of the lands sold were in the cultivation of the vendors. After 1902 the properties were always in the possession of the purchaser, the first defendant. In a suit by the plaintiff to recover

## LIMITATION ACT, (1908) ART. 145.

possession of the properties from the first defendant, held that the suit was governed by Art. 144 of the Lim. Act and not by Art 127 and adverse possession commenced to run at least from the year 1902, when the vendors ceased to cultivate the properties they had alienated.

Under Art. 144 it is not necessary for the defendants to prove the exact date, when the plaintiff became aware that he had been excluded from a right to share in the joint family properties. 23 B. 137, 37 B. 84 foll 25 I. C. 573 doubted. (*Spencer and Ramesam, JJ.*) LINGA MUNISAMI REDDI v. P. S. GOVINDASWAMI NAICKER.

42 M. L. J. 364: 15 L. W. 294: (1922) Mad 369

—Art. 144—*Suit by a holder of an office to recover lands forming the emoluments thereto—Dismissed office holder continuing in possession—Adverse possession See (1921) DIG COL. 774 KUPPUSWAMI MUDALIAR v. SAMIA PILLAI.*

42 M. L. J. 1: 15 L. W. 33.

—Art. 144—*Suit for possession—Plaintiff—Onus—Prior possession—Proof of.*

In cases under Art. 144 of the Lim. Act it is not incumbent on the plff. to establish possession within 12 years of suit. He has to prove title and it then rests on the defendants to show that he and those under whom he claims have been in possession for over 12 years before suit. (*Prideaux, A. J. C.*) SAKHARAM v. DEOBA.

68 I. C. 320.

—Art 144—*Suit under—Proof of title—Onus on deft to prove adverse possession.*

In cases coming within Art. 144 of the Lim. Act, if the plaintiff has succeeded in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period, and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness 41 A. 669; 6 Pat. L. J. 478 Ref. (*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN v. TULSI CHARAN DAS. 36 C. L. J. 472.

—Arts. 145 and 49—*Deposit—Suit for recovery—Limitation—Death of depositary.*

Art. 145 is a special article applicable where the depositor seeks to recover from the depositary moveable property deposited and time runs from the date of the deposit. Art. 49 is on the other hand a general article for the recovery of specific moveable property or for compensation for wrongly detaining the same and time runs from the date when the property is wrongfully taken or when the detainer's possession becomes unlawful. All actions for the recovery of a deposit of moveable property are comprised within Art. 145 and no exception is made where demand and refusal make the continuance of possession unlawful. The fact of possession by the depositary after demand being wrongful does not make art 49 applicable. Where the original depositary dies and the subject matter of the deposit passes into the hands of his heir, the latter remains an involuntary bailee thereof and a suit for recovery of the deposit would still be governed by art. 145 of the Lim. Act 33 M. 56, 60 foll 14 A. C. 273 Ref. (*Ghose, J.*) PROMOTHO NATH MULLICK v. PRODYMO KUMAR MULLICK 26 C. W. N. 772.

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—Art. 145 — Fishery—Immoveable property—User within 2 years under S. 26 of the Limitation Act need not be proved. See LIM. ACT, S. 26. 64 I. C. 346

—Arts 148 and 144—Charge—Redemption. See (1921) DIG. COL. 778 RAM NARAYAN RAI v. RAM DENT RAI 6 Pat. L. J. 680 (1922) Pat. 129

—ArtS 148 and 132—Co-mortgagors—Redemption of mortgage by one—Suit by other mortgagors against redeeming mortgagor—Limitation—Art. 148 and not Art. 132 applicable. See LIM. ACT, ART. 132 AND 148, 20 A. L. J. 611.

—Arts. 148 and 105—Suit for redemption of usufructuary mortgage and for recovery of surplus profits received—Limitation. See (1921) DIG. COL. 777 PRASANNA KUMAR MANDAL v. NILAMBAR MANDAL. (1922) Cal. 189: 64 I. C. 75.

—Art. 152—Date of decree—Appeal—Decree drawn up after judgment

For purposes of calculating limitation for an appeal the date of the decree is the date when the judgment was pronounced even though the decree is drawn up subsequently. This is entailed by the provisions of O. 20, R. 7, C. P. Code. (Kotwal, A. J. C.) NARAIN v. RAMDULARE. (1922) Nag. 113 66 I. C. 7

—Art. 156—Appellate order not appealed against in time—Subsequent amendment of decree relating to an error as regards interest—Filing of second appeal thereafter—Question of interest not attacked—Bar. See C. P. CODE, S. 180.

L. R. 3 All. 27.

—Art 158—Award—Decree passed on—No time for objections—Effect of.

A court has no jurisdiction to pass a decree in terms of the award within the 10 days allowed by Art. 158 of the Limitation Act for filing objections to the award.

9 M. L. T., 391 and (1912) M. W. N., 1232 foll.

The mere fact that the parties agree to be bound by the award and not to object thereto does not prevent them from impeaching the award on the ground of fraud and collusion. (Odgers, J.) T. L. RUNGIAH CHETTY v. T. GOVINDASAMI CHETTY. 15 L. W. 160: (1922) Mad 179

—Art. 164—Application to set aside ex parte decree—Delay—S. 5 if applies. See LIM. ACT, S. 5 AND ART. 164.

66 I. C. 270

—Art. 164—Ex parte decree—Application to set aside—Limitation—No inherent power to extend time prescribed by art. 164. See C. P. CODE S. 151 AND O. 9, R. 13. (1922) Pat. 61.

—Arts. 165 and 181—Execution of decree—Property not covered by decree alleged to have been delivered—Application for redelivery of possession by judgment debtor—Limitation Act Art. 181 and not art. 165 applicable. See LIM. ACT ARTS. 181 AND 165.

24 Bom. L. R. 771.

## LIMITATION ACT (1908), ART. 174.

—Art. 165—Scope of.

Art. 165 of the Limitation Act applies only to proceedings under O. 21, R. 100 C. P. Code (Greaves and Ghose, JJ.) BAHU. DAS PAL v. GIRISH CHANDRA PAL 67 I. C. 663.

—Arts. 166 and 181—Execution sale—Setting aside—Application under S. 47, C. P. C.—Limitation

Art. 166 and not Art. 181 applies to an application to set aside an execution sale on the ground of illegality or irregularity under S. 47, C. P. CODE. (Spencer and Krishnan, JJ.) KONIDEVA KANNAYYA v. RAMAMMA (1922) M. W. N. 176: (1922) Mad. 95: 16 L. W. 934.

—Art. 166—Execution sale—Application to set aside under S. 47 C. P. Code—Limitation

An application to set aside an execution sale whatever its nature and whether falling under S. 47 C. P. Code or O. 21, R. 90 C. P. Code is governed by Art. 166 and not by Art. 181 of the Lim. Act. (Oldfield and Venkatasubba Rao, JJ.) GANAPATHI MUDALIAR v. KRISHNAMACHARI

43 M. L. J. 184: 16 L. W. 178  
31 M. L. T. 135 (H. C.): (1922) M. W. N. 514:  
(1922) Mad. 417.

—Art 166 and 181 — Execution sale—Application to set aside—Fraud—Limitation.

It does not make any difference whether an application to set aside an execution sale was made under O. 21 R. 90 or S. 47 C. P. Code, so far as limitation is concerned. Art. 181 of Lim. Act applies only to applications for which no period of limitation is prescribed elsewhere in the schedule but all applications for setting aside a sale in execution of a decree are governed by Art. 166 of the Lim. Act even though the ground for setting aside the sale should be fraud or any other reason. All applications to set aside a sale in one sense come within S. 47 C. P. Code as that section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the executing court. The effect of Art. 166 of the Lim. Act cannot be evaded merely by stating in the application itself that it is brought under S. 47, C. P. Code as well as under O. 21, R. 90, C. P. Code. An application beyond period prescribed by Art. 166 would be time barred unless, it can be shown that the applicant's right to set aside the sale was concealed from him by the fraud of the respondent. In such a case under S. 18 of the Lim. Act time would only begin to run when the respondent first became aware of the fraud. (Miller C. J. and Mullick, J.) RAMDHARI CHAUDHURY v. DEONANDAN PRASAD SINGH. 3 Pat. L. T. 501: (1922) Pat. 209: 4 U. P. L. E. (Pat.) 71: (1922) P. 507.

—Art. 174—Application by judgment-debtor—Limitation.

Article 174 of the Limitation Act is applicable only to a case under O. 21, R. 2 (2) that is, where the judgment debtor seeks to inform the court of a payment alleged to have been made by him out of court to the decree-holder. In such a case, the period of limitation is 90 days. This period does not govern an application by the decree-holder

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himself. (*Mookerjee and Panton, JJ*) *BAHY MAHOMED SAHAI v. AIJANMAI*. 26 C. W. N. 529 : 35 G. L. J. 71.

—Art. 175 — *Adjustment — Saving of limitation—Bar under S. 48, C. P. C.*

A decree was passed on 23-3-06 which was sought to be executed by an application filed on 21-5-18. An adjustment had been effected between the parties on 27-7-12, by which the balance was made payable in instalments and this had been recognised by an order in a previous execution proceeding. *Held*, S. 48, C. P. Code, barred the application in spite of the adjustment. Even if the order was one under O. 20, R. 11, the application was clearly barred under Art. 175 Limitation Act. (*Coutts and Adams, JJ.*) *GOBARDHAN PRASAD v. BISHUNATH PRASAD*. 2 P. L. T. 80.

—Art. 176—*Amending Act 26 of 1920—Not retrospective—Death of appellant—Limitation for bringing on record legal representative.*

The appellant died on 19-11-1920 and the Limitation Act 26 of 1920 reducing the period for bringing on record the legal representative to 3 months came into force on 1-1-1921. *Held* the period for an application for bringing on record the legal representative was 6 months under Art. 176 of the Lim Act as it stood before the amendment. (*Mookerjee and Chotzner, JJ.*) *AJIT SINGH v. BHAGABATI CHARAN MUKERJEE*. 36 C. L. J. 263 : (1922) Cal 491.

—Art. 177—*Period under, if reduced by Act XXVI of 1920.*

The new amending Act 26 of 1920 passed by the Governor-General does not reduce the period of limitation as prescribed by Act IX of 1908, as no mention of Art. 177 is made in the body of the new Act 26 of 1920 although there may be mention of this in the statement of objects and reasons. (*Harrison, J.*) *RUP KISHORE v. BHAGAT GOVIND DAS*. (1922) Lah. 211.

—Art. 179 — *Leave to appeal to His Majesty in Council—Limitation—Time for obtaining copies—If can be deducted* See LIM. ACT S. 12 (3) AND ART. 179, 3 Pat. L. T. 289.

—Art. 179—*Mortgage decree—Application for order absolute—Limitation—Starting point—Dismissal of appeal for default of prosecution.*

An application for an order absolute under S. 89 of the T. P. Act was governed by Art. 179 of the Lim. Act, 1877 and limitation ran from the date of the decree on appeal. The dismissal of an appeal by the Privy Council for want of prosecution did not give a fresh starting point. 36 A. 350 ; 36 A. 284 Ref. (*Lord Atkinson.*) *SACHINDRA NATH ROY v. MAHARAJ BAHADUR SINGH*. L. R. 3 P. C. 174 (P. C.)

—Art. 181—*Applicability of—Application for recording part payment and for execution as regards balance*

Article 181 of the Limitation Act is applicable to an application, which is a combined one embodying a two fold prayer, namely, first, that the alleged payment be recorded, and, secondly, that the decree be executed for the balance of the judgment debt, by a decree-holder, who has

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received payment from the judgment-debtor out of court, to record the payment. The right of the decree holder to apply accrues as soon as he receives payment and he had to apply to the execution court within three years from that date to record the payment. 45 Calc. 630; 23 C. W. N. 320 Ref. (*Mookerjee and Panton, JJ*) *BALEY MAHAMMAD SAHI v. AIJANMAI*. 26 C. W. N. 529 35 C. L. J. 71

—Art. 181—*Application for final decree—Continuation of existing application—No bar.*

Within three years of the passing of the preliminary decree in a mortgage suit an application was made for the final decree but the application was returned for a correct statement of the amount due to the mortgagee and for a proper description of the mortgaged property. No time was fixed for the amendment and the decree-holder presented his application after the expiry of three years from the date of the preliminary decree. *Held* that the subsequent application must be regarded as one for the continuation or revival of the previous one and that it was not barred by the limitation (*Lindsay and Kanharya Lal, JJ.*) *KALLU MAL v. KASHI NATH*. 20 A. L. J. 580 : L. R. 3 A. 496. (1922) All 446 : 4 U. P. L. E. (A) 190 : 68 I. C. 175.

—Art. 181—*Application for final decree in mortgage suit—Date of payment in preliminary decree more than 3 years earlier—Effect* See C. P. CODE O. 34 RR 4 AND 5. 42 M. L. J. 51.

—Arts 181 and 182 — *Execution of decree—Decree incapable of execution—Limitation.* See (1921) DIG, COL. 782 *MAHARAJA OF DHARBHUNGA v. HOMESHWAR SINGH*.

30 M. L. T. 189 (P. C.)

—Arts 181 and 165 — *Execution — Delivery of property in excess—Application for restoration.*

Where a judgment-debtor who has been dispossessed of property not covered by the decree in execution thereof, applies for recovery of possession, the application is governed by Art. 181 and not by Art. 165 of the Lim. Act, 42 M. 753 ; 38 A. 339 foll. (*Macleod, C. J and Shah, J.*) *RASUL MALIK PINGAR v. AMINA HANIT*. 24 Bom. L. R. 771 : (1922) Bom. 271 : 68 I. C. 349.

—Art. 181 — *Execution proceedings — Application for continuance of—Limitation.*

Where an application for execution by sale of the mortgaged property had been transmitted to the Collector under Sch. III, C. P. Code but owing to the death of the decree holder thereafter no steps were taken and the Collector returned the papers to the Civil Court a subsequent application by the representatives of the decree-holder could be treated as one for the continuance of the proceedings from the stage at which they were stopped by the death of the decree-holder. The application will be in time if made within 3 years of the closure of the previous proceedings. (*Dhobley, A. J. C.*) *BHAURAO v. LAHANU*. 64 I. C. 855.

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———Art. 181—*Mesne profits—Application for ascertainment of.*

The limitation for an application for the determination of mesne profits, if there is any limitation applicable, is to be computed from the date of the final decree by which the award of mesne profits was confirmed. 36 A. 350 39 A. 641 Rel. (Kanhaya Lal J. C.) KUBER SINGH v MUSSAMMAT RAJ KUNWAR.

25 O. C. 132 (1922) Oudh 197 : 68 I. C. 896.

———Arts. 181 and 182—*Mortgage—Amendment of preliminary decree—Final decree—Mortgagee's right on basis of amended decree.*

On the amendment of the preliminary decree in a mortgage suit by the mortgagee, the decree-holder's right to obtain a final decree which is barred by limitation is not revived and the decree-holder does not become entitled to a final decree on the basis of the amended decree. (*Drake Brockman, J. C.*) NANHELAL v. GULSHANRAI.

18 N. L. R. 58. (1922) Nag 217. 68 I. C. 919.

———Art. 181—*Mortgage suit—Appeal from preliminary decree—Application for final decree—Right when accrues—Analogy of Arts. 179 and 182.*

When in a mortgage suit, an appeal has been preferred against the preliminary decree, the right to apply for the final decree accrues on the date of the appellate order—Analogy of Arts 179 and 182 considered (*Das and Adam, JJ.*) SAIYAD JAWAD HUSSAIN v. GENDAN SINGH.

1 Pat. 444 : (1922) Pat. 164 : 3 Pat. L. T. 329 : (1922) P. 205 : 66 I. C. 790.

———Art. 181—*Mortgage suit—Final decree for foreclosure—Limitation—Starting point—Dismissal of appeal for non-prosecution—Effect of.*

Art. 181 of the Limitation Act governs an application for the passing of a final decree in a mortgage suit. Where an appeal has been preferred from the preliminary decree, but the appeal is dismissed for non-prosecution, the dismissal of the appeal by the appellate court does not give rise to a fresh starting point for an application for a final decree 37, C, 796 dist, 1 Pat L. J. 364 foll. 36 A 350 P. C. applied. (*Das and Adam, JJ.*) CHHOTAY NARAIN SINGH v KEDAR NATH SINGH.

3 Pat. L. T. 565. 66 I. C. 97 : (1922) P. 201 : 1 Pat. 435 : (1922) Pat. 342

———Arts. 181 and 182 Explan. I—*Personal decree against mortgagor and his surety—Application for—Limitation*

An application for a personal decree against the mortgagor or his surety after exhausting the hypothecated properties is governed by art. 181. Even if art. 182 applies any application for execution against the mortgagor would save limitation against the surety under Art. 182. Explanation I, (*Swinhoe, A. J. C.*) YINKE SUPAYA v. MAUNG KIN.

60 I. C. 23.

———Arts. 181 and 182 — Preliminary decree—Deposit of money due under—Limitation—Continuing right. See C. P. CODE O. 24. RR. 4 AND 5.

9 O. L. J. 14.

## LIMITATION ACT (1908), ART. 182.

———Art. 181—"Right to apply"—*Construction of.*

The expression "Right to apply" in Art 181 of the Lim Act should not be rigidly construed (*Drake Brockman, J. C.*) NANHELAL v GULSHANRAI.

18 N. L. R. 58. (1922) Nag 217. 68 I. C. 919.

———Art. 181—*Right to apply for a final decree—Limitation—Starting point—Amendment of decree.*

A preliminary decree for sale by a mortgagee was passed on 25—1—1917. Time was given to the mortgagees up to 22—3—1917 to pay up the decree amount. On 28—4—1917 a clerical mistake in the decree was corrected and the sum of 2,486 was substituted instead of Rs. 2,350 as being the decree amount. On 27—4—1920 plff. applied for the passing of a final decree. Held, that the right to apply accrued on 22—3—1917 and that inasmuch as the application was made more than 3 years after that date it was time-barred. There was no alteration in the decree and it cannot be said that the decree as amended on 28—4—1917 was a new decree. The mere fact that by a clerical error a wrong sum had been entered does not affect the case. (*Rytes and Stuart, JJ.*)

RAM CHANDRA v. JAI MAL 20 A. L. J. 640 : L. R. 3 A. 483.

———Art. 182—Application against judgment debtor—If saves limitation against surety—Limitation for execution See (1921) DIG COL. 783.

4 Lah. L. J. 85.

———Art. 182—Decree—Amendment of—Decree made capable of execution—Limitation. See (1921) DIG COL. 784 SANATON SANT v. DINABANDHUGIRI.

64 I. C. 622.

———Art. 182 — Execution application—Continuation of prior application—Execution sale set aside at the instance of judgment-debtor—Subsequent application for execution treated as one for continuation of earlier application. See LIM. ACT, S. 15 and ART. 182. 35 C. L. J. 135.

———Art 182 and 181—*Execution—Application by decree-holder auction purchaser.*

Where an application has been made against one of several judgment-debtors and has been dismissed for this reason, a subsequent application made against the whole of the judgment debtors cannot be treated as an application in continuation of the previous application. If the first application for execution is *ab initio* a bad application, the subsequent application cannot be an application made in continuation. Where the question is whether an application by a decree-holder auction purchaser for delivery of possession is a step in aid of execution the answer must be in the negative.

O. 21, R. 95 applies to an application made by the purchaser and an application made by the purchaser cannot possibly be read as an application by a decree-holder to take some step in aid of execution, whether the purchaser be the decree-holder or an outsider. (*Coutts and Das, JJ.*) KAMAL NAIN SINGH v. MAHARAJA BAHADUR KESHO PRASAD SINGH. (1922) P. 310 : 68 I. C. 636.



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—Art. 182—Execution application—Continuation—Revival of prior application—Circumstances justifying inference.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction. 37 Cal 796 foll.

A consent decree was made on the 26th June 1915. On the first application for execution made on the 24th June 1916, the court directed a writ of attachment to be issued. The writ being returned unserved, the court on the 4th August 1916, directed a fresh attachment to issue. The decree-holder was ordered to file process and process-fees within five days. This order was carried out. But on the 5th August, 1916, the judgment-debtor filed a petition under O. 21, R. 2 of the Code of Civil Procedure to the effect that the decree had been satisfied out of court and consequently no execution could issue on the basis thereof. The objection was numbered as a separate case. The two cases were adjourned from time to time and on the 9th December 1916, the objection case as well as the execution case came up for consideration. The objection case was dismissed for default. Afterwards the following order was made in the execution case: "The pleader for the decree-holder has no objection to his case being dismissed provided he gets his costs. The execution case is dismissed for default. The decree-holder will get his costs." Subsequently on the 27th November, 1919, the present application was made:

*Held* that the execution proceedings which had been initiated on the 24th June, 1916, had been suspended by reason of the objection taken by the judgment-debtor. As soon as the objection was abandoned on the 9th December 1916, it became the duty of the court to proceed with the application for execution. The order for dismissal made on the 9th December, 1916, should be treated as equivalent to an order for striking off the case or removing it from the file for the convenience of the Court. 23 All 114 Ref. (*Mookerjee and Pantou, JJ.*) CHOWDHURY AJODHYA NATH PAHARY v. CHOWDHURY SRINATH CHANDRA PAHARY.

26 C. W. N. 338 : 35 C. L. J. 84 68 I. C. 207

—Art. 182—Fresh application—Continuation of old application—Former execution application consigned to record room.

Where without any fault or delay on the part of the decree-holder and without notice to him, the court consigns an application for execution to the record room, a further application for execution will be treated as one for continuation of the old application 37 A. 518 foll. (*Walsh and Ryves, JJ.*) RAM LAKHAN SINGH v. MEWA LAL.

3 U. P. L. R. (A) 13 : 65 I. C. 78 : (1922) All. 433.

—Art. 182—Joint decree against principal debtor and surety—Execution against principal debtor—If saves limitation against surety.

Where a decree is passed jointly against several persons notwithstanding the fact that it is to be executed against some of them only in case the decree-holder failed to realise it from the

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principal judgment-debtors, an application for execution against the latter saves limitation for an application for execution against the former (*Martineau, J.*) HONDA BAM v. FIRM OF SETH KUNWAR BHANSUK NAND.

4 U. P. L. R. 70 (Lah) : 67 I. C. 301

—Arts 182 and 183—Limitation Act (1877) art. 179—Mortgage—Preliminary decree—Appeal—Dismissal for non prosecution—Order absolute—Limitation—Indemnity—Liability under. See (1921) Dig. COL. 785. SACHINDRA NATH ROY v. MAHARAJ BAHADUR SINGH

33 M. L. T. 96 : 24 Bom. L. R. 659 (P. C.) :

26 C. W. N. 859 : 4 U. P. L. R. (P. C.) 57.

(1922) M. W. N. 338 :

(1922) P. C. 187.

—Art. 182—Mortgage—Decree nisi under Dekhan Agriculturists Relief Act—No necessity for decree absolute—Application for same—Effect—Step-in-aid of execution. See C. P. CODE, S. 48.

24 Bom. L. R. 269.

—Art. 182—Mortgage—Instalment decree under Dekhan Agriculturists Relief Act—Failure to pay instalments—Execution application—Effect—Step-in aid of execution of all instalments.

A decree was passed on a mortgage and the amount directed to be paid in instalments under the Dekhan Agriculturists' Relief Act. As some of the instalments were not paid, darkhast on execution application for some of those instalments was taken out. When darkhast was taken later for default in payment of some other instalments, a point of limitation was raised.

*Held*, the prior Darkhast was a step-in-aid of execution in respect of all the instalments then due. (*MacLeod, C. J. and Shah, J.*) SITABAI ZUKAPPA MHETRE v. KESHAVRAO KATE.

46 Bom. 719. 24 Bom. L. R. 284 :

(1922) Bom. 194 : 67 I. C. 169.

—Art. 182—Step-in-aid—Application to summon witness to resist objector's claim to attached property. See (1921) Dig. COL. 786. MAHOMED SIDDIG KHAN v. MISRI LAL.

(1922) A. 432 : 64 I. C. 524.

—Art. 182—Step-in-aid of execution—Application for making decree final—Time barred application if saves limitation. See (1921) Dig. COL. 786. GULAPPA v. ERAVA

46 Bom. 269 : (1922) Bom. 118.

—Art. 182 (1)—Decree for perpetual injunction—Breach—Limitation for execution.

When a perpetual injunction has been granted on each successive breach of it the decree may be enforced by an application made within 3 years of such breach. 29 M. 314 : 28 A. 300 : 23 A. 465 Ref. Cultivation of land is an infringement of the right of grazing and every successive season in which the land has been cultivated is the occasion of a fresh breach of the injunction. (*Chevis, J.*) UDMI v. SOHAN LAL.

66 I. C. 168.

—Arts. 182 (1) and 5—Execution of decree—Limitation—Decree in favour of one person—Transfer of portions thereof to different persons—Execution application by one of the

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transferees as regards portion of the decree transferred to him—Limitation if saved as regards other transferees. *See* (1921) DIG. COL. 786, PUSARAPU VENKATA REDDAYA v. THORAM YARAKAYYA 45 Mad. 35 : 15 L. W. 157 : (1922) Mad. 129.

———Art. 182 (1)—*Ex parte decree—Application for execution—Time taken to set aside ex parte decree.*

An application for execution of an *ex parte* decree against which no appeal is preferred is governed by Art. 182 cl. (1) and the time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree cannot be deducted nor does the limitation begin from the date of the dismissal of the application. (*Prideaux, A. J. C.*) JABARKHAN v. RAHIM KHAN.

18 N. L. R. 190 : (1922) Nag. 197 : 68 I. C. 728.

———Art. 182 Cl. (2)—*Scope of*

The words "Where there has been an appeal" in cl. 2 of the article contemplate and mean an appeal from the decree or order sought to be executed and do not include an appeal from an order dismissing an application to set aside an *ex parte* decree. (*Prideaux, A. J. C.*) JABARKHAN v. RAHIM KHAN (1922) Nag. 197 :

18 N. L. R. 190 : 68 I. C. 728.

———Art. 182 (3)—*Application for review of decree—Dismissal—Appeal against order—If suspends limitation.*

The decree under execution was sought to be reviewed and on the petition being dismissed, an appeal was preferred. *Held*, such an appeal being incompetent in law, the running of limitation for purposes of execution was not suspended by reason of the pendency of the appeal (*Greaves and Ghose, JJ.*) RAM RATAN CHOWDHURI v. UPENDRA CHANDRA DAS.

68 I. C. 727.

———Art. 182 (5)—*Application in accordance with law—Defect—C. P. Code, O. 21 Rr. 15 and 22.*

An application under R. 15 (1) O. 21 C. P. Code though defective saves limitation. A notice under R. 22 O. 21 issued on a defective application saves limitation. (*Couits and Das, JJ.*) GOBEHAND DAS v. SATIS CHANDRA RAI.

(1922) P. 597.

———Art. 182 (5)—*Application in accordance with law—Meaning of—Application to transfer decree for execution—Court having no pecuniary jurisdiction—If a step-in-aid of execution.*

An application to transfer a decree for execution is a step-in-aid of execution, if it is in accordance with law. The terms "applying in accordance with law" mean applying to the court to do something in execution which by law that court is competent to do. It does not mean applying to the court to do something which either to the decree-holder's direct knowledge in

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fact or from his presumed knowledge of the law he must have known the court was incompetent to do.

Hence an application to transfer a decree for execution to a court which was pecuniarily incompetent in jurisdiction, is not a step-in-aid of execution (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL v. MURLIDHAR, 3 Pat. L. T. 422 : (1922) Pat. 229 : (1922) P. 188 : 67 I. C. 538.

———Art. 182 (5)—*Application in accordance with law—Plaint filed in suit to set aside fraudulent transfer—Decree—Limitation—Saving of.*

A obtained a decree for money against B on 22—7—1918. B transferred all his properties to a relation of his, C, by a sale dated 20—8—1918. Thereupon A instituted a suit on 26—11—1918 in the court which passed the decree, for a declaration that the transfer was fraudulent and void and that the properties were liable to attachment and sale in execution of his decree impleading B and C as parties to the suit. The suit was decreed on 23—8—1921. A applied to execute his decree by sale of the properties of B and B pleaded that the application was barred under Art. 182 (1) of the Lim Act. *Held*, that the plaint in the suit filed by A against B and C in the court which passed the decree and was bound to execute it, constituted a step-in aid and that the present application was not barred. 22 A. 358 ; 25 B. 639 ; 30 A. 179 ; 25 B. 452 ; 32 M. 425 ; 19 A. L. J. 905 Ref. 37 B. 559 dist. (*Wazir Hasan, A. J. C.*) SHEO RAM v. RAM BHAROSEY.

90 L. J. 444 : 4 U. P. L. R. (Oudh) 97.

———Art. 182 (5)—*Application for arrest of judgment debtor—Subsequent application for arrest of surety—Limitation—Saving of.*

Where certain persons had become sureties for the satisfaction of the entire decree on default of payment by the judgment-debtor and an application for execution was put in for the arrest of the judgment-debtors and subsequently within 3 years of that application a fresh execution application was put in for recovery of the decree amount by arrest of the judgment-debtor and the surety. *Held*, that the first application was a step-in-aid and that the second application was in time. (*Piggott and Sulaiman, JJ.*) SHAIKH BADRUDDIN KHAN v. MAHAMMAD HAFIZ.

L. R. 3 All. 523.

———Art. 182 (5) — *Application to foreign court—Execution in British Indian court—Law applicable.*

An application to the court of a Native State to transmit its decree to a British India court for execution is a step-in-aid within Art. 182 (5) of the Lim Act. 40 M. 1069 dist.

Art 182 (5) of the Lim Act must be read to mean "to take some step which according to the law of the place where the application therein referred to has to be made is a step in-aid of execution" 40 M. 1069 dist. (*Sir Walter Schwabe, C. J. and Wallace J.*) SRINIVASA AIYANGAR v. NARAYANA RAO.

43 M. L. J. 700 : (1922) M. W. N. 647 : 16 L. W. 736

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—Art. 182 (5)—*Application in accordance with law—Defective application—Civil P. C., O. 21, R. 11 (b). Omission to mention correct decree amount or prior application for execution.*

An application for execution failed to mention costs and the previous application and the Court returned it for amendment. The amended application was not signed and verified and it was filed. *Held* the omission to mention the amount of costs is a defect of immaterial character but the omission to mention as required by O. 21 R. 11 (b) the previous application was such a material defect as to render the application not in accordance with law as it did not show whether the application was within the period of limitation. "In accordance with law" is a phrase adjectival not only to the words "the proper Court for execution" but also to the words "to take some step in execution". If a fresh application is not made, after such an irregular application within three years of the application before the irregular one it is barred (1906) 33 Cal 867; (1896) 22 Bom. 83 foll. (*Kennedy J. C. and Raymond A. J. C.*) *SAHJRAM TAHILRAM v. TOWER, SON OF GUL.* 65 I. C. 14; 15 S. L. R. 156 (1922) Sind 29

—Art. 182 (5)—*Oral application—Application to record payment.*

An oral application by the decree holder to record a payment made to him out of court is a step-in-aid. (*Hallifax, A. J. C.*) *NARAYAN RAO v. BALKRISHNA* 67 I. C. 899.

—Art. 182 (5)—*Oral application—Payment of bail for arrest of judgment-debtor.*

An application to the court to receive railway charges for taking the judgment-debtor to the civil prison and subsistence money for his maintenance while in prison is a step-in-aid of execution, within Art 182 (5) of the Limitation Act.

In order to save limitation, the application put in need not be a 'necessary application' and these words cannot be read into the article.

Such an application may even be oral. (*Krishnan, J.*) *SEKHARIPURAM GRAMOM KRISHNA AIYAR v. NAMIASSAN VEETIL MAYANKUTTI.* 15 L. W. 14 (1922) Mad 30.

—Art. 182 (5)—*Application for execution against two judgment-debtors one of whom dead at the time—Saving of limitation.*

An application for execution against two judgment debtors one of whom was dead at the time saves limitation against the living judgment debtor and the legal representatives of the deceased judgment debtor. (*Prideaux, A. J. C.*) *HASHALI v. BHAGVANT ATMARAM.* 5 (1922) Nag 112; 66 I. C. 176

—Art. 182 (5)—*Application for transfer of a decree already transferred—Proper court.*

Where a decree has been transferred by the court which passed the decree to another court for execution a subsequent application for transfer

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made to the court which passed the decree is not a step-in-aid of execution under S 182 (5) of the Lim Act: (*Macleod, C. J. and Shah, J.*) *RANGASWAMI SHETTI v. SHESHAPHA.* 24 Bom. L. R. 798 (1922) Bom. 359; 68 I. C. 506.

—Art 182 (5)—Application by mortgagor for extension of time to pay up a redemption decree. See (1921) DIG. COL. 790. *SANKARA NAINAR PILLAI v. P. V. THANGAMMA.* 45 Mad 202; 30 M. L. T. 252; (1922) Mad. 247.

—Art. 182 (5)—*Prior application against judgment debtor -- Subsequent application against surety and judgment debtor -- Limitation -- Saving of.*

Where two persons bound themselves to pay the decretal amount in case the judgment debtor defaulted, an application for execution and recovery of the amount by arrest of the judgment-debtor alone saves time for a subsequent application for recovery of the amount by arrest of the judgment-debtor and his sureties, made within 3 years of the prior application. (*Piggott and Sulaiman, JJ.*) *BADRUDDIN v. MAHOMED HAFIZ.* 20 A. L. J. 726; (1922) All. 481.

—Art. 182 (5)—Decree comprising two reliefs—Mortgage decree for sale and personal decree—Application to execute first portion—Keeping alive the second. See (1921) DIG. COL. 790. *RAM BRICH RAI v. DEO TEWARI.* 44 A. 166; 65 I. C. 358; (1922) All. 388.

—Art. 182 cl. (5)—*Defective application—Omission to state amount of decree and costs.*

An execution application which does not contain particulars as to the amount of the decree and costs awarded is not in accordance with law and is not a step-in-aid of execution. 23 C. 217; 18 C. L. J. 538 foll. (*Adami, J.*) *GURU MAHADEVA ASHRAM PROSAD SAHIB BAHADUR v. MAHABIR SUKUL.* 65 I. C. 120.

—Art 182 (5)—*Essentials of—Application to record payment by court—Effect of*

It is not what the decree holder does that is to be a step-in-aid of execution but what he asks the court to do, and the date from which the period of limitation starts is the date on which he asks for that step to be taken, not that on which it is taken. An application to the court to record a part-payment of the decree, certified to it, is a step-in-aid.

*Quære* whether the result would be the same if execution of the decree had been barred? 12 C. 608; 20 C. 696; 32 A. 257 Ref. (*Hallifax, A. J. C.*) *LACHMAN v. GAHRESHWAR.* 65 I. C. 681; 18 N. L. R. 62; (1922) Nag 166.

—Art. 182 (5)—*Nature of application—Pendency of application necessary—Objection to enter up satisfaction—Plaint in a suit under S. 53, T. P. Act—If a step-in-aid.*

## LIMITATION ACT (1908), ART. 132.

Art. 182 (5) in so far as it relates to a "step-in-aid of execution" contemplates an application which is not an initial application for execution but is an application to take some step to advance an execution proceeding which is already pending e.g. an application to bring to sale properties already under attachment. 16 Cal. 757, 17 Cal 268; 23 Cal. 690 foll; observations of Ramesam J. in 41 M. L. J. 374 dissented from.

A "counter-statement" filed by the decree-holder in answer to an application by the judgment-debtor to enter up satisfaction of the decree, is not a "step-in-aid" when there was no petition for execution pending at the time. Nor could the time, during which the application to enter satisfaction was pending, be deducted in counting the period of limitation against the decree-holder as the pendency of that application in no way prevented the execution of the decree. 43 Mad. 185 and 43 Cal 660 distd.

The plaintiff in a suit by the decree-holder under S. 53 T. P. Act to set aside a deed of settlement by the judgment debtor does not operate as a "step-in-aid of execution" especially where the properties sought to be attached in execution are different from those which formed the subject matter of the suit (*Ayling and Venkatsubba Rao, JJ.*) KUPPUSWAMY CHETTIAR v. RAJAGOPALA AIYAR. 42 M. L. J. 303 :

45 Mad. 466 : (1922) M. W. N. 113 :  
15 L. W. 348. (1922) Mad. 79.

—Art. 182 (5)—Limitation—Virtual stay of execution—Court requiring copy of judgment in another suit pending decision—Exclusion of period pending decision of that suit. See (1921) DIG. COL. 789 BALDEO SINGH v. RAM SARUP. 64 I. C. 598.

—Art. 182 (5)—Relief granted by decree—Prayer for.

To constitute a step-in-aid, an execution application must pray for some relief which can be granted by the court. An application to bring on record the legal representatives of a deceased judgment-debtor and for issue of notice under O. 21, R. 22, C. P. C., is a step-in-aid even though it did not state the date of the prior application for execution, the amount of costs, or the way in which the court's assistance was required. (*Mookerjee and Panton, JJ.*) SADAY CHANDRA JANA v. PORESH NATH GHOSE. 35 C. L. J. 82 :  
65 I. C. 571 : (1922) Cal. 44.

—Ars. 182 (5)—Revival of prior proceedings—Step in-aid.

An application for the revival of previous proceedings for execution is a step-in-aid of execution 27 C. 285 Rel. (*Richardson and Beachcroft, JJ.*) CHANDRA KUMAR DHAR v. RAMDIN DHAR. 64 I. C. 727.

—Art. 182 cl. (5)—Transfer of decree to another Court for execution—Certificate.

Where a decree holder seeking to execute his decree in a court other than that which passed it, applies for a certificate of transfer, the application is a step in aid. (*Miller C J. and Jwala Prasad J.*) RAMCHANDRA MARWARI v. KRISHNA LAL MARWARI 3 Pat. L. T. 298 : 65 I. C. 332 :  
1 Pat. 328 : (1922) P. 301.

## LIS PENDENS.

—Art. 182 (5)—Transfer of decree for execution—Application for notice to judgment-debtor made to court passing decree—If in accordance with law. See (1921) DIG. COL. 791. HAZARI LAL v. BAIDYANATH SAHA 26 C. W. N. 292. (1922) Cal. 3.

—Art. 182, Expln — Decree against managing member—Execution against junior members.

Where a decree was obtained against the eldest brother of a joint Hindu family carrying on a business and several applications for execution were ordered against him and after his death against his legal representatives, the previous applications for execution save limitation for an execution application against the other members of the family. (*Cheruvu, J.*) KIDAR NATH v. RADHA KISHEN 67 I. C. 56.

—Art. 182 Expln 1—Decree passed jointly in favour of more persons than one—Decree for partition—Execution application by defendant—Fresh starting point in favour of plaintiff.

A partition decree, which awards to the plaintiff an aliquot part, specified as one quarter of certain family lands and the profits therefrom and also his costs, the ascertainment of the particular lands and the amount recoverable as profits being reserved for execution, is a decree passed jointly in favour of all the sharers within the meaning of Expln. I of Art. 182 of the Lim. Act. And an application by the plaintiff for execution of such a decree filed within 3 years of an application for execution filed by the second defendant, another sharer, is not barred, though plaintiff's own prior application was filed more than 3 years before. (*Oldfield and Venkatasubba Rao, JJ.*) VASUDEVA MUTHU SHASTRY v. VITTAL SHASTRY. 43 M. L. J. 379 : (1922) M. W. N. 518 :  
31 M. L. T. 311. (H. C.) : 16 L. W. 292. (1922) Mad. 456.

—Art. 182 Expln 1—Joint decree—Decree for partition awarding plaintiff and each of the defendants a share to be ascertained in the property—Execution—Limitation. See (1921) DIG. COL. 787 RAMASWAMI AIYENGAR v. NARAYANA AIYENGAR 42 M. L. J. 94 :  
30 M. L. T. 312 : 65 I. C. 990 : (1922) Mad. 327.

—Art. 183—Application for restitution in pursuance of Privy Council decree—Limitation applicable—"To enforce" meaning of.

An application for restitution in pursuance of a Privy Council decree is in substance one to enforce a decree of the Privy Council and is governed by Art. 183. The words "to enforce" in Art. 183 are wider than the words "to execute" in Art. 182 and should be interpreted as equivalent to "give full effect to" (*Walsh and Ryves, JJ.*) BRIJ LAL v. DAMODAR DAS.

20 A. L. J. 456 : 44 All 555 :  
(1922) All. 238 : 4 U. P. L. R. (A). 74 :  
66 I. C. 545.

LIS PENDENS—Suit for pre-emption—Declaratory decree affecting sale—Effect on pre-emption suit.

## LIS PENDENS

During the pendency of a pre-emption suit, a reversioner filed a suit and obtained a consent decree recognising his rights to the property after the death of the vendor. Held, as a litigating party is exempted by the rule of *lis pendens* from taking notice of a title acquired during his litigation, the pre-emption suit is not in any way affected by the declaratory decree. (*Scott-Smith J.*) HAZARA SINGH v. BUBE KHAN

3 Lah 264 (1922) Lah 403.

—Suit for specific performance—Alienation pending suit—Effect.

A person who acquires title during the pendency of a suit for specific performance is bound by the decree in the same. 9 C.L.J. 96 and 17 C.L.J. 427 folld. This is because when the jurisdiction of court has once attached, if it could be ousted by a transfer of interest, there would be no end to litigation and justice would be defeated. (*Mookerjee and Buckland, JJ.*) JAHAR LAL BHUTRA v. BHUPENDRA NATH BASU.

49 Cal. 495 (1922) Cal 412

LOWER BURMA COURTS ACT (VI of 1900) S. 30—Special appeal—Limits of enquiry—Practice.

Though a special appeal under S. 30 of the Lower Burma Courts Act reopens the whole case on facts it does not follow that the court should depart from the well established rule as to concurrent findings of fact. The general rule is that the court will not interfere with concurrent findings on pure matters of fact unless very good grounds for that interference are made out. (*Duckworth J.*) PALAWAN v. KANU.

66 I. C. 501.

—S. 30—Suits for damages for breach of contract of marriage—Appeal—Maintainability of See BURMA LAWS ACT (XIII of 1898) S. 13.

65 I. C. 411.

LOWER BURMA LAND AND REVENUE ACT S. 56 (a)—Civil Court—Jurisdiction—Sale of land for arrears of revenue—Fraud—Rights of co-owners.

Where one co owner of a plot of land with the object of defeating the other co-owners makes default in the payment of land revenue and thus causing the property to be sold buys it at a low price in the name of his son, the other co-owners can maintain a suit in the civil court for a declaration that their rights are not affected. S. 56 (a) of the Land and Revenue Act only ousts the jurisdiction of civil courts as to a determination of the validity of sales under S. 47.

The sale, in such a case, though it has the appearance of a sale for arrears of revenue, is in essence, a private alienation. (*Pratt, J.*) MA ZA v. MA MI.

11 L. B. E. 313 : 67 I. C. 636.

LUNACY ACT (IV of 1912) Ss. 37 and 38 (1) and 63—Jurisdiction of High Court and District Court—Residence—Meaning of—Temporary removal—Effect of. See (1921) DIG. COL. 792. ANILABALA CROWDHURANI v. DHIRENDRA NATH SAHA.

65 I. C. 57.

LUNATIC—Adverse possession against—Limitation—Widow's right of suit—Reversioners bound by action or inaction of widow. See LIM. ACT, Ss. 6, 8, 9 AND ART. 144.

49 M. L. J. 262.

## MADRAS CIVIL COURTS ACT, S. 16.

MADRAS ABKARI ACT (I of 1886) S. 55 (a)—Possession—Meaning of—Conviction under section—Valid—Actual possession of contraband liquor necessary.

The word "possession" in S. 55 (a) of Madras Act I of 1886 does not mean constructive possession but actual possession. The mere fact that a person is the owner of a cattleshed in which contraband liquor is found is not sufficient to justify a conviction under S. 55 (a) when there is no evidence to show that he was in possession of the liquor. (*Krishnan, J.*) JAYARAMULU NAIDU in re.

43 M. L. J. 553 (1922) M. W. N. 570 : 16 L. W. 496.

MADRAS CITY CIVIL COURTS ACT (VII of 1892) S. 3—Ejectment Suit—Jurisdiction of Small Cause Court and City Civil Court—Pres. Sm. C. Act S. 41.

A suit in ejectment is not excluded from the cognizance of the City Civil Court, Madras simply because an application to eject the tenant could be filed in the Small Cause Court 22 M. 256 38 Bom. 309 4 L. W. 402 Ref. (*Coutts Trotter and Ramesam, JJ.*) DORAISWAMI AIYANGAR v. NARAYANA AIYANGAR

43 M. L. J. 288 : (1922) Mad. 445 : 68 I. C. 983 : 16 L. W. 137 : (1922) M. W. N. 462.

MADRAS CITY MUNICIPAL ACT (IV of 1919) Sch. IV, R. 17—Reference to High Court—Scope of.

On a reference under R. 17 of Sch. IV of the Madras City Municipal Act, the High Court is not bound to give a decision on the questions involved in the suit other than those specifically referred for decision; even as regards these, the High Court can refuse to answer any of them, if the same is not necessary for the decision of the case.

"Mortality tables" explained. (*Ayling and Venkatasubba Rao, JJ.*) THE SUN LIFE ASSURANCE COMPANY OF CANADA v. THE CORPORATION OF MADRAS.

42 M. L. J. 283 : 15 L. W. 330 : (1922) M. W. N. 155 : 31 M. L. T. 271 (H. C.) : (1922) Mad. 85 : 66 I. C. 800.

—Such. IV R. 7—Insurance Company—Income—Onus.

Under the proviso to R. 7 of Sch. IV of the Madras City Municipal Act, the onus is on an Insurance Company to show that its income could not have exceeded a certain figure, if it wants to claim the benefit of the proviso. (*Ayling and Venkatasubba Rao, JJ.*) THE SUN LIFE ASSURANCE COMPANY OF CANADA v. THE CORPORATION OF MADRAS

42 M. L. J. 283 : 15 L. W. 330 : (1922) M. W. N. 155 : 31 M. L. T. 271 (H. C.) : (1922) Mad. 85 : 66 I. C. 800.

MADRAS CITY POLICE ACT (III of 1888) S. 71 (XI)—Obstruction by vehicles or animals—Essentials of—Intention—Necessity. See (1921) DIG. COL. 793. KUPPAMMAL v. EMPEROR.

65 I. C. 639 : 23 Cr. L. J. 175 : 45 Mad. 26 : (1922) Mad. 349.

MADRAS CIVIL COURTS ACT (III of 1873) S. 16—Hindu converts to Mahomedanism—Law applicable—Custom—Mahomedan law.

Under S. 16 of the Madras Civil Courts Act where the parties are Hindu converts to Mahome-

## MADRAS DIST. MUNICIPALITIES ACT, S. 18.

danism the Mahomedan law of succession *prima facie* applies to them and a custom at variance with the Mahomedan law if proved may be given effect to (*Sir Lawrence Jenkins*) MAHOMED IBRAHIM ROWTHER, *v.* SHAIK IBRAHIM ROWTHER.

45 Mad. 308 : 43 M. L. J. 69 : 30 M. L. T. 85 :

15 L. W. 354

(1922) M. W. N. 470 : 36 C. L. J. 64

24 Bom. L. R. 944 : (1922) P. C. 59

L. R. 3 P. C. 149 : 26 C. W. N. 793 :

67 I. C. 115 : 49 I. A. 119 (P. C.)

**MADRAS DISTRICT MUNICIPALITIES ACT (V of 1920) Ss. 18 and 28—Chairman—Chairman delegate—Outgoing chairman standing as candidate for re-election—Presiding at meeting—Taking part in ballot—Breach of Election rules—Election when liable to be set aside—C. P. Code S. 115—High Court—Interference in election cases—Material irregularity.**

The expression "taking part in a ballot" in Rule IV of the Rules under the Mad. District Municipalities Act includes presiding at the meeting of councillors for the election of a Municipal chairman, conducting the ballot, opening the box and counting votes. The expression is not confined to the mere act of voting. The word chairman in S. 28 of the Act includes "Chairman Delegate" in cases where there is no vice-chairman. A chairman seeking re-election is incompetent to preside at a meeting of the council for election of a chairman, and where there is no Vice-Chairman he should appoint a Chairman Delegate who under S. 28 of the Act would preside at the meeting. Where instead of so doing the Chairman himself presided, it is a clear breach of the election rules. But the election will not be invalid on that ground unless the result has been materially affected by the breach of the rules. Where therefore the lower court set aside an election of a chairman, on the ground that he presided at a meeting of the council for election of the chairman, though he was himself seeking re-election without finding whether the illegality affected the result of the election, the High Court remanded the case for such enquiry and decision. In dealing with an election enquiry a subordinate Judge is a court subordinate to the High Court under S. 115 C. P. C. 16 L. W. 848 foll. (*Wallace, J.*) AHMAD THAMBI MARAICAI *v.* BASAVA MARAICAYAR. 16 L. W. 898.

———Ss. 249, 338 (b) and 365 — Notification issued in July 1920 purporting to be under the Act before the new Act came into force—Validity—Conviction—Penal statute—Construction.

The accused was convicted and sentenced for the offence of storing and selling grain wholesale within the Cannanore Municipal limits without the license of the Municipal Chairman under Ss. 249 and 338 (b) of the Madras District Municipalities Act V of 1920 contrary to a notification issued in July 1920 by the Municipal Council constituted under the repealed Act of 1884 purporting to act under S. 249 of the new District Municipalities Act V of 1920, some 2 months before the new Act was put in force. On revision held that the notification was not a valid one under the new Act because the council purported to act before the new Act

## MADRAS ESTATES LAND ACT, S. 3.

came into force and the notification was therefore invalid and consequently accused was not guilty of the offences under the new Act.

The fact that the petitioner was in no way prejudiced is immaterial when the question arises in connection with the application of a penal provision as a strict construction of the law is required in such a case.

The notification cannot be supported as a "rule" "bye-law" or "regulation" under the proviso to S. 365 of the new Act, as the conditions requisite for that purpose are not satisfied (*Oldfield and Krishnan, JJ.*) SETHA PRABHU, *In re.*

42 M. L. J. 149 : (1922) M. W. N. 79 :

66 I. C. 429 : 31 M. L. T. 314 (H. C.) :

23 Cr. L. 285.

———Sch. V—Wholesale dealer,

A trader who stores bags of shells grain by the bulk without breaking the bags is a wholesale dealer within the meaning of Sch. 5 of the Madras District Municipalities Act. (*Oldfield and Krishnan, JJ.*) SETHA PRABHU, *In re.*

42 M. L. J. 149 : (1922) M. W. N. 79 :

31 M. L. T. 314 (H. C.) : 66 I. C. 429 :

23 Cr. L. J. 285.

**MADRAS EDUCATIONAL RULES, R. 59 A—If exhaustive—Corporal punishment—Power of schoolmaster. See MASTER AND PUPIL.**

42 M. L. J. 560.

**MADRAS ESTATES LAND ACT (I of 1908) S. 3, (2) (d) and (5)—Agraharam village—Pre-settlement grant—Estate—Claim of occupancy right.**

There is no presumption that the grant of an agraharam in inam conveys only the melwaram, 41 M. 1012 : 43 M. 166, 44 M. 588. Ref. *Held*, on the construction of a shrotriem grant of an agraharam village of the year 1639 that the use of the expression "Mauza" and "Shrotriem" in reference to the village did not indicate that it was a grant of the melwaram only. It was found however on the evidence that the grantees were in actual possession of the lands, harvesting the crops and mortgaging and selling and letting the land on terms inconsistent with the existence of an occupancy right in any one till the year 1885 when disputes arose regarding the claim to occupancy rights. *Held* that the grant was one of both the warams and the village was not an estate under S. 3 (2) (d) of the Madras Estates Land Act (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) SUBRAMANIYA SOMAYAJULU *v.* SEETHAYYA.

16 L. W. 462 : (1922) M. W. N. 614 :

31 M. L. T. 347 (H. C.)

———S. 3 (2) (d)—Inam—Grant—Presumption.

In the case of an inam grant there is no presumption that both the warams were granted or only the melwaram was granted. It is a question of fact to be decided on the facts and circumstances of each case. 41 M. 1012 : 43 M. 166 : 43 M. 567 Explained 44 M. 588 Disapp. (*Mr Ameer Ali*) SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL *v.* VEERAMA REDDI. 45 Mad. 586 : 43 M. L. J. 640 : (1922) M. W. N. 749 : (1922) P. C. 292 : 68 I. C. 538 : 49 I. A. 286 : 16 L. W. 102 : 31 M. L. T. 54 (P. C.)

## MADRAS ESTATES LAND ACT, S. 3.

—Ss. 3 (3) and 189—Holding—Meaning of Undivided share—Ejectment—Partition. *See* (1921) DIG. COL. 795. DUVVURY RAMAMURTHY v. PABBINEEDI BALLIRAJA. 68 I. C. 907.

—S. 3 (5)—Landholder—Post settlement inam on favourable rent—Grantee if a landholder.

*Held* by the majority of the Full Bench (The Chief Justice and Devadoss, J. dissenting) Where a Zemindar makes a post settlement inam grant of a portion of a village with both varams on a permanent kattubadi, the grantee is a landholder within S. 3 (5) of the Estates Land Act. 44 M. 676, 41 M. L. J. 512; approved. (Schwabe, C. J. Oldfield, Phillips, Devadoss and Venkatasubba Rao, JJ.) JARUGUMILLI BRAHMAYYA v. CHALLAGHALI ACHIRAJU. 43 M. L. J. 229 :

(1922) M. W. N. 280 : 45 Mad. 716 :  
31 M. L. T. 91 (H. C.) :  
(1922) Mad. 373. (F. B.)

—Ss. 3 (5) 6 and 19—Minor inamdar—Post settlement inam—Inamdar if a 'landholder' within the Act. *See* (1921) DIG. COL. 796. SRI GADADHARADAS BAVAJI v. SURYANARAYANA PATNAIK. 64 I. C. 317

—Ss. 4, 28 and 29—Waste land—Liability to pay rent—Waram rate—Wet crops. *See* (1921) DIG. COL. 793 KOTHANDARAMA REDDIAR v. CHINNASWAMY REDDY. 64 I. C. 740

—Ss. 6, 46 and 50—Ijaradar—Lease before the Act—Lessees in possession through tenants—Occupancy rights. *See* (1921) DIG. COL. 798 SURISSETTI BUTCHAYYA v. SRI RAJA PARTHASARATHY APPA RAO BAHADUR. 26 C. W. N. 785 : (1922) P. C. 243 : 69 I. C. 1. (F. C.)

—Ss. 8 and 185—Creation of mortgage by ryots—Subsequent relinquishment to landlord—Suit by mortgagee against heirs of mortgagor—Omission to implead landlord—Execution sale—Rights of purchaser—Effect of relinquishment. *See* (1921) DIG. COL. 799; SRI RAJAH VENKATA RAMIAH APPA RAO BAHADUR v. LANKA LAKSHMINARAYANA. 45 Mad. 39 : 42 M. L. J. 161 : 15 L. W. 218 : 30 M. L. T. 188 : (1922) Mad. 281 : 66 I. C. 376.

—S. 12—Occupancy tenant—Right to trees on holding—"Cut down"—"Use"—Meaning of. *See* (1921) DIG. COL. 800. RAJAH OF RAMNAD v. KAMITH RAVUTHAN. 42 M. L. J. 78 : 15 L. W. 140. (1922) M. W. N. 46 : 30 M. L. T. 42 : (1922) Mad. 34 : 66 I. C. 686.

—S. 52 (3)—Pattahs decreed—If include these under the Rent Recovery Act.

The expression "pattahs.....decreed" includes a pattah decreed by the Revenue Courts under the Rent Recovery Act. (Lord Shaw.) RADHAKRISHNA AYYAR v. SUNDARASWAMIER. 49 I. A. 211 : 45 Mad. 475 : 43 M. L. J. 323 :

27 C. W. N. 1 : (1922) P. C. 257 :  
20 A. L. J. 937 : 36 C. L. J. 450 :  
16 L. W. 18 : 31 M. L. T. 31 (P. C.)

—Ss. 53, 146, 189 and Schedule Part A Item 18—Rent sale under the Estates Land Act—Purchaser obtaining possession—Prior purchaser in execution of a mortgage decree against ryot

## MADRAS ESTATES LAND ACT, S. 181.

—Suit by former to recover possession from latter—Whether latter can plead invalidity of the rent sale under S. 53—Policy of the Estates Land Act.

The plaintiff purchased and got possession of the suit lands from one who bought them in a rent-sale under the Estates Land Act in 1914. He sued the defendants for possession and mesne profits. The defendants claimed the lands by virtue of a court auction purchase in 1911 in execution of a mortgage decree against the original ryot; but they had not taken steps to obtain a transfer of the tenancy in their favour under S. 146 of the Madras Estates Land Act. On a plea by the defendants that the rent sale was invalid under S. 53 of the Madras Estates Land Act as no patta and muchilika had been exchanged and no permanent patta was in force, *held* that it is not open to the defendant to raise this plea.

The occasion for raising such a contention was by way of suit under S. 112 of the Act within the period prescribed therefor.

S. 189 of the Madras Estates Land Act bars the jurisdiction of the Civil Court to entertain such a plea in a suit in the Civil Court.

For this purpose it makes no difference that the defendants were not defaulters within the meaning of S. 112 and for this reason could not sue under part A item 12 of the schedule and S. 112 of the Act.

The policy of the Estates Land Act clearly is (1) to compel any person who has acquired an interest in ryoti tenancy to follow the procedure laid down in S. 146 if he wishes to be treated as a ryot and (2) to have all disputes as to procedure in rent sales enquired into by the Revenue Courts.

To allow a person who has not taken action under S. 146 to ignore a rent-sale at the time it is held and subsequently to dispute its validity in a civil suit is to run counter to both these principles; and S. 189 does not allow such a course (Ayling, O. C. J. and Odgers, J.) IRULAPPAN SERVAI v. VEERAPPAN. 42 M. L. 113 : 15 L. W. 99 : (1922) M. W. N. 67 : 31 M. L. T. 71 (H. C.)

—S. 112—Sale of ryot's holding under—Validity—Notice of intention to sell—Omission to give—Suit to set aside sale—Jurisdiction of Civil Courts—Estates Land Act, Sch. Part A. art. 12.

A sale of ryot's holding held under the provisions of Ch. VI of the Madras Estates Land Act without notice being given to the ryot by the landholder, of his intention to sell is illegal, and a Civil Court has jurisdiction to entertain a suit by the ryot to set aside such a sale. The suit referred to in Art. 12, Part A. of the schedule to the Act is a suit by the ryot within 30 days of the service on him of the notice to contest the right of sale, and not a suit of the kind referred to. (Schwabe, C. J. Oldfield and Coutts Trotter, JJ.) RAJAH OF RAMNAD v. MINOR VENKATARAMAIAHER. 43 M. L. J. 264 : (1922) M. W. N. 501 : 31 M. L. T. 158 : (H. C.) : 16 L. W. 274.

—Ss. 146 and 189—Failure to take action ignoring rent sale—Civil suit claiming relief—Maintainability. *See* MADRAS ESTATES LAND ACT Ss. 53, 146, 189. 42 M. L. J. 113.

—Ss. 181 and 185—Landholder—Home-farm land—Conversion into ryoti—Evidence of—Issue of ryoti pattas,

**MADRAS ESTATES LAND ACT, S. 181.**

There is nothing to prevent a landholder from converting his homefarm land into ryoti land and if he does so, his successor cannot merely by a notice to quit or alteration of entries in the registers restore the land to its original character as homefarm land. *Held* on the evidence in the case that homefarm land had been converted into ryoti land, (*Spencer and Devadoss, JJ.*) SARAVAN APERUMAL PILLAI *v.* SUBBAYYAN.

31 M. L. T. 430 (H. C.)

—S. 181—*Pannai lands—Conversion into ryoti—Reconversion into pannai again—Evidence of.*

Where a landholder has converted his *pannai* lands into ryoti lands, it is not open to his successor at his will to avoid such conversion and restore the land to *pannai* by issuing a notice to quit or by an alteration in his registers. (*Spencer and Devadoss, JJ.*) MULLAI THAYAMMAL *v.* SUBBARAYYAN PILLAI. (1922) M. W. N. 763 : 16 L. W. 802

—Sch. I Part. A. art. 12—Sale of ryot's holding without service of notice of intention to sell—Sale illegal—Suit to set aside sale not governed by art. 12. *See* MAD. EST. LAND ACT S. 112 16 L. W. 274

**MADRAS FOREST ACT (V of 1882) Ss. 35, 36 and 55—Transporting timber—Expiry of time limited by license before timber reaches destination—Extension of time by another Government—Penalty—Compensation.**

The appellant imported timber from the Central Provinces into the Madras Presidency and by the time the timber arrived in Madras the time fixed in the pass expired. The time fixed in the pass was extended by the Central Provinces Government but not by the Madras Government. At the checking station in the Madras Presidency the appellant was made to pay the penalty and the value of the timber under S. 55 of the Madras Forest Act on the ground that the time fixed in the pass had expired. *Held* that the action of the Forest officer in Madras was legal and the extension of time by the Central Provinces Government did not legalise the import into Madras Presidency. Under S. 55 of the Forest Act it is open to the Forest Officer not only to collect the compensation for the offence on account of the prosecution but also to collect the value of the timber concerned, which he would be entitled to detain and which would be liable to confiscation in case the prosecution succeeded (*Oldfield and Ramesam, JJ.*) KOTI MALLIKARJUNAYYA *v.* SECRETARY OF STATE FOR INDIA, (1922) M. W. N. 491 : 16 L. W. 165 : (1922) Mad. 427.

**MADRAS HEREDITARY VILLAGE OFFICES ACT, Ss. 3 (4), 13 and 14—Service inam lands—Purohit service—Suit for possession—Jurisdiction of Civil Court—Enfranchisement. *See* (1921) DIG. COL. 804 VANCHINATHA AIYAR *v.* RAJA GOPALA AIYAR. (1922) Mad. 361 : 65 I. 321.**

—S. 7—Proceedings under—Village officer dissuading electors from voting—Officer enquiring

**MADRAS LOCAL BOARDS ACT, S. 55.**

—Revising *See* (1921) DIG. COL. 804 PALANI-KUMARA CHINNYA GOUNDAR *In re.* (1922) Mad. 337 : 66 I. C. 566.

**MADRAS HIGH COURT RULES (ORIGINAL SIDE) APP. II ART. 36—Original side—Decision of Judge on guardianship petition—Appeal—Court-fee payable—Art. 36 applicable *See* COURT FEES ACT, S. 5. (1922) M. W. N. 511.**

—S. 63 A—*Applicability—Negotiable instrument—What is—Shah Jog Hundis—Document on the face of it acknowledging indebtedness and promising to pay interest—If a negotiable instrument*

S. 63 A of the Original Side Rules was intended to cover all documents in the nature of negotiable instruments, specifically described in the Rule as "Bills of Exchange, Hundis or promissory notes" irrespective of the question how far a particular bill of exchange might be negotiable or what the restrictions might be on its negotiability.

Shah Jog Hundis sued upon held to be negotiable instruments within the definition in S. 13 (2) of the Neg. Ins. Act, 1881, as amended by the Neg. Ins. Act 1914, as being payable in the alternative to one of several payees. (*Sir Walter Schwabe, C. J. and Coultis-Trotter, J.*) KANNAYA LAL BHOYA *v.* BALARAM PARAMSUKHDAS.

43 M. L. J. 480 : 16 L. W. 608 : 31 M. L. T. 284 (H. C.) : 68 I. C. 921.

—Rr. 206, 208 and 214—Sale by official referee—Sale proclamation not mentioning place of sale—No prejudice—C. P. Code, O. 21, R. 90. *See* 1921 DIG. COL. 805. T. V. TULJARAM ROW RAMACHANDRA ROW 68 I. C. 916.

**MADRAS INAMS ACT, (VIII of 1869)—Inam title deeds—If confer title. *See* INAM—ENFRANCHISEMENT. 30 M. L. T. 334 (H. C.)**

**MADRAS LAND ENCROACHMENT ACT, (III of 1905) S. 14—Suit for recovery of penal assessment—Cause of action—Bar.**

The cause of action for the recovery of a penal assessment alleged to be wrongly levied arises, under S. 14 Expt. of Madras Act III of 1905, on the date on which such assessment or penalty is levied. Consequently the omission to object to the penal assessment in a previous *faisli* does not bar a suit for the recovery of penal assessment levied in a subsequent *faisli*, 25 M. L. T. 227 : 1914 M. W. N. 197 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* HUSSAIN SHERIFF SAHIB.

16 L. W. 1971 : (1922) M. W. N. 330 : 31 M. L. T. 49 (H. C.) : (1922) Mad. 232.

**MADRAS LOCAL BOARDS ACT (XIV of 1920) Ss. 55, 57 and 199 and 238—Rules framed under—Taluk Board—Election of President—Transitory Rules Rr. 10 and 12—Interpretation of.**

Under Rr. 10 (1) and (2) of the transitory provisions of the Madras Local Boards Act the term of office of all the members of the Taluk Board as members expire on the date fixed by the notification made under the Act by the Local Government. But for the purpose of carrying on the executive functions of the Taluk Board, the



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President of the old Taluk Board continues in office as President until a president for the newly constituted Taluk Board is elected (*Krishnan and Venkatasubba Rao JJ*) RAMASWAMI GOUNDAN v. MUTHUVELAPPA GOUNDER  
44 M. L. J. 1 : 16 L. W. 848

**MADRAS PERMANENT SETTLEMENT REGN. (XXV of 1802)**—Military tenure—Palayam—Military or police service tenure—Abolition of, by proclamation—Alienation of estate *See* (1921) DIG COL. 807. MALAYANDI APPAYASAMI NAYAKER v. THE MIDNANAPORE ZEMINDARY CO., LTD.  
20 A. L. J. 393 : (1922) P. C. 154.

—Ss 3 and 4—Zemindari sanad—Grant of—Inams in Zemindari—Right of Government to resume. *See* (1921) DIG COL. 807. SECRETARY OF STATE v. RAJAH OF VENKATAGIRI.  
(1922) M. W. N. 1 : 30 M. L. T. 164 (P. C.) : 26 C. W. N. 809 : (1922) P. C. 168

**MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II of 1894)** Ss 9, 10 and 13—Village office newly created—Mode of appointment—Succession—Meaning of *See* (1921) DIG COL. 808 MUTHANAN SERVAI v. RAJA RAJESWARA SETHUPATHI.  
64 I. C. 312.

—S. 27 (4)—Tenant—Meaning of—Abolition of cess—Payment of village officers directly by Government—Rights of Zemindar against cowledar.

Under a cowle granted by a Zemindar the cowledar paid certain fixed rates of the rent to the village officers of the Zemindari. Subsequently the Government extended Madras Act II of 1894 to the Zemindari, paid the village officers directly and enhanced the peishcush payable by the Zemindar who thereupon sued the cowledar to account for the amounts paid by him to the village officers which had been abolished by the Government *Held by Schwabe C. J. and Coutts Trotter J. (Kumaraswami Sastri, J. dissenting)*:—(1) that there was no implied term in the cowle making the cowledar accountable to the zemindar if at any time the whole or part of the amount fixed was not required for the payment of the village officers and (2) that the remedy of the zemindar was not under the terms of the cowle but by an application to the collector for increase of rent under S. 27 (4) of Madras Act, II of 1894. The expression 'a tenant' in S. 27 (4) of Madras Act II of 1894 includes a cowledar from a zemindar (*Schwabe, C. J., Coutts Trotter and Kumaraswami Sastri, JJ.*) TIRUNEELAKANTAM SERVAI v. RAJA OF RAMNAD  
43 M. L. J. 158 : (1922) Mad. 263  
15 L. W. 556 : 30 M. L. T. 317.

**MADRAS REGULATION (V of 1804) (COURT OF WARDS)** S. 25—Hindu law—Adoption—Ward under Court of Wards—Consent in writing of Court of Wards—Necessity—Ward over 18 but under 21 years of age.

An adoption made by a person, who was at the time of the adoption over 18 but under 21 and a ward under the Court of Wards, is not invalid for want of the previous consent in writing of the Court of Wards as required by S. 25 of Regulation

**MAD. SURVEYS AND BOUNDARIES ACT, S. 13,**

V of 1804. (*Spencer and Ramesam, JJ.*) ARULANANDA MUTHU v. PONNUSAMI  
42 M. L. J. 129 :  
(1922) Mad. 1 : 15 L. W. 237 :  
(1922) M. W. N. 93 : 66 I. C. 265.

**MADRAS SALT ACT (IV of 1889) S. 11—License**—Transfer of interest by way of mortgage—Validity of.

S. 11 of the Madras Salt Act is not confined in its operation to the absolute transfers of the entire interest of the licensee but applies to transfers by way of mortgage. Consequently a mortgage of a salt pan without leave of the Commissioner is of no effect against him, (*Kumaraswami Sastri and Deva Doss, JJ.*) GUJJU NAGAMMA v. SECRETARY OF STATE FOR INDIA.  
42 M. L. J. 318 : (1922) M. W. N. 166 :  
66 I. C. 356 : 31 M. L. T. 61 (H. C.) :  
16 L. W. 295 : (1922) Mad. 106.

**MADRAS SURVEYS AND BOUNDARIES ACT (XXVIII of 1860) S. 20 (3)**—Tenant—If includes the holder of a rent free nam in Zemindari. *See* (1921) DIG. COL. 810 RAJA OF VENKATAGIRI v. SUBBIAH.  
45 Mad. 1 : 30 M. L. T. 52 (H. C.) :  
(1922) Mad. 137.

—(IV of 1897) Ss. 12 and 13—Suit to establish right—Limitation for—Starting point—Party to dispute before survey officer—Party to appeal—Who is.

A statement in the judgment of the appellate Survey Officer that a party to the appeal had notice of the appeal is not conclusive of the fact of service of the notice where the Civil Court finds that neither party to the appeal in the survey proceedings had notice of the appeal. In such a case the jurisdiction of the civil court is not ousted.

The first defendant and plff. had been given rough pattas at the survey for the lands found to be in their possession. The first defendant presented to the superior survey Officer a petition in which he stated that his patta included too little and the plaintiff's too much and asked for correction of each. He did not formally set out the plaintiff as respondent to his appeal though he desired relief against her by way of appeal. Notice of the appeal was issued to the plff. but was not duly served on her before the date fixed for the hearing, but the superior Survey Officer nevertheless declared her ex parte and allowed the appeal. In a suit by plff for a declaration of title to the land in dispute *Held*, that S. 13 of the Madras Survey and Boundaries Act (IV of 1897) had no application to the case and that the suit was not barred though brought more than a year after plff. had notice of the survey appellate decision because (1) plaintiff was not party to any boundary dispute before the inferior Survey Officer (2) She was not a party to an appeal preferred under S. 12 of the Act and (3) she was not a person to whom notice of such appeal was given. (*Oldfield and Ramesam, JJ.*) SUBRAMANIA MUDALI v. MEENAKSHI AMMAL.  
43 M. L. J. 194.  
16 L. W. 149 : 31 M. L. T. 145, (H. C.) :  
(1922) Mad. 392.

—S. 13—Decision of Survey Officer—Question of possession—Decision on—Omission to sue—Effect of.

**MADRAS TOWNS NUISANCE ACT, S. 3.**

In proceedings before a Survey Officer the plaintiff was declared to be in possession and entitled to certain property. The defendant who as a matter of fact was in possession did not sue to set aside the decision within 1 year. In a suit by plff. for possession *Held*, that though defendant had been in possession for 12 years beginning from a date prior to the decision of the survey officer, still his omission to sue within one year of the decision barred his right and plff. was entitled to a decree for possession. 42 M. 425; 38 M. 1202 Ref. (*Coutts Trotter and Ramesam, JJ.*) KUPPUSWAMI IYER v. VENKATASWAMI. 31 M. L. T. 62 (H. C.). 16 L. W. 99.

**MADRAS TOWNS NUISANCE ACT (III of 1880) § 3 (12)—Trial of offence under by Bench of Magistrates**

It is competent to a Bench of Magistrates to try an offence under S. 3 (12) of the Mad. Towns Nuisance Act. 13 M. 142 foll. (*Krishnan, J.*) RAMASAMI CHETTY v. MUTHUVELU MUDALI. 16 L. W. 562; 31 M. L. T. 420 (H. C.)

**MAHOMEDAN LAW—Applicability—Ahmadiyas—Governed by Mahomedan law. See PENAL CODE, S. 491.**

16 L. W. 626

**———Applicability of—Halai Memons—Bombay.**

The Halai Memons of Bombay are governed by Mahomedan law in matters of succession, 21 Bom. L. R. 85 foll. (*Marten and Fawcett, JJ.*) SIR MAHOMED YUSUF v. HARGOVINDAS JEVAN.

24 Bom. L. R. 753; (1922) Bom. 392

**———Conversion—Succession — Burmese—Buddhist relations of convert to Islam. See (1921) DIG. COL. 811 ASHA BIBI v. MA KYAW YIN.**

(1922) L. B. 15 64 I. C. 514.

**———Divorce—Iddat — Talak-i-bain—Talak ahsan—Talak hasan. See (1921) DIG. COL. 811. MOHAN MOLLA v. BARU BIBI.**

26 C. W. N. 261; 64 I. C. 704; (1922) Cal. 21

**———Dower—Charge—Widow in possession.**

If a Mahomedan widow has obtained possession of her husband's property lawfully and peacefully, without force or fraud she is entitled to a lien thereon for dower; it is not necessary that her possession should be the result of agreement or consent of her husband or his heirs (*Daniels and Dalal, A. J. C.*) HAFIZ-UN-NISSA v. JAWAHIR SINGH. 24 O. C. 374; 66 I. C. 24

**———Dower—Lien in favour of widow — Transfer of debt and the property—Transfer of the property without the debts—Rights of transferee—Death of widow—Effect of merger.**

Where a Mahomedan widow in possession of her husband's property "in lieu of dower" transfers the security, either with or without the dower debt, the transferee is entitled to retain possession of the property until the dower debt is paid, though, where the transfer is without the privity of the persons bound to discharge the dower debt, the transferee takes the security subject to the state of account between the widow and the persons bound to discharge the dower debt at the date of the transfer and any payment made by these persons to the widow after, but

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without notice of the transfer must, in the absence of collusion, be allowed to those persons as against the transferee.

But the case is different where there is a sale of the property and not an assignment of the security. The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property, and is both heritable and transferable. 43 A. 127; 32 A. 551; 43 M. 214 Ref.

But the widow has no proprietary title in the property, except to the extent of her share therein, and where she purports to sell the property and not the security only, the sale is utterly ineffectual so as to confer any title on the vendee. But though the vendee takes no title to the property by virtue of the sale, he is entitled to retain possession of the property, if he is put in possession thereof, not indeed by virtue of the deed of sale but because, so long as the debt remains unsatisfied, the heirs at law could not claim to be put in possession of the property, and the widow herself would be bound to make good her representation to the vendee to the extent of such interest as she could lawfully transfer. The widow is entitled to retain possession of the property so long as her claim is not satisfied. There is nothing to prevent her from putting some one else in possession of the property, and conferring on him the same right which she could exercise over the property. Having done so, she could not maintain ejectment against him, if she has received consideration for the transaction; and it follows that, though the sale does not operate to confer any title on the vendee, he is still entitled to retain possession of the property as against the widow and all persons claiming through the widow, so long as there is a debt due to the widow. He is also entitled to maintain his possession of the property as against the heirs at law so long as they do not discharge the dower debt.

Where therefore a Mahomedan widow in possession of her husband's property as a security for her dower debt, purports to sell the property and puts the vendee in possession of the property the vendee is entitled to retain possession of the property so long as her claim to the dower remains unsatisfied. But the moment the dower debt is satisfied either by payment to the widow or to her heirs, the heirs of the husband are entitled to recover possession of the property from the transferee; and the same result follows where the heirs of the widow happen to be heirs of her husband, for in such an event, the right to receive the dower debt and the liability to pay the dower debt unite in the same persons, and there is consequently an extinction both of the debt and security and therefore of the right to retain possession of the property as a security for the debt. (*Coutts and Das, JJ.*) BIBI MAKBUUN-NISSA v. BIBI UMAT-UN-NISSA. (1922) Pat. 348.

**———Dower—Lien for—Right to possession—Transfer of right—Dower debt—Succession to.**

When a Mahomedan has promised a woman, whom he marries, a dower but that dower has not been paid, she, can lawfully remain in possession of his property when he dies, until her dower is paid by her husband's heirs or until she

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has succeeded in realising it out of the usufruct which she enjoys by reason of her being in possession; but she has to render to the heirs an account. The right of the widow is heritable and she can assign the right to a stranger 14 W R 239, 14 M. I. A. 377, 7 A. 353, 6 A. 50, 20 A. 262 29 A. 64, 32 A. 551, 40 B. 34; 43 M. 214 Ref. The transferee of the right would be entitled to possession until the dower debt is liquidated. (*Bucknill, J.*) **ABDUL RAHMAN v. WALI MAHOMAD** 65 I. C. 224.

———Dower—Lien—Right to—Wife—Rights of, during husband's life-time, See (1921) DIG. COL. 812. **NARAYANA AIYAR v. BIYARI BIBI**.

45 Mad. 103 : (1922) Mad. 221 : 68 I. C. 673

———Dower—Prompt and deferred—When payable.

Mahomedan Law enjoins payment of prompt dower at any time before or after consummation of marriage and no condition whatsoever can be lawfully attached to the payment of prompt dower. As regards the deferred portion ordinarily it is supposed to be payable on dissolution of marriage, but, as observed by Mr. Amir Ali in his *Muhammadian Law* Vol. 2 Page 503, 4th Edn "There is no rule by which it necessarily follows that postponed or deferred dower becomes realisable on the death of the husband or if he happened to divorce the wife, on such divorce". (*Abdul Quadir, J.*) **MUSAMMAT NAWAB BEGUM v. ALLAH RAKHA** (1922) Lah. 172

———Dower—Widow's lien in respect of—Transfer of lien—Rights of transferee.

The lien on the property of her husband given by the Mahomedan law to a widow in respect of her dower is a right to possession until the debt is discharged. It is not an interest in property which can be severed from the right to dower and transferred as a separate interest. It is a right to the possession of the property by the person entitled to be paid the dower as long as the debt is not discharged either by the income from the property or by payment by the heirs or others interested in discharging the debt. It gives the widow the right to possession and so long as she does not transfer her dower debt and that debt remains undischarged, she may transfer, for her life-time possession of the property the proceeds of which belong to her until the debt is paid off. The position of the transferee in such a case might be regarded as constructively her possession and in this sense it would not be severed from the dower debt. Just as she could dispose of the proceeds in any way she chose during her life-time and until the debt was discharged so also she could transfer possession of the property in the same circumstances, the transferee being entitled to the usufruct. But if she should transfer the dower-debt or if she should die and her estate devolve upon her heirs or assignees, the transferee's rights to possession would be extinguished as the debt and the security cannot be severed, thereby converting the security into a separate interest in the property. (*Miller, C. J. and Mullick, J.*) **ABDUL RAHMAN v. MAHOMED**. 68 I. C. 601.

**MAHOMEDAN LAW—Gift.**

———Dower—Widow in possession of property in lieu of it—Alienation—Rights of transferee.

Under Mahomedan law, a widow who is in possession of her husband's property in lieu of dower is competent to alienate the same. But the alienation gives the transferee only the right to remain in possession till she dies or her dower debt is satisfied. (*Coutts and Das, JJ.*) **SHEIKH NABI-JAN v. MT. SAHJIAN**. 67 I. C. 635.

———Family arrangement—Maintenance charged as income—Validity of.

In a suit relating to 'wakf' properties the parties entered into a compromise as a result of which the claim to the properties was given up and a family arrangement was made pursuant to the deed of wakf to the effect that certain maintenance allowances were to be paid regularly to the parties and their heirs, and the muawalli afterwards failed to pay the allowances to the heirs on the ground that the original wakf itself was invalid so far as the provision for the heirs was concerned.

Held, even though the family arrangement purported to confirm the wakfnamas, which were invalid, maintenance had thereby become a charge on the properties and the agreement having become a contract for valuable consideration, was quite valid and enforceable. (*Viscount Cave*) **KHAJEH SOLEHMAN QUADIR v. NAWAB SIR SALIMULLAH BAHADUR**.

49 I. A. 153 : 49 Cal. 820 : 43 M. L. J. 385 :

31 M. L. T. 79 (P. C.) : 4 U.P. L. R. (P. C.) 70 :

L. R. 3 P. C. 189 : (1922) P. C. 107 :

27 C. W. N. 101 : 24 Bom. L. R. 1257 :

69 I. C. 138. (P. C.)

———Gift—Applicability to Mahomedans—Doctrine of Musha. See (1921) DIG. COL. 813 **TARA PRASANNA SEN v. SHAMDI BIBI**.

49 Cal. 68 : (1922) Cal. 422.

———Gift by mortgagee—Validity of—Conception of gift in Mahomedan jurisprudence—Essentials—Nature of seisin required. See (1921) DIG. COL. 815 **TARA PRASANNA v. SHAMDI BIBI**.

49 Cal. 68 : (1922) Cal. 422.

———Gift—Mushaa—Scope of.

The doctrine of mushaa which invalidates gifts under the Mahomedan Law should be confined to the narrow limits. (*Daniels and Dalal, A. J. C.*) **HAFIZ-UN-NISA v. JAWAHIR SINGH**.

24 O. C. 374 : 66 I. C. 24.

———Gift—Delivery of possession—Endorsement on registration deed.

Where there is a deed of gift and before its registration an endorsement is made therein that possession is delivered to the donee and the deed is subsequently registered, the burden of proving that possession was not given and therefore the gift is invalid is on those asserting its invalidity. Where there are tenants on the property, their attornment to the donee is sufficient delivery of possession. (*Schwabe, C. J. and Wallace, J.*) **FATIMA BIBI v. KHAIRUM BIBI**. 16 L. W. 894.

———Gift—No possession given—Effect.

The gift by a Mahomedan of the equity of redemption in a property is bad without possession. As such a gift does not take effect, the grantor

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continues to be the owner of the land and can effect a valid sale in respect thereof 61 P. R. 1871 followed. (*Abdul Raoof and Harrison, JJ*) *SHARIF HUSSAIN v. RUKAN DIN.* (1922) Lah. 40

—**Gift—Possession of portion not taken—Life interest of donor in usufruct of part—Validity.**

Where a Mahomedan made a gift of a zemindari estate reserving to herself usufruct of a portion for her life, and in pursuance of the same the donee obtained possession of the whole estate with the exception of the portion reserved :

*Held*, (1) the reservation of the usufruct did not by itself make the gift void 11 M. I. A 517 follid ,

(2) the Zemindari estate being one property the taking possession of any part of it is constructively taking possession of the whole, and hence the gift was valid.

Distinction between *hiba* and *wasiat* pointed out. (*Sir John Edge*). *MOHAMMAD ABDUL GHANI v. FAKHR JAHAN BEGAM*

49 I. A 195 : 43 M. L. J 453 : 44 All. 301 : 20 A. L. J. 994 ; 31 M. L. T. 21 (P. C.), 25 O. C. 95 : 27 C. W. N. 53 : 9 O. L. J. 369 : L. R. 3 P. C. 198. (1922) P. C. 281 68 I. C. 254 : 24 Bom. L. R. 1268. (P. C)

—**Gift—Remainder—Shiah Law.** See (1921) DIG. COL. 815 *SIRAJ HUSAIN v. MUSHAF HUSAIN.* 65 I. C. 132.

—**Gift—Restraint against alienation—Estate taken—T. P. Act, if applies.**

The Transfer of Property Act does not apply to a gift made between Mahomedans and the provisions thereof do not control such a transaction.

A condition in a gift deed restraining the donee from transferring, is invalid under Mahomedan Law and the donee takes an absolute estate. (*Piggott and Walsh, JJ*) *BABU LAL v. GHANSHAM DAS.* 44 A. 633 (1922) All. 205 : 20 A. L. J. 466 : L. R. 3 A. 313

—**Gift—Transfer of possession—Donor in possession of some fields—Others mortgaged with possession—Actual delivery of possession of the first lot of lands only—Donee's right to redeem the mortgage.** See (1921) DIG. COL. 815 *CHAND-SAHEB KASHIM SAHEB PIRZADI v. GANGABAI VISHNU* 64 I. C. 21.

—**Gift—Validity of—Death illness—Marz ul-maut—What is.** See (1921) DIG. COL. 815 *BIBI JINIIRA KHATUN v. MAHOMED FAKIRULLA MEA.* 49 Cal. 477 : 26 C. W. N. 749 : (1922) Cal. 429 : 67 I. C. 77.

—**Gift—Hiba-bil-ewaz—Essentials of.**

For a valid Hiba-bil-ewaz, actual payment of consideration must be proved and also a *bona fide* intention of the donor to divest himself in *praesenti* of the property and to confer it on the donee. Where therefore there was no relinquishment or surrender of any rights, or any consideration for the transaction, the hiba-bil-ewaz is invalid (*Piggott and Walsh, JJ*) *MOHAN. LAL v. MAHMUD HUSAIN* 44 A. 580 (1922) All. 347 : 4 U. P. L. R. (A) 158 : 20 A. L. J. 434 : 67 I. C. 671.

**MAHOMEDAN LAW—Guardianship.**

—**Gift—Hiba-bil-ewaz—Whether can take effect as a simple hiba in the absence of evidence of passing of any consideration or exchange of gifts—Gift by grandfather to minor grand daughter Delivery.** See (1921) DIG. COL. 114 *SERAJUDDIN HALDAR v. ISBA HALDAR*

49 Cal. 161 : (1922) Cal. 258

—**Guardianship—De facto guardian—Powers of.**

It is not competent to the *de facto* guardian of a Mahomedan minor to bind his estate or to affect his interest by statements or admissions. Such statements however are admissible in evidence (*Chatterjee and Panton, JJ*) *BASARAT SARKAR v. HIRU PRAMANIK.* (1922) Cal. 287 : 65 I. C. 353.

—**Guardianship—De facto guardian—Rights of transferee from—Ejectment**

A transfer of the minor's property by the *de facto* guardian of a Mahomedan minor is void and the transferee cannot maintain a suit in ejectment against a trespasser on the property. 45 C. 878 foll. (*Richardson and Suhrwardy, JJ.*) *MONMOHINI DAS GUPTA v. BASANTA KUMAR DAS GUPTA.* 36 C. L. J. 190 (1922) Cal. 458

—**Guardianship for marriage—Age of majority—Law applicable.** See MAJORITY ACT, S. 2. 68 I. C. 727.

—**Guardianship—Mother—De facto guardian—Power to bind minor son's interest by reference to arbitration—C. P. Code, Sch. II. para. 17—Subsequent assent by de jure guardian.**

A Mahomedan mother on behalf of her minor children entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under Sch. II, para 17, C. P. Code. The guardian of the minors' properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participated in the said application under para. 17. The Court thereupon acted upon the agreement and referred the dispute to arbitration : *Held*, that the mother was not competent to bind the infants by the agreement to refer to arbitration. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The natural guardian can perform acts which are purely advantageous to the infant, but can impose no obligation on the infant. 45 Cal. 878 foll.

A party who entered into the agreement to refer, under a misconception as to the legal authority of the mother, may afterwards withdraw therefrom.

The legal guardian's assent subsequently given to the agreement to refer and his participation in an assent to the application under para. 17 cannot validate the agreement which formed the basis of that application.

Per *Beachcroft, J.*—The fact that the Subordinate Judge subsequently found the mother fit to act for the minors would not validate an arrangement which in its inception was invalid, there being no appointment of the mother to act for the infant in the partition proceedings by the District

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Judge who takes the place of the Kazi in Mahomedan Law. (*Teunon and Beachcroft, JJ.*) **MOH-SINUDDIN AHMED v. KHABIRUDDIN AHMED.**

26 C. W. N. 246

——— *Guardianship — Mother's right—Effect of marriage with stranger.*

Under Mahomedan Law the custody of a boy until at least the age of 7 years belongs to the mother. The right is forfeited by the mother's subsequent marriage to a stranger. (*Kincaid, J. C.*) **BIBI FATIMA v. BAKARSHAH.**

15 S. L. R. 175 : 66 I. C. 888.

——— *Guardianship—Husband not guardian of infant wife.*

Under the Mahomedan Law, the husband is not the guardian of either the person or the property of his infant wife. (*Mookerjee A C, J and Fletcher, J.*) **BEPIN BEHARI SAHA v. CHARU CHANDRA GHOSE**

35 C. L. J. 192.

——— *Husband and Wife — Agreement for future separation—Legality of.*

An agreement for future separation between a Mahomedan husband and wife is void 7 Bom L. R. 602 Ref S. Similarly an agreement which leaves the wife absolutely free to separate herself from her husband without reason. Where however an agreement provides for wife leaving her husband in case of ill treatment and the husband agrees to pay the wife a monthly sum in consideration of the wife giving up her defences in a suit for restitution by the husband the agreement is valid and enforceable. (*Simpson A. J. C.*) **BANNEY SAHEB v. ABIDA BEGAM.**

25 O. C. 157 :  
(1922) Oudh 251.

——— *Legitimacy — Acknowledgment of — When applies.*

The Mahomedan law principle of acknowledgment of legitimacy applies only when the alleged marriage is not proved. It has no application when it is found as a fact that the alleged marriage did not take place. (*Le Rossignol and Harrison, JJ.*) **HUSSAIN BAKSH v. JHANDA SINGH.**

68 I. C. 749

——— *Legitimacy—Acknowledgment of legitimacy—Disproof of marriage—Legitimacy and legitimation — Difference between. See* (1921) DIG. COL. S. 817, **SYED HABIBUR RAHMAN CHOWDHURY v. SYED ALTAUF ALI CHOWDHURY.**

48 Cal 856. (1922) O. C. 159.

——— *Legitimacy—Acknowledgment—Effect of —Presumption.*

Acknowledgment by a Mahomedan father creates a presumption of legitimacy but an acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. Where however there is clear evidence that no marriage ever took place, the presumption has no place, 10 A. 289 11 M. I. A. 94 : 21 C. 966 Ref. (*Broadway, J.*) **ABDUL AZIZ v. MT. AMEER BEGAM.** 66 I. C. 404.

——— *Marriage — Ceremonies — Formalities — Absence—Effect of.*

Under the Shia Law the presence of witnesses is not necessary in any matter regarding marriage;

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and, if a marriage were contracted by the spouses themselves or their guardians in private, it would be valid; even if there were an injunction to secrecy that would not invalidate it. There is nothing in the Mahomedan Law which countenances the doctrine that a marriage which is a valid marriage can be invalidated by the desire of the parties to have a more elaborate ceremony performed later. There is no provision for a ceremony which would create a marriage if afterwards ratified by a subsequent ceremony. If there had been a stipulation after the marriage had taken place to the effect that it would not be consummated until the lapse of a specified period, such a stipulation is valid.

The law appoints no specific ceremony for the performance of a nikha marriage and no religious rites are necessary for contracting a valid marriage. Where the essentials are present, viz., the declaration and the acceptance expressed in such a manner as to demonstrate an intention to give away without any ambiguity, presence or the absence of religious ceremonials is immaterial and in no way affects the validity of the marriage.

There is nothing in the Shia law to justify the imposition in the matter of marriage of conditions which have been imposed upon persons dealing with paidanashin women in business matters. The Shia law lays down that, if a woman is adult and sane, she is competent to enter into a matrimonial engagement without advice or consent from anybody. (*Stuart, J.*) **MT. NAFIS UN-NISSA v. MIRZA MUMTAZ HUSAIN.**

4 U. P. L. R. 17 (A). 65 I. C. 539.  
(1922) All. 363.

——— *Marriage — Dissolution — Death or divorce—Remarriage*

Under the Mahomedan Law death or divorce dissolves the tie between the husband and wife. On the happening of either event the relationship between the parties ceases. Much more would it be so in the case of a woman who after the death of her first husband marries into another family. (*Rafique and Piggott, JJ.*) **JAHANGIR KHAN v. SYED ABDUR RAHMAN.**

20 A. L. J. 56 : L. R. 3 A 23 : 64 I. C. 943.

——— *Marriage—Formalities necessary for.*

The Mahomedan law appoints no specific ceremony for the contractual performance of a marriage but according to recognised custom marriages among all the sects are solemnized by a person conversant with the requirements of the law (i.e. the Kazi while two other persons are appointed for the purpose of acting on behalf of the contracting parties with a certain number of witnesses. (*Broadway, J.*) **ABDUL AZIZ v. MT. AMEER BEGAM,**

66 I. C. 404.

——— *Marriage—Performance during minority —Repudiation — Right when exercisable. See* (1921) DIG. CGL. 819 **BISMILLAH BEGAM v. NUR MAHOMED.**

44 A. 61 : (1922) A. 155.

——— *Marriage—Repudiation—Delegation of power—Divorce—Ill-treatment.*

Where a husband at the time of his marriage executed an agreement and delegating the power of repudiation to his wife she is entitled to obtain

## MAHOMEDAN LAW—Mosque

a divorce on the ground that the deft. had contravened the terms of the agreement and had ill-treated her on several occasions. (*Moti Sagar J.*)  
*SAHRA JAN v. SARDAR ADDUL ROOF*,  
 3 Lah. L. J. 519.

—Mosque—Management—Right of—Descendants of founder—Appointment of one as Kazi—Effect of.

Where a mosque and Idga were founded by the common ancestors of the plff. and deft. and continued in the possession of their family ever since, the appointment of the deft. as Kazi by the Govt does not give him an exclusive right to the possession of the institutions and their endowments. (*Kumaraswami Sastri and Devadoss, JJ.*)  
*KAJI AMIR SAHIB v. KAJIR MAHOMED OLI AHMAD SAHIB*,  
 15 L. W. 430 66 I. C. 237  
 (1922) M. W. N. 439

—Mosque—Mutwalli—Powers of superintendence over mosque and its properties—Rights of the worshippers. See CR. P. CODE, S. 144.  
 26 C. W. N. 904.

—Pre-emption—Applicability of—Hindu vendor—Property in Behar—Sale in Delhi—Law applicable

Where the custom of pre-emption is judicially noticed as prevailing among non-Mahomedans in a certain local area, it does not govern non-Mahomedans who though holding land therein for the time being are neither natives of, nor domiciled in that district 18 W. R. 441, 24 W. R. 95; 32 C. 988 foll.

It cannot be said that Hindus of Bihar or other localities where the custom of pre-emption exists have adopted the law of pre-emption as part of their personal law (*Coutts and Das, JJ.*)  
*SAIYID FAZAL KARIM v. MT. BIBI FATMATUL KUBRA*,  
 3 Pat. L. T. 556 : (1922) Pat. 360 : (1922) P. 567  
 67 I. C. 706

—Pre-emption—Demand—Necessity for

Under the Mahomedan Law a suit for pre-emption cannot succeed unless the demands for pre-emption of the property are made immediately after knowing of the sale of the property (*Rafique and Piggott, JJ.*)  
*ABDUL RAHIM v. MT. RAFIQ-UN-NISSA*  
 4 U. P. L. R. 24 (A) : 65 I. C. 641

—Preferential right—Preemptor and vendee belonging to same category—Equal rights against vendee. See (1921) DIG. COL. 919 MAHOMED YAKUB v. KANHAI LAL.  
 44 A. 83 :  
 64 I. C. 673.

—Pre-emption—Right to-Sale—Absence of registered document. See (1921) DIG. COL. 819.  
*ABDULLA AVJAL MOMIN v. ISMAIL* : 46 Bom. 302 :  
 (1922) Bom. 124 : 64 I. C. 913

—Pre-emption—Same class of pre-emptors—Nearness of degree—Co-sharer in same Mahal—Rights of. See (1922) DIG. COL. 919 SYEEDDIN v. LATIFUNNISSA.  
 44 A. 114 : 64 I. C. 456 :  
 (1922) All. 391.

—Pre-emption—Vendee a Hindu—Law applicable.

## MAHOMEDAN LAW—Religious Endowment.

A Mahomedan pre-emptor is entitled to pre-emption under the Mahomedan law of pre-emption even though the vendee is a Hindu. (*Coutts and Bucknill, JJ.*)  
*ACHUTANANDA PASSAIT v. BIKI BIBI*.  
 (1922) P. 601.

—Religious endowment—Khankah, meaning of—Succession of eldest son is not by right.

A khankah is a monastery or religious institution where dervishes and other seekers after truth congregate for religious instruction and devotional exercises. It has generally been founded by a dervish or sufi professing esoteric beliefs whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrines. After his death he is often revered as a saint, and his humble *takia* (or abode) grows into a khankah and his *durgah* (or tomb) into a *mauzah* (or shrine). The khankah is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutwalli* (or manager) of the institution, and of the adjoining mosque, but also is the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin*, and after his death the spiritual line (*silsilla*) is extended by a succession of *sajjadanashins*, generally members of his family chosen by him or according to directions given by him in his lifetime, or selected by the *fakirs* and *murids*, and formally installed; and the income of the institution is usually received and expended by them. On the death of a *sajjadanashin*, his eldest son is not entitled as of right to succeed him; but the eldest son, if qualified, is the natural successor of his father. And where, the evidence is clear that he was formally recognised and installed by the *pirs* with the express consent and assistance of the opponent, it is not open to the opponent to question his position as *sajjadanashin* or his right to manage the mosque and the property attached to the khankah. Dedication may be inferred although the word *wakf* is not shown to have been used. Where the *serais* and *langars* were used for the accommodation of the pilgrims, but were never appropriated to the religious purpose of the khankah, and were not erected out of the offerings at the shrine and were the *Tumandars* and the arbitrators, all of them skilled in Mohammandau Law, treated these houses as private property and partible, and the parties to the dispute accepted this view and agreed to a partition. Held, they must not be treated as wakf.

Ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwalli*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *mahant* of a Hindu math has full power of disposition over it. But this does not mean that in every case the whole income from a khankah is at the disposal of the *sajjadanashin*; and it is plain from the authorities that at certain shrines the members of the founder's family other than the *sajjadanashin* are treated as entitled to share in the surplus offerings which remain after payment of expenses (*Viscount Cave*), *KHWAJA MAHOMED HAMID v. MIAN MAHMUD*.  
 (1922) P. C. 384 :  
 44 M. L. J. 149 (P. C.)

**MAHOMEDAN LAW—Religious Office**

———Religious Office—Succession—Primgenture. See (1922) DIG. COL. 820 SECY. OF STATE FOR INDIA *v.* SYED AHMED BADSHA SAHEB 87 I C. 971.

———Restitution of conjugal rights—Discretion of court.

Where there is a valid marriage under the Mahomedan Law, a Court has not very great discretion in granting or refusing restitution of conjugal rights but in a case where the wife is anxious to go to her husband but is being restrained by her relatives, there is every reason why the relief should be granted. 11 M. I. A. 551 (ref. *Stuart, J.*) MT. NAFIS UN-NISSA *v.* MIRZA MUMTAZ HUSAIN.

4 U. P. L. B. 17 (A) : (1922) All. 363 : 65 I. C. 539.

———Restitution of conjugal rights—Non-payment of prompt dower—Not a bar to the suit See (1921) DIG. COL. 821 MUSST. HIJABAN *v.* ALI SHERKHAN. 64 I. C. 117

———Succession—Heirs—Right of representation—Death of heir before representation.

Under the Mahomedan Law, a vested inheritance is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. The shares have to be determined on the occasion of each death. (*Scott Smith and Harrison, JJ.*) MT. JAWAI *v.* HUSSAIN BAKHSH. 3 Lah. 80 : (1922) Lah. 298 67 I. C. 154.

———Succession—Sister and collaterals—Rights of.

Under Mahomedan Law a sister becomes a residuary only if she has a brother or brothers or if there are daughters or son's daughters of the deceased. She becomes a sharer by reason of there being no child or son's child or brother of the deceased. Where the only claimants are, a sister and some collaterals of the 4th degree, the sister as sharer takes one half and the rest will go to the collaterals who as descendants in the male line of the deceased's great grandfather were distant kindred. (*Abdul Raoof and Campbell JJ.*) MT. GHULAM ZOHRA *v.* NUR HASAN. 3 Lah. 278 : (1922) Lah. 406

———Waqf—Dedication—Evidence of—User.

Where the origin of an endowment is unknown reference may be made to user as evidence of dedication. But user cannot be substituted for the purpose of finding out the origin of the endowment. It is essential to the validity of a waqf that the author of the trust should have divested himself of his proprietary interest in the subject of the waqf. In cases of partial dedication, the property descends beneficially to heirs of the founder subject to the trust or charge. 2 Cal. 341 ; 15 O. C. 76 ; 33 P. R. 1917 ; 7 A. L. J. 1095 ; 23 Cal. 129 ; 40 Mad. 116 ; 40 Cal. 297 Ref. (*Kamhatay Lal, J.C. and Daniels, A. J. C.*) SADIQ HUSAIN *v.* KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN. 3 O. L. J. 111 ; 66 I. C. 90. 4 U. P. L. B. (O. C.) 35 : (1922) Oudh I.

**MAHOMEDAN LAW—Waqf**

———Waqf—Dedication—Charitable objects—Mode of dedication—Mosque—Tomb of a saint—Cutch Memons—Position of the High Priest.

Under Mahomedan Law, a gift for charity may take two forms *via* either by way of waqf which signifies an endowment or else by way of Sadakah, which signifies a donation. In the Mussalman Waf Validating Act 1918, a waqf is defined as the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. Though the Act is not retrospective the definition contains a statement of the Mahomedan law on the point. All works of religious charity or public utility not condemned by the Mahomedan religion are objects of waqf. But the particular objects intended must be indicated with a reasonable degree of precision in order that the courts of British India may give effect to the endowment. A gift by way of Sadakah indicates the special motive of the gift is to acquire religious merit or nearness to God, but it does not follow that because such a gift is made it is a charity in the eye of law.

Where the distribution of a gift is to be made by persons in succession as holders of a particular religious or charitable office that goes far to establish—and it may be, goes sufficiently far to establish—that the whole gift is charitable. But the mere fact that the donee holds a religious office is not by itself enough, and if trusts are added which are not all charitable, the whole gift fails. Although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the court, yet a gift for public purposes in a specified locality is a valid charitable gift.

In a suit for a scheme against the High Priest of the Dawoodi Borah community on a declaration that a mosque named after one Chandaboy who was regarded as a saint by the Dawoodi Borah community and that the tomb of Chandaboy and the offerings placed in an offertory box and a building partly acquired out of such funds were annexed to a public trust, the defence was Chandaboy was not a Saint and the Mosque was not named after him, that the offerings belonged to the High Priest by virtue of his office and that there was no public religious or charitable trust. It was found on the evidence (1) that the mosque was regarded as God's house and held by the High Priest and passed to his successor on the gadi and not to his heirs (2) that the High priest could not alienate or sell the Mosque (3) that he could not close it except for some temporary and necessary purpose such as repairs or sanitation (4) that it was a mosque for the use of Dawoodi Borah community although others were occasionally permitted to use it and (5) that it could not be used for any other purpose than a mosque. It was also proved that the site had been used for a mosque for over 100 years: Held, that there was a public trust of a charitable or religious nature and that the High Priest was the trustee thereof, though the sole right of management vested in him and his successors in office. Consequently the defendant was accountable as a trustee though he had wide powers of management and also a wide discretionary power as

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the particular purposes for the benefit of the community on which the surplus should be expended. There was no necessity for framing a scheme and disturbing the possession of the High Priest. (*Martin, J*) *THE ADVOCATE GENERAL OF BOMBAY v. YUSUFALLI EBRAHIM*.  
24 Bom. L. R. 1060.

**—Waqf—Dedication—Validity of—Power of sale reserved to donor.**

The reservation of a power to sell and transfer the property during her life-time by the dedicatrix, derogates from the nature of the grant. Such a condition is inconsistent with a valid waqf which must be certain as to the property appropriated and at the same time unconditional, and not subject to an option. There might be a reservation of the annual profits of the property for the benefit of the donor for her life; but a provision empowering the donor to sell and appropriate the proceeds thereof for his own or other's benefit, would make the settlement invalid. 6 B 42; 16 A. L. J. 841 Ref. (*Gokul Prasad and Kanhaiya Lal, JJ.*) *AMIRUDDIN v. MUZAFFAR-UL-HASAN*.  
20 A. L. J. 897.  
L R. 3 A. 490.

**—Waqf—Existence of mortgage on property—Mutwalli—Appointment of.** See (1921) DIG. COL. 823. *JINJIRAKHATUN v. MAHOMED FAKIRULLA MIA*.  
49 Cal. 477; 67 I. C. 77.  
26 C. W. N. 749; (1922) Cal. 429

**—Waqf—Gift for perpetual succession—Aggrandisement of family—Use of word "wakf"—Effect.**

A deed purporting to create by gift a perpetual succession of interests for the aggrandisement of the family of the donors is invalid according to Mahomedan Law and is not validated by the use of the term 'Wakf' or by the insertion of a remote trust for the poor. (*Viscount Cave.*) *KHAJEH SOLEHMAN QUADIR v. NAWAB SIR SALI-MULLAH BAHADUR*.  
49 I. A. 153; 49 Cal. 820;  
43 M. L. J. 385; 31 M. L. T. 79 (P. C.);  
4 U. P. L. R. (P. C.) 70; L. R. 3 P. C. 189.  
(1922) P. C. 107; 24 Bom. L. R. 1257;  
27 C. W. N. 101; 69 I. C. 138. (P. C.)

**—Waqf—Mutwalli—Powers of leasing.**

A mutwalli should not lease waqf property, if it be agricultural, for a term exceeding three years, and, if non agricultural, for a term exceeding one year unless he is expressly authorised by the deed of waqf to do so, or where he has no such authority, unless he has obtained the leave of the court to do so. (*Mookerjee and Cumming, JJ.*) *GAJENDRA NATH DEY v. MOULVI ASARAF HOSSAIN*.  
27 C. W. N. 159; 36 C. L. J. 48.

**—Waqf—Mutwalli—Powers of leasing—Ejection of tenant—Notice.**

The rule of Mahomedan Law is that with regard to house property a Mutwalli should not in general be authorised to make a lease of such property for a period longer than one year but there is this qualification attached to it, namely, that in all cases the Qazi might empower the mutwalli to grant leases for longer periods if he thought that such a grant was for the benefit of the trust estate; consequently a lease of a shop by

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the trustees of the Islamia College for five years is valid and entitles the lessee to eject a previous tenant whose lease has expired. (*Lindsay and Kanhaiya Lal, JJ.*) *BAIJ NATH v. MAHOMED ISMAIL*.  
44 A. 677; 20 A. L. J. 697;  
L R. 3 A. 418; (1922) All. 417; 68 I. C. 764

**—Waqf—Mutwallis—Suit and decree against one—Not binding on waqf or other mutwalli.**

A suit for rent and a decree thereon against one of two mutwallis of a waqf is not binding on the other Mutwalli or on the waqf in the absence of proof that the person sued represented the other mutwalli or the waqf in the landlord's sherista. (*Suhrawardy and Cumming, JJ.*) *ABDUL GANI v. NABENDRA KISHORE ROY*.  
65 I. C. 592.

**—Waqf—Objects of dedication—Maintenance of relatives.**

A dedication of property for purposes of charity including the maintenance of the relatives of the donor and their descendants and for the reading of fateha for the salvation of his soul, is a valid waqf under the Mahomedan law. (*Rafiq and Stuart, JJ.*) *MUKERRAM ALI KHAN v. ANJUMAN-UN-NISSA BIBI*.  
20 A. L. J. 924;  
L R. 3 A. 617.

**—Waqf—Permanent mutawalli a female infant—Powers of court—Husband, if can grant lease.**

Where the permanent mutawalli is a female infant the Court is not only competent but bound to make suitable arrangements for the upkeep and administration of the estate in its custody. A lease granted by one of its officers, who had been appointed receiver is in effect an act of the court and is valid and operative.

A permanent lease granted by the husband of an infant mutawalli is void and not voidable. 4 App. Cases 324 reld. to (*Mookerjee A. C. J. and Fletcher, JJ.*) *BEPIN BEHARI SAHA v. CHARU CHANDRA GHOSE*.  
35 C. L. J. 192.

**—Will—Executor—Powers of—Sale of estate.**

It is competent to the executors of the will of a deceased Mahomedan to sell his property without taking probate or obtaining the consent of his heirs. The property of the testator vests in the executor under the will of which the probate is only the authenticated evidence. 8 B 244; 37 C 839; 82 I. A. 244 foll. (*Marten and Fawcett, JJ.*) *SIR MAHOMED YUSUF v. HAR GOVANDAS JIVAN*.  
24 Bom. L. R. 753; (1922) Bom 392.

**—Will—Life estate to wife if husband died childless—Reversion to a stranger.**

If the wife survived the husband but bore no children, under the terms of the will, wife was to succeed to a life estate and a stranger was to obtain the residue. Held: the terms of the will are unenforceable. The wife was an heir but the heirs did not consent to the will and the will purports to create a life estate and a reversionary interest, both of which are unknown to the Muhammadan Law. The bequest would not be good in respect to one-third of the property, because the will shows a distinct intention that



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he should take nothing until after the death of the wife. (*Stuart, J.*) **ALLAH DIA v. ABDUL GAFUR.** (1922) **All. 283 (A.)**

—Will—Legacy to heir—Burden of proof of consent

The Mahomedan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and the burden of proving the consent of a particular heir is upon the legatee. (*Lord Phillimore.*) **SALAJEE v. FATIMA BIBI** (1922) **P. C. 391.**

**MAJORITY ACT, (IX of 1875) S. 2—Adoption—Minority—Effect of.**

By S. 2 of the Indian Majority Act, the capacity of minors is, as regards questions of marriage, adoption etc the same as if the said Act had not been passed. (*Spencer and Ramesam, JJ.*) **ARULANANDA MUTHEN v. PONNUSWAMI** 15 **L. W. 237** : (1922) **M. W. N. 93** : 42 **M. L. J. 129** . (1922) **Mad 1** : 66 **I. C. 265**

**S. 2—Mahomedans—Guardian for marriage.**

In considering the age of majority for purposes of exercising the right of guardianship for marriage in the case of a Mahomedan, reference should be made to the provisions of Mahomedan Law, as S. 2 of the Majority Act makes the Act inapplicable to such a case. The age of majority under that law is 15. (*Marlineau, J.*) **YUSUF v. MT. ZAINAB** 68 **I. C. 727.**

**MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I of 1900)—Improvements—Assessment of value—Appointment of successive commissioners.** See (1921) **DIG. COL. 826**, **KUTHIRAVATTATH KONGASSERI MOK SHATH THOTTAMMA v. SUBRAMANIAN.** 45 **Mad. 79** : (1922) **Mad. 219** : 68 **I. C. 469.**

—Ss. 5 and 6—Decree in ejectment—Application for revaluation of improvements—Execution. See (1921) **DIG. COL. 826**, **MANAKAL MURTHI SANKARAN NEELAKANDR NAMBUDIPAD v. SANKARAN NAIR.** (1922) **Mad. 347.**

—S. 5—Improvements—Changes in the property altering its condition—Injunction by Civil Court—Revision—C. P. Code S. 115.

There is nothing in S. 5 of the Malabar Compensation for Tenants Improvements Act which ousts the jurisdiction of a Civil Court in a suit between landlord and tenant to grant a temporary injunction restraining the tenant from making changes in the property, changes not made *bona fide* for purposes of agriculture but to harass the landlord. Consequently the High Court would not interfere under S. 115 C. P. Code with the grant of such an injunction (*Kumaraswami Sastri, J.*) **KADAN KULATHIL SAIDALI KUTTI v. C. M. GODAN NAMBUDRI** (1922) **M. W. N. 303** : 16 **L. W. 239** : (1922) **Mad. 172.**

—S. 10—Limitation—Tenant's right to make improvements—Provision for payment of fee in respect of trees cut.

The imposition of a small *kuth kanom* (stump-fee) does not contravene the provisions of S. 19

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of the Mal Compensation Act. If on the other hand the fee imposed is the full value of the trees, it does contravene the provisions of S. 19 of the Act. An agreement to pay some fee on each tree cut during the duration of the lease does not limit the right to claim compensation for improvements. If the trees are in existence at the end of the tenancy the tenant is entitled to compensation but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises. 40 **M. 603 F. B. 24 M. 47** , 32 **M. L. J. 541** Ref. (*Ramesam, J.*) **KELU NAIR v. VIYATHEN MAHADEVI** 16 **L. W. 310** : (1922) **M. W. N. 563**

**MALABAR LAW—Devaswom—Trustees—Uralans—Melcharth by majority of the uralans without consulting the others Not binding on the devaswom. See REL. ENDOWMENT. TRUSTEES** 42 **M. L. J. 15 L. W. 264.**

—Devaswom—Uralans—Renewal of *kanom* by one of the co-uralans—Binding nature of—Minor—Competency to sue.

Where there are several Uralars of a Malabar devaswom a renewal of a *kanom* granted by one of the Uralars without consulting the others, is invalid and not binding on the devaswom. A minor can be the uralan of a devaswom and a suit by his next friend would be maintainable on behalf of the devaswom (*Spencer and Krishnan, JJ.*) **KOTASSERI E. V. SANKARAN NAMBI v. KAN HOLI I. D. ANTHEJENAM** 43 **M. L. J. 572** . (1922) **Mad. 259** : (1922) **M. W. N. 428** : 16 **L. W. 26.**

—Karar—Binding nature of—Dissentient members.

A family *karar* when not assented to by an individual member of the *tarwad* though assented to by a majority, is powerless to interfere with his personal birthright to succeed to all the powers of a *Karnavan* in due course of succession. 41 **M. 577** ; 32 **M. L. J. 323** Ref. (*Sadasiva Aiyar and Napier, JJ.*) **MUKKIL MARUTHUR SANKARA MENON v. GOPALA MENON.** 65 **I. C. 805**

—Karnavan—Compromise—Burden of proof.

It is not obligatory on a limited owner like a *Karnavan* to contest a hopeless case ; but if he chooses to enter into a compromise, he and his alienee must prove that the compromise was entered into honestly and for the benefit of the estate. (*Oldfield and Ramesam, JJ.*) **SUBRAMANIAM PATTAR v. KIZHAKKARA UTHENANTHIL.** 16 **L. W. 620** : 31 **M. L. T. 454 (H. C.)**

—Land tenures—Kanom—Redemption—Neerozhikka Otti Kanom. See MORTGAGE REDEMPTION. 42 **M. L. J. 350**

—Land tenures—Karamkari and Adimayavana—Inalienability and forfeitability. See LAND TENURES. 15 **L. W. 164.**

—Land tenures—Nir Ozhikka Otti—Incidents of. See MORTGAGE—REDEMPTION. 42 **M. L. J. 350.**

—Land Tenure—Service tenure—Santhathi Brahmaswom—Adimayavana—Alienability—Liability to resumption.

**MALABAR LAW—Tarwad.**

Assuming without deciding that service tenures like Santhathi Brahmaswom and Adimayavana are inalienable, it is not part of the customary law of Malabar that on such alienation the grantor is entitled to resume the grant and re-enter on the lands granted. Cases and text books considered. (*Schwabe, C. J. Oldfield, Philips, Devadoss and Venkata Subba Rao, JJ.*) *AYYAKUTTI v. KRISHNA PATTAR.*

45 Mad 394 : 43 M. L. J. 1 :  
(1922) M. W. N. 192 : 65 I. C. 942 (F. B.) :  
31 M. L. T. 1 : 15 L. W. 650 :  
(1922) Mad. 274

—*Tarwad—Acquisitions of members of family—Devolution on intestacy.*

Under the Malabar law the acquisitions of a member of the tarwad if undisposed of at his death do not go to his nephews but form part of the family properties being managed by the eldest surviving male member (*Spencer and Devadoss, JJ.*) *ABUVAKKAR v. KUNHIKUTTIYALI*

16 L. W. 768 : 31 M. L. T. 389 (H. C.)

—*Tarwad—Tavazhi—Acquisitions with Tavazhi funds—Nature of—Nucleus.*

Where a member of a Tavazhi acquires properties with the help of tavazhi putravakam properties, the acquisitions become the property of the Tavazhi and the karnavan of the tarwad cannot claim them. The fact that the Tavazhi was possessed of some funds or nucleus is insufficient to impress the acquisitions of a member with the character of Tavazhi property. (*Spencer and Devadoss, JJ.*) *ABUVAKKAR v. KUNHIKUTTIYALI*

16 L. W. 768 :  
31 M. L. T. 389 (H. C.)

—*Tarwad—Tavazhi—Relationship between—Possession by Tavazhi when adverse.*

Where the eldest male member of a Tavazhi forming a branch of a tarwad, also happens to be the karnavan of the tarwad, there can be no question of adverse possession by the Tavazhi as against the Tarwad. (*Spencer and Devadoss, JJ.*) *ABUVAKKAR v. KUNHIKUTTIYALI*

16 L. W. 768 : 31 M. L. T. 389 (H. C.)

**MALICIOUS PROSECUTION—Cause of action—Application for sanction to prosecute—Damages.**

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Code of Cr. Procedure. The application for sanction is a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done, as the law required, in a civil and not in a criminal court. Where the allegations in the plaint are that the defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction, and the plaintiff was obliged to defend the case they are sufficient to disclose a cause of action for malicious prosecution. (*Teunon and Newbould, JJ.*) *NORENDRA NATH DAY v. JOTISH CHANDRA PAL.*

(1922) Cal. 145 : 67 I. C. 705.

**MARTIAL LAW ORDINANCE.**

—*Cause of action—Innocence of plaintiff—Proof of.*

In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the criminal court before which the accusation was made. It is not enough for plff. to produce the judgment of the criminal court which acquitted him but he must prove his innocence by other independent evidence. (*Lindsay and Stuart, JJ.*) *GOBERDHAN SINGH v. RAM BADAN SINGH.*

44 A. 485 : L. R. 3 A. 199 : 20 A. L. J. 284

—*Cause of action when commences—Date of discharge or acquittal—If suspended by proceedings in revision. See LIM. ACT, ART. 23*

24 Bom. L. R. 507

—*Damages—Cause of action—Prosecution—Master and servant*

If a person maliciously and without reasonable cause sets the machinery of the criminal law in motion, he is liable in a suit for damages for malicious prosecution. The prosecution commences as soon as the complaint is made to the magistrate, irrespective of the result of the prosecution or the stage at which it may fall through. If a servant acts at the instigation of his master in launching a malicious prosecution, the master will be liable in damages 38 C. 880 dist, 20 C. L. J. 518 foll 17 C. L. J. 105 Ref (*Newbould and Panton, JJ.*) *BISHAN SINGH v. RAM BAHAL ROY.*

84 I. C. 741.

**MALIK—Meaning of—Not a term of art, See DEED—CONSTRUCTION.**

(1922) Pat. 70.

**MARTIAL LAW ORDINANCE (II of 1921)—Applicability of—Summary magistrate—Power to hold summary court outside martial law area—Offence committed inside such area—Conviction and sentence illegal. See CR. P. CODE, Ss. 456 AND 491**

16 L. W. 349

—*Ss. 6 and 16—Arrest of offender by police outside martial law area for offences committed outside the area—Legality—Habeas Corpus—Power of High Court to issue See (1921) DIG. COL. 832 KOCHUNNI ELAYA NAIR In re.*

45 Mad. 14 : (1922) Mad. 215 : 68 I. C. 26 :  
23 Cr. L. J. 490.

—*(I of 1922)—Conviction—Appeal against—Limitation—Time requisite for obtaining copies—Deduction of—Act X of 1922—Effect of—Lim Act Ss. 5 and 12.*

Since the passing of Act X of 1922 an appellant appealing against a conviction under Ordinance I of 1922 is entitled to credit for the time spent in obtaining a copy of the judgment under S. 12 of the Lim. Act. But an appellate Court has no power to excuse delay in filing the appeal under S. 5 of the Lim. Act. (*Oldfield and Ramesam, JJ.*)

43 M. L. J. 561

**MASTER AND PUPIL.**

**MASTER AND PUPIL**—Disciplinary action—Corporal punishment—When permitted and to what extent—Madras Educational Rules.

The principal of a college inflicted two smacks with his hand on a pupil of the college who was guilty of breach of school discipline in that he was shaking a reversible desk which was in a rickety condition. The smacks were light and caused no injury or severe pain to the pupil. In a suit by the pupil against the principal for damages held that the punishment inflicted by the principal on the pupil was within the right possessed by a schoolmaster over his pupil and was justified by the circumstances of the case. The master as the delegate of the parent may for the purpose of correction inflict on a pupil moderate and reasonable corporal punishment. Care is necessary in the application of this general principle in this country in which this delegated authority has to be exercised by persons so dissimilar in status as a school master and the principal of a college. The courts will insist on a close scrutiny of the chastisement inflicted and its justification in every case.

R 59 A of the Madras Educational Rules is not exhaustive of the powers of corporal punishment possessed by a school master over his pupils. (*Oldfield and Venkatasubba Rao, JJ.*) SANKUNNI v. VENKATARAMAN.

45 Mad. 548 : 42 M. L. J. 560 :  
(1922) M. W. N. 246 : 15 L. W. 501 :  
31 M. L. T. 26 (H. C.) : (1922) Mad. 200 :  
67 I. C. 514.

**MASTER AND SERVANT**—Contract of service—Daily wages—Wages calculated on working days—Payment at the end of a month—Nature of contract of service. See (1921) DIG. COL. 833 ARJON VISHNU v. HORMUSJEE SHAPURJEE SEERVAI.

46 Bom. 44 : 64 I. C. 114 :  
(1922) Bom. 184.

—Discontinuance of service in the middle of a month—Salary—Right to.

When a teacher drawing monthly salary from a School Committee resigns his post in the middle of a month without sufficient cause, he could not recover his salary for that fraction of the month during which he had served 13 M. L. J. 680 Ref (*Oldfield, J.*) THE CUDDALORE MUNICIPAL COUNCIL v. T. M. PANCHABIKASA AYYAR.

(1922) M. W. N. 153 : 15 L. W. 362 :  
31 M. L. T. 83 : (H. C.) (1922) Mad. 102.

—Notice—Necessity of, for dispensing with service.

The rule of one month's notice which applies to menials, will not apply to the case of a school master. The rule as to yearly hiring extends to domestic and other servants such as clerks and others, but it is not an inflexible rule and each case must be considered by itself and in each case it must be decided what notice would be reasonable. In the case of a school master, especially when he was intending to leave his profession and join another, a notice of

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three months would be reasonable and the period of three months may be regarded to be equivalent to about a term. (1858) 8 Exh. 150 distinguished. (44 Cal. 917 followed. (*Jwala Prasad and Adam, JJ.*) NIROD CHANDRA ROY v. RAJA KIRTYA NANDA SINGH.

(1922) P. 24.

—Tort—Malicious prosecution—Instigation of master—Liability in damages See MALICIOUS PROSECUTION.

64 I. C. 741

—Termination of service—Notice of—Reasonable notice—Schoolmaster

The position which a tutor holds, the station which he occupies in the family and the manner in which such a person is usually treated in society place him in a very different situation from that which mere menial and domestic servants hold. Consequently a month's notice to terminate his employment is not reasonable notice. A term's (six months) notice would be reasonable in the case of a tutor. (*Greaves, J.*) WITTENBAKER v. J. C. GALSTAN.

36 C. L. J. 256

**MAXIM**—Expressio unius exclusio alterius—Scope of. See INTERPRETATION OF STATUTES, 36 C. L. J. 382.

—Falsus in uno falsus in omnibus—Appreciation of evidence—Duty of Court See EVIDENCE—APPRECIATION

1 Bur. L. J. 213.

—He who seeks equity must do equity—Applicability of—Voidable sale—Setting aside—Duty to refund purchase money properly paid and applied for benefit of minor. See GUARDIANS AND WARDS ACT, Ss. 29 and 30.

36 C. L. J. 326.

—Actio personalis moritur cum persona—Applicability of—Tort. See TORT.

64 I. C. 311.

**MERGER**—Debt—Creditor succeeding to estate of debtor—Widow—Limited estate—Extinguishment of the debt.

There is an extinguishment of the debt if the person who is to receive the money is also the person who ought to pay. Where a Hindu lady who is a creditor of her husband's estate succeeds to that estate on her husband's death, there is no extinguishment of the debt as she is only a limited owner. In the case of a limited owner the presumption is against merger as it is not for her advantage that the charge should sink for the benefit of the remainderman. (*Spencer, J.*) CHIDAMBARAM PILLAI v. MEENAKSHMI AMMAL.

16 L. W. 678.

—Landlord and tenant—Zemindar becoming entitled to tenant right.

When mother and son live together, the former being recorded as sole zemindar and the latter her tenant the tenant right merges in the zemindari. (*Burn S. M. and Fremantle, J. M.*) JHUR AHIR v. PABBAROO SINGH. L. R. 3 A. 480 (Rev.)

**MESNE PROFITS.**

**MESNE PROFITS**—Alienee from Hindu widow—Suit by reversioner to recover property—Principle on which mesne profits allowed. See VOIDABLE TRANSACTION. 25 O. C. 2

—Hindu Law—Partition—Right of coparcener—Property subject to mortgage—Redemption by one coparcener See HINDU LAW—PARTITION. 16 L. W. 297.

—Liability for—Joint Hindu family—Alienee from manager—Setting aside—Alienee when liable for antecedent mesne profits. See HINDU LAW, JOINT FAMILY, ALIENATION 42 M. L. J. 372

—Measure of—Mining operations—Period for which judgment-debtor is liable for mesne profits—Relinquishment after private notice to decree holder—Enquiry into mesne profits. See (1921) DIG COL 835. SAMBHU NATH KHETRI v. SASTISH CHANDRA MITRA. 66 I. C. 49.

—Right to—Suit by Hindu reversioner—Alienation by limited owner without necessity—Past mesne profits. See HINDU LAW, WIDOW, ALIENATION 16 L. W. 752.

—Right to—Alienee from Hindu widow—Alienation set aside at the instance of reversioner—Right to mesne profits—Improvements set off, against mesne profits. See HINDU LAW, WIDOW, ALIENATION SETTING ASIDE L. R. 3 (P. C.) 20.

**MINOR**—Alienation—Certificated guardian—Alienation without sanction of court—Purchase money applied for benefit of minor—Subsequent sale of the same property with sanction of court—Rights of subsequent purchaser—Duty to refund purchase money to first purchaser. See GUARDIANS AND WARDS ACT Ss. 29 AND 30. 36 C. L. J. 326.

**MINORITY—Burden of proof—Contract.**

If a minor acted and appeared like a major, the burden of proving minority lies on the party alleging it and presumably basing its allegation on peculiar knowledge. (*Le Rossignol, J.*) DAHARAN SINGH v. HARBANS SINGH. (1922) Lah 75

—Cancellation of sale—Duty to restore benefit received. See CONTRACT ACT, S. 65. 24 O. C. 348.

—Compromise by guardian—Subsequent ratification by conduct—Effect of—See COMPROMISE. 66 I. C. 412.

—Contract by guardian—Ratification—Power of, on attaining majority

The occasion for ratification only arises when the obligation was not one originally binding on the minor and so far as he is concerned, the minor has full power to ratify a contract entered into by his guardian, with this qualification that he cannot ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value. Where a debt contracted by the guardian is barred by limitation it is open to the minor to execute a fresh bond on attaining majority and such bond

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could be enforced against him under S. 25 (3) of the Contract Act. (*Batten, J. C.*) NANDRAM v. RANCHHODDAS. 5 N. L. J. 178 : (1922) Nag. 250 : 65 I. C. 718.

—Decree against—Person sued as minor in fact a major—Decree if binding on him. See (1922) DIG COL 837. SARAT CHANDRA MAITI v. BIBHABATI DEBI. 66 I. C. 433.

—Decree against—Absence of guardian—No representation in suit—Decree a nullity—Defect in appointment of guardian—Mere irregularity See C. P. CODE, O. 32. Rr. 3 AND 4. 66 I. C. 137.

—Decree against—No representation in suit—Decree not binding on him.

A minor debt who is not represented in the suit by a properly appointed guardian is not a party to the suit in the proper sense of the term and the proceedings in the suit cannot bind him 31 A 572 P. C. Ref. (*Kotwal, A. J. C.*) PERMANAND v. LAKHMICHAND. 66 I. C. 460.

—Decree against—Representation in suit—Decree when a nullity.

When a minor is entirely unrepresented before the court which issues the decree against him that decree is a nullity so far as the minor is concerned. But when a minor is a party to the case and the decree is issued against him there is no reason to hold that the decree so long as it stands is invalid. It is only voidable at the instance of the minor. (*Le Rossignol and Campbell, JJ.*) INDARSAIN v. PRABHU LAL. 3 Lah. 88. (1922) Lah. 277. 66 I. C. 5.

—Decree against—Setting aside—Majority at the time of decree—Effect of.

Where a person had as a matter of fact attained majority at the time when a compromise decree was passed against him with the court's sanction the decree is not voidable at the instance of the minor. The fact that he was represented by a guardian ad litem even after attaining majority does not vitiate the decree 24 P. R. 1919, 39 M. 1031, 6 C. 687 34 C. 83 Ref. (*Le Rossignol, J.*) GHULAM NABI v. BASHESHA MAL. 4 Lah. L. J. 298 : (1922) Lah. 407.

—Decree against—Setting aside—Court's power to go into merits of litigation. See DECREE SETTING ASIDE. 20 A. L. J. 329.

—Decree against—Setting aside—Negligence of guardian—Omission to raise a valid defence—Minor can sue to set aside decree. See DECREE, SETTING ASIDE. 42 M. L. J. 429.

—Decree against—When can be impeached.

A minor is as much bound as a person of full age by a decree in a suit—Except in the case of gross laches of the guardian or fraud or collusion it cannot be impeached. (*Walsh and Ryves, JJ.*) JAMMU v. MAHADEO PRASAD. L. R. 3 A 195 (Rev.) : 66 I. C. 559. (1922) A. 294 : 4 U. P. L. R. (A) 84.

—Guardian ad litem—Appointment of—Decree against minor—Appeal by another person as next friend.

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Where a guardian ad-litem has once been appointed his appointment endures for the whole of the suit in the course of which it was made unless and until revoked by the court. Consequently an appeal against a decree passed against the minor can only be prepared by him. An appeal presented by another next friend is not a valid presentation. 14 A. 35; 22 M. 187, 2 A. L. J. 489 foll. (*Stuart and Ryres JJ*) SHAMBHO v. KANHAYAN 20 A. L. J. 599; 44 All 619  
L R. 3 A. 512 (1922) All. 332.

—Guardian-ad-litem—Refusal to act—Effect of—Court declining to appoint fresh guardian—Decree if binding on minor.

Where a person appointed guardian-ad-litem for a minor defendant refused to act and intimated to the court his unwillingness but the court refused to remove him or appoint a fresh guardian-ad-litem, the decree passed against the minor is not binding on him. (*Stuart and Kanhaiya Lal, JJ.*) JANGI v. MUSSAMMAT SUNDAR. L R 3 A. 458 (1922) All. 416.

—Guardianship—Appointment of guardian—Considerations to be taken into account—Adopted boy—Right of guardianship.

In matters relating to the appointment of a guardian for a minor the main question for the court is the welfare of the minor child and the court is not always bound to appoint the person having the best title to be the guardian of the person of the minor. In the absence of proof of incompetency or serious ill-treatment, the adoptive parents are the proper guardians of their minor adopted son, 3 B. Rel. (*Ashworth, J. C.*) MT. GANGA JALI v. DIP NARAIN, 9 O. L. J. 325 (1922) Oudh 129; 68 I. C. 553.

—Guardian—Contract—Fraud or illegality.

If a guardian while acting for a minor is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts than the guardian could, if he were acting on his own behalf. 10 Cal. 951 foll. (*Robinson, C. J. and Heald, J.*) MAUNG TIN v. MA MAI MEJINT. 11 L. B. R. 83; 65 I. C. 459.

—Guardian—Contract—Personal liability—Acknowledgment of pre-existing debt—Liability of minor or his estate—Court of Wards.

Where the guardian of a minor executes a simple money bond in renewal of an antecedent debt due from the minor's estate, a decree on the bond could be passed on the bond against the minor's estate. An acknowledgment of a pre-existing debt stands on a different footing from the creation of a fresh liability by the guardian. In respect of the former a decree against the minor may be passed and may be executed against his assets though not by his arrest 11 B. 551; 2 N. L. R. 25, 13 N. L. R. 109; 26 M. 330; 19 C. 507 foll. 29 A. 394; 40 C. 784 Ref. The Court of Wards in charge of a minor's estate has no greater authority to bind the minor ward personally than an ordinary natural or certificated guardian, except so far as the statute confers special powers

## MORTGAGE—Consideration

on the Court of Wards, (*Hallifax and Dholey A. J. C.*) JIWANDAS v. JANKI. 5 N. L. J. 49; 65 I. C. 53; 18 N. L. R. 145 (1922) Nag. 98.

—Guardian—Torts of—Liability of minor's estate.

The estate of a minor is not liable for damages for a tort committed by his guardian. The only person responsible would be the actual tortfeasor, the guardian himself 31 C. 839; 6 N. L. R. 6 dist. 13 N. L. R. 101 foll. (*Hallifax, A. J. C.*) SADARAM v. RAO SAHEB MANNULAL SAO. 64 I. C. 473.

—Liability of estate—Trespass by guardian—Benefit.

Where the estate of a minor has benefited by a trespass on the part of the guardian, the estate will be liable for the resulting damage to third persons 28 B. 330, M. 632, 638 foll. (*Kotwal, A. J. C.*) CHATARJA v. DAWLAT. 5 N. L. J. 206; 66 I. C. 468 (1922) Nag. 48.

—Necessaries—Money paid to minor not discharge of a father's debts—Estate of minor if liable. See CONTRACT ACT, S 68 64 I. C. 851.

—Partnership business on behalf of—Presumption of benefit.

In the case of a business undertaking, in which a minor is a partner, where transactions are carried on in the usual course of business, it is not necessary for the creditor to give specific evidence of benefit in each individual transaction. The fact that the transactions were carried on in the usual course of business is sufficient to raise a presumption that they were for the benefit of the business (*Daniels, A. J. C.*) WILAYAT HUSAIN v. PUTTU LAL. 25 O. C. 7; 67 I. C. 982.

## MORTGAGE — Conditional sale — Foreclosure

Failure to make a formal demand—Effect  
Where the plaintiff did not disclose that any demand had been made before the notice was issued nor did the mortgagee at any later stage even assert that he had made such a demand, the omission is a fatal flaw in the proceedings and the court will not presume that all formalities have been duly observed 16 P. R. 1888, 106 P. R. 1889 Ref. (*Scott Smith and Harrison, JJ.*) 67 I. C. 161

—Consideration—Agreement not to prosecute—Prior liability—Validity of mortgage.

A decree-holder in attempting to execute his decree was resisted by a third party. The court granted the decree holder sanction to prosecute the obstructor. An agreement was arrived at to the effect, that on a mortgage bond being executed by the judgment debtor and the obstructor, for the amount of the decree the latter would not be prosecuted. In a suit to enforce the mortgage, illegality of consideration was pleaded in defence. Held, the bond was enforceable against all the defendants.

The distinction between the motive for coming to an agreement and the actual consideration for the same must always be kept in view. (*Das and Adami, JJ.*) ADHIKANDA SAHU v. JOGI SAHU. 1 Pat. 164; (1922) P. 502.

## MORTGAGE.

Construction — Interest — Right to — Accrual of — Usufructuary mortgage — Period fixed for redemption. See (1921) DIG COL 841 MAHOMED ALI v. RAMZAN ALI. 69 I. C. 65.

Construction — Mortgagee creating a sub-mortgage — Effect of — Indemnity clause.

A mortgagee in his turn created a submortgage of the properties and at the time of receiving the mortgage money from the mortgagors agreed to indemnify them against any loss they might be put to owing to any claims made against them by any body under the mortgage. The sub-mortgagee sued on the mortgage and obtained a preliminary decree. The mortgagors paid off the decree amount and claimed it from the mortgagee. *Held*, though the payment of the decree amount by the mortgagors was voluntary, still they were entitled to be reimbursed by the mortgagee under the very wide terms of the indemnity clause. (Lord Atkinson.) SACHINDRA NATH ROY v. MAHARAJ BAHADUR SINGH, L. R. 3 P C 174 (P. C.)

Construction — Improvements — Redemption — Liability of mortgagee.

A mortgage of house property provided for the mortgagee rebuilding the house and for payment of the cost of rebuilding with interest by the mortgagor. The mortgagee rebuilt the house but considerably improved it also. Subsequently the mortgagors sold the house directing the vendee to pay off the mortgage money and interest and also all sums spent by the mortgagee in rebuilding. *Held* that having regard to the terms of the mortgage and the subsequent conduct of the mortgagors their vendee was bound to pay the mortgage money, interest and the cost of rebuilding. (Broadway and Abdul Qadir, JJ.) KIRPARAM v. JOWANDA MAL. (1922) Lah. 252; 66 I. C. 755

Construction — Interest — Payment of rents — Provision for realisation of arrears of interest and mortgage money by sale of the mortgaged property — Simple mortgage.

Under a deed of mortgage the owner of a shop mortgaged it for Rs. 200 and put the mortgagee in possession. The mortgagee was to set off the rent of the shop against the interest on Rs. 100 out of the principal money and the interest on the remaining Rs. 100 was to be paid by the mortgagor. The mortgage money was to be paid within 2 years on default of which the mortgagee would have a right to realise it from the shop. On a construction of the deed. *Held* that it was a simple mortgage for Rs. 200 and not two separate mortgages and that the mortgagor on redemption was bound to pay the mortgage money which included the whole of the principal and interest due upon it at the time of the suit. 2 A 527 dist. (Ryves and Gokul Prasad JJ.) SUNDER LAL v. SHIB NARAIN. L. R. 3 A. 325; 66 I. C. 704; (1922) All. 362.

Construction — Payment of revenue — Covenant for — Liability of mortgagee.

At the time when a mortgage was executed no revenue was assessed on the land. It was provided in the deed that if any revenue should be assessed in future the mortgagor would pay it and would not claim to redeem without so paying

## MORTGAGE

it. *Held* that if the mortgagee paid the revenue on the land he was entitled to a charge on the property (Daniels and Lyle, A. J. C.) SAYYID MAHOMED HADI v. MT. PARBATI. 90 I. J. 312.

Construction — Personal liability — Conditions negating.

If the mortgage is a mortgage with a condition of "lahan Gahan", it ordinarily involves no personal liability on the part of the mortgagor for repayment of the debt, unless it may by special agreement or local custom confer on the mortgagee the option of recovering the money from the mortgagor personally. The parties having adopted a form of mortgage which ordinarily is understood to involve no personal liability must be taken not to have contemplated it (Kotwal, A. J. C.) KUNDANMAL v. WASUDEO 5 N. L. J. 259; (1922) Nag. 119.

Construction — Provision for payment year by year — Default — Addition to principal.

A deed of charge provided that interest would be paid year by year; in case of default it was to be added to the principal and compound interest would be charged; that the mortgagee might realise the interest every year by suit or might have it added to the principal, and that at the time of redemption or foreclosure the total interest due would be deemed to be a separate item which the mortgagee would be entitled to recover from the person and other property of the mortgagors. *Held* that the deed gave the mortgagee an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreclosure. 16 O. C. 645, 20 O. C. 132 51 I. C. 985; 22 O. C. 169 Ref (Daniels and Lyle, A. J. C.) MAHRAJ PRAG DIN v. BHAGWATI SAHAI. 66 I. C. 687

Construction — Simple mortgage — Provision for delivery of possession — Interest.

Where a mortgagor undertakes to deliver possession after a certain period but does not do so, the mortgagee is entitled to enforce the initial terms of his mortgage independently of the position which would have been created had such possession been delivered. If the mortgage was originally a simple mortgage liable to be converted into a usufructuary mortgage at the expiry of a certain period the mortgagee can fall back on the simple mortgage and enforce it in case the mortgagor does not fulfil the obligation, he had undertaken. In such circumstances, if the mortgagor fails to deliver possession the mortgage should continue to retain its character of a simple mortgage and the mortgagee would be entitled to claim interest and also a decree for sale. (Kanhaiya Lal, J. C.) DAL CHAND v. SITA RAM 65 I. C. 449.

Construction — Usufructuary mortgage by two persons — Additional mortgage by one of them — Mashrent-ul-rahin — Stipulation that property would not be released unless both amounts be paid — Implied transfer of interest in immoveable property. See (1921) DIG COL. 841 HAR PRASED v. PAM CHANDAR. 44 A. 37; (1922) A. 174.

**MORTGAGE.**

—Court-fee—Interest after institution of suit—Appeal—Calculation of Court fee See COURR-FEE. 1 Pat. 19.

—Decree—Form of—Personal decree claimed by debtor.

If a person professes to have an interest in a property whatever interest he may have is bound by the mortgage and must be enforced against him and he cannot claim that a personal decree should have been passed. (*Lord Pillimore*) BHOLANATH SEN v. BALAPAM DAS

(1922) P. C 382.

—Decree—Time fixed for redemption by decree of first court—Confirmation of decree on appeal—Time for redemption to be expended by appellate court. See C. P. CODE, O. 34, R. 2.

26 C. W. N. 440.

—Extinguishment—Subsequent sale to mortgagee, providing for discharge of mortgage—Partial failure of consideration for sale—Effect.

After a mortgage was executed, the properties were purchased by the mortgagee and a portion of the consideration for the sale was retained for the discharge of the mortgage debt—Subsequently it turned out the sale was partly invalid and on a suit being brought on the mortgage deed, held the suit was not maintainable as the mortgage had been extinguished at the time of the sale. (*Piggott and Walsh, JJ.*) LACHMAN PRASAD v. LACHMESWAR PRASAD. 20 A. L. J. 151 : 66 I. C. 203 : (1922) All. 76.

—Interest—Court's power of interference with rate—Contract Act, Ss. 16 and 74.

A Court has no jurisdiction to reduce the rate of interest in a mortgage bond unless a case is made out under S 16 of the Contract Act. Indian law does not recognize the English principle of equity which gives relief to a debtor whenever a Court considers the rate of interest unduly high.

Where the only facts found were that the mortgagor was badly in need of money and the mortgagee was the only person who could advance the sum, undue influence cannot be inferred.

The fact that the security is sufficient for payment of the loan is not a consideration at all, nor does the stipulation for compound interest make it a penalty. (*Das and Adami, JJ.*) CHOTA NAGPUR BANKING ASSOCIATION, LTD v. BHAGWAT BUT RAI 1 Pat. 263 : (1922) P. 491

—Interest—Default in payment—Clause for giving up possession—Waiver—Notice if necessary for subsequent default.

Where a mortgage bond provides for possession being given to the mortgagee on failure to pay interest regularly, but the mortgagee did not enforce this right on prior occasions of default, held, there is no general rule that a mortgagee who in the past has waived his right on the occurrence of a default is bound to give notice before enforcing his penalty, although it may be equitable in certain cases to insist on such notice. (*Le Rossignol and Harrison, JJ.*) PARTAB SINGH v. NATHU. 3 Lah 285 : (1922) Lah. 416.

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—Interest—Liability to pay after period fixed for redemption.

Where in a mortgage by conditional sale the mortgagor covenanted to pay interest till the date fixed for payment after which the mortgagee was to become the absolute owner of the property and there was nothing expressed in the document to provide for payment of interest after the due date in case the mortgagee did not institute foreclosure proceedings held that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond. 19 A. 39, 20 A 171 : 25 C. 246. Ref. (*Mears, C. J. and Piggott, J.*) MAHADEO PRASAD v. DHIRAJ SINGH 20 A. L. J. 752 : L. R. 3 A 536.

—Interest—Period fixed for redemption—Interest subsequent to that date.

Where it is agreed that a mortgage with possession of a house should be redeemed within four years on payment of the principal sum with interest at 9 per cent, per annum, failing which the mortgage would become a sale, no interest could be allowed after the expiry of that period, 57 P. R 1914 : 94 P. R, 1914 foll. (*Martineau, J.*) GHATU RAM v. RAM MAL 64 I. C. 230.

—Interest—Post diem—Damages—Quantum of.

In the absence of a stipulation express or implied the mortgagee is not entitled to interest after the due date. But the mortgagee is entitled to damages to be calculated ordinarily at the covenant rate of interest and for the entire period during which the principal sum was remained unpaid unless the mortgagee is himself the plaintiff in which case the period would be the same as that prescribed by the statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour. 19 A. 39 : 20 A 171 : 17 A. 511, 95 P. R. 1902 Rel. (*Shadi Lal, C. J.*) *Chevis, Scott Smith Le Rossignol and Broadway, JJ.*) MOHAN LAL v. MAHOMED BAKSH.

4 U P. L. R., (Lah), 55 : 66 I. C. 771 : 3 Lah 200 : (1922) Lah 254.

—Interest—Stipulation as to—Interpretation

A general stipulation in a mortgage deed that the mortgage money with interest at As. 7 per cent per mensem was to be paid in 7 years and that if the interest was not paid half yearly it was to be added to principal and bear compound interest at the same rate, can only be treated as applicable to the entire period for which the money might remain unpaid. (*Kanharya Lal, J.*) NAJM-UN-NISSA v. RAGHUNATH. (1922) Oudh 123 : 67 I. C. 963 : 25 O. C. 36.

—Keeping alive—First mortgagee's decree satisfied out of advance of third party—If entitled to priority over puisne mortgages See MORTGAGE SUBROGATION. (1922) Pat. 174 : 3 Pat. L. T. 261.

—Keeping alive—Prior mortgagee purchasing equity of redemption in execution of simple money decree—Existence of puisne mortgage—Effect of—Presumption of intention to keep alive prior mortgage. See T. P. Acr, S. 101. 20 A. L. J. 596.

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———*Moveable property—Standing crops, and cattle—Right of alienation—Notice.*

Where there is a mortgage of standing crops and cattle without possession and the property is purchased by a third person the mortgagee cannot follow the property into the hands of the purchaser if he had no notice of the mortgage. (*Maung Kin, J*) MAUNG SHWE HNYIN v. LALA FAL CHAND 1 Bur. L. J. 136.

———*Prior and subsequent—Suits for foreclosure without impleading other mortgagee—Possession given to puisne mortgagee under earlier decree—Rights of parties.*

Where two mortgagees of the same property sue for foreclosure without impleading each other, but the puisne mortgagee gets his decree earlier than the prior mortgagee and obtains possession of the property :

*Held*, the prior mortgagee can maintain a suit against the puisne mortgagee for possession, subject to the latter's right to redeem, even though at the time of the suit the right to foreclose the mortgage was barred (*Halifax, Kotwal and Dholey, J C.*) JAGESHWAR v. MOTI (1922) Nag. 89 : 5 N. L. R. 157 (F. B.).

———*Prior and subsequent—Suit by prior mortgagee—without impleading puisne mortgagee—Decree and execution sale—Rights of prior mortgagee.* See C. P. CODE O. 34, R. 1. 1 Bur. L. J. 215.

———*Prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Decree for foreclosure—Right of prior mortgagee to redeem puisne mortgagee.* See C. P. CODE, O. 34, R. 1. L. R. 3 A. 217

———*Prior and subsequent—Suit on prior mortgage without impleading puisne mortgagee—Decree—Rights of purchaser of a portion of the mortgaged property in an execution sale—Partial payment of the decree on the prior mortgage—Subrogation.* See (1921) DIG. COL. 846 VENKATARAMANA REDDI v. RANGIAH CHETTI, (1922) M. W. N. 15 : (1922) Mad. 249

———*Prior and subsequent—Suit by prior mortgagee without impleading puisne mortgagee—Rights of purchaser—Improvement—Subsequent suit by puisne mortgagee.*

Where a prior mortgagee brought a suit for sale without impleading the puisne mortgagee and as a result of the decree the properties were sold and purchased, the rights of the puisne mortgagee are not affected. If the puisne mortgagee want to sell the property in a suit on his own mortgage the decree must direct redemption by the second mortgagee of the first mortgage or a sale if the purchaser of the property in execution of the decree on the prior mortgage does not wish to redeem the puisne mortgagee. 31 M. 425 Ref. There is no distinction in such cases between purchasers at court auction and those by private treaty. The auction purchaser has no right to claim to be paid the value of his improvements before the puisne mortgagee could bring the property to sale 31 M. 425 ref. (*Ryves and*

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Gokul Prasad, JJ.) BUDHI LAL, v. THE ADMINISTRATOR GENERAL OF MADRAS 20 A. L. J. 216 : L. R. 3 A. 160 : 44 All. 418 (1922) All. 104 : 65 I. C. 841.

———*Priority—Test of—Priority of execution not proved—Pari passu rule.* See (1921) DIG. COL. 848 KUTTI THEVAN v. RAYAPPA GOUNDAN. 65 I. C. 961.

———*Receiver—Appointment not to be made, if decree holder objects* See C. P. CODE S. 51 AND O. 40, R. 1. (1922) Pat. 66.

———*Redemption—Clog on—Long term.* See T. P. ACT, S. 60. 20 A. L. J. 607.

———*Redemption—Clog on—Long term for redemption—Other circumstances.* See T. P. ACT S. 60. 9 O. L. J. 294.

———*Redemption—Clog on—Mortgage and permanent lease—Forming part of the same transaction—Relief against.* See T. P. ACT, S. 60. 68 I. C. 237.

———*Redemption—Clog on—Permanent lease of mortgaged property and mortgage executed on the same day—Same transaction* See (1921) DIG. COL. 850. BHIMRAO NAGOJIRAO PATANKAR v. SAKHARAM SABAJI. 46 Bom. 409 : (1922) Bom. 277 : 64 I. C. 612.

———*Redemption—Irredeemable mortgage—Onus of proof—Neerozhikka Otti Kanom.*

The onus of proving that a mortgage is irredeemable lies on the party setting up the plea. The tenure "Neerozhikka Otti" kanom held not to be redeemable. (*Krishnan and Ramesam, JJ.*) RYRU NAMBIAR v. KANARA KURUP. 42 M. L. J. 350 : (1922) Mad. 185 : 16 L. W. 930

———*Redemption—Loss of a portion of the mortgaged property through negligence of the mortgagee—Accounts—Separate suit if necessary* See (1921) DIG. COL. 851 ANANDRAO PURSHOTTAM HATKAR v. BHIKAJI SADASHIV. 46 Bom. 218 : (1922) Bom. 156. 64 I. C. 485.

———*Redemption—Mortgagee acquiring rights of the mortgagor—Knowledge of the other—Effect of possession for 12 years—Right barred* See ADVERSE POSSESSION. 24 Bom. L. R. 287.

———*Redemption—Mortgagee failing to keep account of the income—Agreement in mortgage deed.*

Where mortgagee failed to keep regular account of the income of the mortgaged property according to the agreement in the mortgage deed; *Held*, . The interest on the mortgage money and the income of the garden should balance each other. 95 P. L. R. 1908. Ref (*Shadi Lal C. J. and Harrison, J.*) SHAMBHU NATH v. NIHAL CHAND. (1922) Lah. 213.

———*Redemption—Partial redemption when allowed.*

A mortgage contract is indivisible and it is the right equally of the mortgagor and mortgagee to keep it indivisible. The general rule is that a mortgagee cannot be required at the instance



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of a purchaser of part of the premises to apportion on his mortgage debt among the several parts into which the property has been divided and to look to each only for its proportionate share, unless circumstances, have happened the effect of which, in fact or in law, is to create a severance of the security. In exceptional cases it will be allowed as where it is necessary for the benefit of one who has taken a part of the property under necessity and for the protection of his own interest, or where the mortgagee himself has been the owner of a part of the equity of redemption or where by his own conduct, there has been a break up of the entire security. The test to be applied in each case is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be forced on him unless special equitable considerations are established. (*Mukerjee and Buckland, JJ.*) *DINANATH MAHISH v NABACUMAR HAJRA.* 35 C. L. J. 332.

—Redemption—Right of—Preliminary decree for foreclosure—Expiry of time allowed—Right of mortgagor to redeem at any time before the passing of the final decree. See C. P. CODE, O. 34, R. 3 26 C. W. N. 532.

—Redemption—Right to—If extinguished by sale under decree. See MORTGAGE—SALE. 35 C. L. J. 332.

—Redemption—Right to—Occupancy holding—Lessee.

The holders of a certain occupancy holding mortgaged their rights with possession before the passing of the Agra Ten. Act. After they had done so, they took a permanent lease of the holding from the zemindar and transferred their rights under the lease to a certain person who proceeded to redeem the mortgage. Held, that he had a right to redeem. (*Mears C. J. and Stuart, J.*) *MAHABIR CHAUBE v. DIP NARAIN CHAUBE.* 20 A. L. J. 976.

—Redemption—Right of—Term fixed in deed—Benefit to mortgagee

A mortgagor or puisne mortgagee may redeem at any time unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgagee as well as of the mortgagor. Where the term fixed for redemption was 50 years it was held that it was fixed in the interests of the mortgagee also. 16 C.P.L.R. 59 Ref. (*Kotval, A. J. C.*) *TUKA RAM v. MANGAYA,* 67 I. C. 900.

—Redemption—Successive suits for redemption—When maintainable—Plea of res judicata See C. P. CODE, S. 11. 20 A. L. J. 631.

—Redemption—Usufructuary mortgage—Further charge created by subsequent simple mortgage—Redemption. See (1921) DIG. COL. 851 *NATHWA v. KANHIYA* 65 I. C. 642.

—Sale under decree—Effect on right to redeem.

So long as the sale under a mortgage decree stands, the right to redeem is extinguished—47 I. A. 91 *Held. (Mukerjee and Buckland, JJ.) DINANATH MAHISH v NABACUMAR HAJRA.* 35 C. L. J. 332.

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—Sale in execution—Sale certificate—Property sold—Conclusiveness of certificate in a subsequent suit—Code of Civil Procedure See (1921) DIG. COL. 851. *V RAMABHADRA NAIDU v. KADIRI-YASWAMI NAICKER.* 30 M. L. T. 34 : 24 Bom. L. R. 692. (1922) P. C. 252 (P. C.)

—Splitting up—Acquisition of interest of mortgagor by prior and subsequent mortgagees—Effect of—Rights of parties. See T. P. ACT, Ss 60 AND 82. 20 A. L. J. 583

—Sub-Mortgage—Payment by mortgagor to mortgagee—Notice. See (1921) DIG. COL. 852. *ISSAKANAKATH MALIYAKKAL MAHOMED HAJI v. I M MOIDEEN KUTTI.* 30 M. L. T. 21 (H. C.)

—Subrogation—Creditor advancing money to pay off prior mortgage decree—Rights of as against mesne encumbrancers.

Where in a suit by a prior mortgagee for sale impleading the mortgagor as well as the puisne mortgagee as parties, a decree for sale is passed and the puisne mortgagee fails to redeem with the result that the properties are brought to sale in execution, it is open to a third person under an agreement with the mortgagor to pay off the decree amount due to the prior mortgagee and get himself subrogated to his rights. It is immaterial that the puisne mortgagee is not given notice of the payment to the judgment creditor (*Das and Bucknill, JJ.*) *MOULVI MAHOMED MUSA v. EDUL SINGH,* (1922) P. 92. 3 Pat L. T. 233. 65 I. C. 801.

—Subrogation—First mortgagee's decree paid by stranger—Position of new mortgagee—Preference to puisne mortgagees—Change in the law.

Where the decree obtained by a first mortgagee was satisfied by money advanced by a third party and subsequently a puisne mortgagee claimed priority over the third party :

*Held,* the charge in the latter's favour must be deemed to have been kept alive and what was manifestly to his advantage and benefit must be deemed to have been intended 43 All. 469 (P. C.) followed, and the change in law noticed (*Das and Adams, JJ.*) *RAM NARAYAN SAH v. SAHDEO SINGH.* (1922) Pat 174. 3 Pat. L. T. 261 : 1 Pat 332 : (1922) P. 181 : 67 I. C. 221

—Subrogation—Partial discharge of mortgage. See (1921) DIG. COL. 853. *KUTTI THEVAN v RAYAPPA GOUNDAN.* 65 I. C. 961

—Subrogation—Prior mortgage—Partial discharge by puisne mortgagee—No right to subrogation. See T. P. ACT, S. 74 16 L. W. 216

—Subrogation—Vendee from mortgagor paying off prior mortgage—Suit by puisne mortgagee—Vendee's right to hold up prior mortgagee as a shield—Right to interest on amount paid by him to discharge prior mortgage. See (1921) DIG. COL. 853. *ANANDI PROSAE DEBI v. KRISHNA CHANDRA MOOKERJEE.*

44 A. 9 : (1922) All. 185.

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—**Suit**—Decree for a larger amount than claimed, as including interest *pendente lite*—If Court fee to be paid on excess before execution *See* COURT FEES ACT, S. 11. 3 Pat. L. T. 146

—**Suit for foreclosure or redemption**—Appeal—Court fee how to be calculated, *See* COURT FEES ACT S. 7 (IX) AND, SCH. I, ART. I. 25 O. C. 30.

—**Suit—Parties**—Persons deriving title from mortgagor after mortgage—Tenants, if necessary parties—Effect of decree in foreclosure **Suit—Rights of tenants, not barred.** *See* C. P. CODE O. 34, R. 1. 65 I. C. 503

—**Suit—Parties**—**Suit by prior mortgagee to enforce his mortgage**—Omission to implead puisne mortgagee—**Suit not liable to dismissal**—Puisne mortgagee, a proper but not a necessary party. *See* C. P. CODE, O. 34 R. 1. (1922) Pat. 326.

—**Test of**—Provision for payment of interest—Indication that transaction is a mortgage. *See* T. P. ACT, S. 58 65 I. C. 673.

**MORTGAGOR AND MORTGAGEE—Accounts**—Possession of mortgagee under invalid agreement.

Where a mortgagee has obtained possession under an invalid agreement for sale his possession may be deemed to be that of a mortgagee when it is established that the agreement was inoperative in law and he may be called upon to account for the rents and profits as if he were the mortgagee in possession 1 Giff 421 Ref. (*Mookerjee and Panton, JJ.*) BAMA CHARAN CHAKRABATI v. NIMAI MANDAL (1922) Cal. 114 : 35 C. L. J. 58 : 64 I. C. 903.

—**Accounts—Profits.**

Where the mortgagee is in possession of land, it is his duty to keep accounts. If he has neglected to cultivate the land it is his fault. The intention in such a case is that profits should go towards interest, by the land being put to the best use. (*Chevis J.*) ZORA V CHANDU 68 I. C. 883.

—**Adverse possession**—Mortgagee acquiring rights of one mortgagor—Knowledge of the other—Effect—Extinguishment of right to redeem. *See* ADVERSE POSSESSION. 24 Bom. L. R. 287.

—**Adverse possession**—Principles. *See* ADVERSE POSSESSION. 9 O. L. J. 173.

—**Powers of leasing**—Lease granted after institution of Suit—If binding on mortgagee.

A mortgagor is not entitled after making the mortgage to grant leases which may have the effect of materially diminishing the value of the security or the remedies of the mortgagee under the mortgage. Where a suit has been filed to enforce the mortgage the rights of the lessee are subject to the result of that suit and no effect can be given to them over the rights which another person may acquire in enforcement of the mortgage. 15 O. C. 239 Ref. (*Kanhaiya Lal, J. C.*) MUSSAMMAT BIBI SAIDUNNISA v. FAIYAZ HASSAN. 4 U. P. L. R. (O. C.) 76 : 69 I. C. 97 : 9 O. L. J. 319.

**MUSS, WAKF VALIDATING ACT, S. 3.**

—**Redemption**—Mortgagee in possession and cultivating land—Status of.

Where after redemption the mortgagee continues in possession of the land and cultivates it, he must be considered the tenant of the mortgagor (*Pearson J. M.*) MT. ARUPA v. BHUSAY. L. R. 3 A. 496 (Rev.)

—**Registration at wrong place**—Absence of knowledge in mortgagee—Mortgagor cannot plead invalidity. *See* REGISTRATION—MORTGAGE.. L. R. 3 A. 293.

—**Relationship**—Creation of—Ejectment decreed on paying compensation—Suit for redemption not competent. *See* ADVERSE POSITION—LANDLORD AND TENANT 64 I. C. 352.

—**Rights of**—Personal covenant to pay debt if mortgagee dispossessed—Omission to redeem prior mortgage—Suit on personal covenant. *See* (1921) DIG. COL. 856 RAMJANAM SINGH v. KUNJ BEHARI SINGH. 6 Pat. L. J. 670 : (1922) Pat. 106 : (1922) P. 154.

—**Title-deeds**—Loss of—Compensation.

In India, as in England, a mortgagor is entitled to compensation from his mortgagee for the loss of title-deeds. He will have his remedy by way of a separate suit for damages, or even under the mortgage decree where the latter contains provision for it. (*Ayling, A. J. C. and Ryves J.*) MARATH SIVARAMAN NAIR v. SESHU PATTAR. 42 M. L. J. 356 : 16 L. W. 589 : (1922) Mad. 299.

**MOTOR VEHICLES ACT (VIII of 1914) S. 8**—License not with driver—Offence.

The driving of a motor car by a properly licensed driver who omits to carry the license with him is not an offence. It is only the non-production of the license on demand by a police officer that constitutes the offence under the section. (*Hallifax, A. J. C.*) DHEKLI KUNBI v. EMPEROR. (1922) Nag. 71 : 65 I. C. 425 : 23 Cr. L. J. 73.

—**S. 18 (2)**—Suspension of license—Sentence appealable. *See* CR. P. CODE, S. 565 65 I. C. 425.

**MOURASI MOKURARI LEASE**—Fixed rate of rent—Consent decree agreeing to pay enhanced rate—Effect.—*See* LEASE. 26 C. W. N. 657.

**MOVABLE PROPERTY**—House and materials—Cutch buildings—Question of fact whether they are movable or immovable property. *See* C. P. CODE, S. 100. L. R. 3 A. 129.

**MUSSALMAN WAKF VALIDITATING ACT—Not retrospective.**

The Musalman Wakf Validity Act is not retrospective in effect. (*Viscount Cave*) KHAYEH SOLEHMAN QUADIR v. NAVAB SIR SALIMULLAH BAHADUR. 31 M. L. T. 79 (P. C.) :

43 M. L. J. 385 : 4 U. P. L. R. (P. C.) 70 : L. R. 3 P. C. 189 : (1922) P. C. 107 : 24 Bom. L. R. 1257 : 27 C. W. N. 101 : 49 Cal. 820 : 69 I. C. 138 : 49 I. A. 153.

—**S. 3 (B)**—Wakf—Hanafi Law—Object of—Payment of debts. *See* (1921) DIG. COL.

**MUTATION.**

857 BIBI JINJIRA KHATUN T. MAHOMED FAKI-  
RULLA MEA. 49 Cal. 477 :  
26 C. W. N. 749 (1922) Cal. 429 :  
67 I. C. 77.

**MUTATION**—Consent to—Proprietary rights—  
Extinguishment of. See (1921) DIG. COL. 857  
RAJA V. SALABAT. 66 I. C. 935.

**NOABAD TALUQ**—Rights of Government in—  
Right to settle lands with persons other than  
those in possession. See LAND TENURE, NOABAD  
35 C. L. J. 580.

—Report of Revenue Officers—Mistakes  
in—Effect of.

A mistake in the report of a revenue officer  
relating to a mutation due to carelessness cannot  
affect the nature of a transfer or make it anything  
but what it really is. (Scott-Smith and Harrison,  
JJ.) SADHU RAM V. UTTAM DAS.  
3 Lah. L. J. 516.

**NATIVE PASSENGER SHIPS ACT, Ss. 9, 10 and  
31**—Ships carrying passenger—Absence of certi-  
ficate—A voyage—Meaning of. See (1921) DIG.  
COL. 857 EMPEROR V. T. S. MACHADO.  
46 Bom. 438 : (1922) Bom. 167 : 69 I. C. 91 :  
23 Cr. L. J. 651

**NEGOTIABLE INSTRUMENT**—Onus of proof as  
to consideration—Question of if one of fact or law

Where the execution of a bond was admitted  
the onus of proving total or partial failure of con-  
sideration is, on the defendant. The Question of  
onus is one of law for purposes of second appeal.  
(Broadway and Abdul Qadir, JJ.) GURDIT SINGH  
V. KARAM DAD. 4 Lah. L. J. 199.

**NEG. INSTRUMENTS ACT (XXVI of 1881) Ss 8  
and 78**—Promissory note—Holder Benamidar—  
Real owner.

Where a promissory note is in the name of A  
and he is *ex facie* the payee under the note, it is  
not open to another person B alleging himself to  
be the real owner who had advanced money under  
the note, to sue on the note, 13 A. L. J. 665, 13  
M. 88; 28 M. 205 foll. (Ryves and Gokul Prasad,  
JJ.) REOTI LAL V. MT. MANNA KUNWAR.  
44 A. 290 : 20 A. L. J. 126 : L. R. 3 A. 50 :  
65 I. C. 785 : (1922) All. 71

—Ss. 8, 9 and 58—Warbonds—Payable  
to order—Forged endorsement—Holder in due  
course—Conversion

A forged endorsement is a nullity and conveys  
no title to the endorsee. It is as much a nullity  
as a forged cheque or a forged hundi provided  
there has been no negligence on the part of the  
true owner in allowing the instrument to come  
into the hands of the forger. A holder under  
such a forged indorsement is not a holder in due  
course. So held in the case of war bonds pay-  
able to order which had been indorsed by forged  
signatures and pledged with a bank, 36 C. 239 ;  
28 A. 428 ; 24 B. 65 Ref. (Kemp, A. J. C.) KODU-  
MAL KALUMAL V. THE KARACHI BANK, LTD.  
15 S. L. R. 93

—Ss. 9 and 18—Holder in due course—  
Presumption—Betting transactions—Endorsee.

**NEGOTIABLE INSTRUMENTS ACT (1881), S. 51.**

Where the appellant, a book maker, gets a  
cheque which had been given in a betting transac-  
tion, endorsed in his favour and it is proved that  
he had transactions for a long time with the en-  
dorser, the presumption in favour of the appellant  
as a holder in due course is rebutted. The burden  
is on the appellant to prove that not only he gave  
consideration but also that he gave it without  
having sufficient cause to believe the title of its  
endorsee. 1877 L. R. 2 L. R. 615 : 24 I. C. 709 foll.  
(Duckworth, J.) E. STEWART V. G. W. MERCADO.  
1 Bur. L. J. 40.

—S. 13 (2)—Shah Jog. Hundis—Payable  
alternatively to one of several payees,

Shah Jog hundis sued upon held to be negoti-  
able instruments within the definition in S. 13 (2)  
of the Negotiable Instruments Act of 1881, as  
amended by the Neg. Ins. Act of 1914 as being  
payable in the alternative to one of several payees  
(Sir Walter Schwabe, C.J. and Coutts Trotter, J.)  
KANNAYALAL BHOYA V. BALARAM PARAMSUKH  
DASS. 43 M. L. J. 480 : 16 L. W. 608 :  
31 M. L. T. 284 (H. C.) : 68 I. C. 921.

—S. 20—Omission to state amount of the  
note in the body of the instrument—Effect of.

So long as the amount of a promote can be  
found out from the instrument itself without  
extraneous aid, the omission to state it in the  
body of the promote does not vitiate its character  
as such 5 Bur. L. T. 162 dist. (Duckworth, J.)  
MAUNG POYE V. YE CHEIN HONG.  
1 Bur. L. J. 172

—Ss. 26 and 27—Hindu Joint family—  
Manager—Negotiable Instrument drawn by  
Manager—Liability of other members. See H.  
LAW JOINT FAMILY, MANAGER

20 A. L. J. 233.

—S. 28—Promissory note—Liability of  
maker—Plea of agency—Proof of

Where the maker of a negotiable instrument  
does not indicate that he signed it as an agent nor  
is there anything in the document itself indicating  
that the executant did not thereby incur personal  
liability, the executant is personally liable. (New-  
bould and Panton, JJ.) DURGA PRASAD SEN V.  
KALI CHARAN AICH ROY  
64 I. C. 742.

—Ss. 48 and 15—Promissory note—Assign-  
ment—Separate writing

A written assignment of a promissory note in  
the shape of a separate document confers on the  
assignee a title to sue on the note. 16 C. W. N.  
666 ; 24 M. 654 : 28 M. 544 : 31 M. 534 Rel. 3 L.  
W. 171 not foll ; 13 Bur. L. T. 37 ; 14 Bur. L. R.  
25 ; 8 L.B.R. 288 Ref. (Duckworth, J.) PALAWAN  
V. KANU.  
66 I. C. 501.

—S. 50—Negotiable instrument—Promote  
—Rights of indorsee—Surt on the note.

An indorsee of a promote can only sue on the  
note as such and cannot fall back on the original  
consideration. 21 M. L. J. 526 Rel. (Robinson,  
C. J. and Duckworth, J.) MAUNG PHO MYA V.  
DAWOOD & CO.  
66 I. C. 584

—S. 51 and 50—Endorsees for collec-  
tion—Joint indorsees—Successive endorsements  
in blank—Effect of.

## NEGOTIABLE INSTRUMENTS ACT (1881), S. 64.

S. 51 of the Neg. Ins. Act does not require that the endorsements should be at one and the same time. Its effect is only to prevent one of two or more payees or endorsees negotiating the promissory note and its requirements are satisfied if the endorsement is by all the payees or endorsees. Where one of three endorsees of a pro note for collection endorsed it in blank and handed it over to the other two for collection and the other two later indorsed the note also in blank and delivered it to the plff. the plff. gets a good title to the note. (*Kumaraswami Sastri and Devadoss JJ.*) ANNAMALAI CHETTY v. MUTHIAH CHETTY.

(1922) M. W. N. 263 : (1922) Mad. 210.

—Ss 64 and 76 (d)—Hundi—Drawer and drawee the same—Presentation for payment—Not necessary.

In a case where the drawee and drawer of a hundi are the same, presentation for payment is not necessary, for no question of damage can arise as the facts are all known to the person drawing it. (*Ryves and Gokul Prasad, JJ.*) PACHKAURI LAL v. MUL CHAND.

44 All. 554 : 20 A. L. J. 437  
(1922) All 279 : L. R. 3 A. 379 : 66 I. C. 503.

—S. 76 (d) — Drawer and drawee of hundi the same—non-presentation for payment—If fatal—Absence of damages See NEG. INSTRS. ACT, SS 64 AND 76 20 A. L. J. 437.

—S. 76 (d)—Hundi—Presentation—Plea of—Subsequent plea that no presentation was necessary—Drawee having no funds of drawer—Effect of.

Though the plaintiff in a suit on a Hundi fails to prove that there had been a presentation of the Hundi as alleged by him he could nevertheless show that the case was one in which no presentation was necessary. S. 76 (d) of the Neg. Ins. Act applies where the drawer has no funds with the drawee at the time the bill is being drawn or in a case where the drawer has no reasonable expectation that the drawee will accept for his accommodation. (*Lindsay and Kanhaiya Lal JJ.*) GENDA LAL v. BALKISHAN

L. R. 3 A. 519

(1922) All. 422.

—S. 80 — Promissory note — Interest payable on.

Where a promissory note does not provide for repayment of interest the plaintiff cannot recover more than six per cent interest per annum and oral evidence to prove a higher rate is not admissible. (*Kanhaiya Lal, J. C.*) KANHAIYA v. AZIM UL-LAL. 25 O. C. 69 : (1922) Oudh 122.

—S. 87—Material alteration.

Where the date of a promissory note is altered it amounts to a material alteration. (*Pratt, J.*) KADER NATH SINGH v. GAMAD.

1 Bur. L. J. 244.

—S. 87—Material alteration—Name of payee.

An alteration of the name of the payee so as to make him an altogether different person, is a material alteration within the meaning of S. 87 of the Neg. Ins. Act. (*Stuart and Ryves, JJ.*) KAMAL KHAN v. NIZAMUDDIN. 20 A. L. J. 987.

## OCCUPANCY HOLDING

—S. 118 (a)—Promissory note—Consideration—Inconsistent statements—Shifting of onus. See (1921) DIG. COL. 860 SIRAJ-UD-DIN v. MT. CHAMPOO. 68 I. C. 443.

NON-JOINDER — Transferee from person having neither title nor cause of action to sue—Transferee *pendente lite*—Not necessary parties. See C. P. CODE O 1, R 1 3 Pat. L. T. 352

NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII of 1873) Ss. 31 and 70 (12)—Penalty—User of canal water for building house—Rr. 10 and 33.

A person using canal water stored in a tank for the purpose of building a pucca house no doubt transgresses R 10 of the Rules framed under the Act but incurs no penalty for there is none attached to such user. (*Shadi Lal, C.J.*) HARNAM SINGH v. EMPEROR. 7 P. L. R. (1922):

64 I. C. 497 : 23 Cr. L. J. 17

NOTICE—Registration—If amounts to. See T. P. Act S. 3 68 I. C. 732.

OATHS ACT—Asking whether Oath would be taken.

Asking whether a person would take oath and not recording the fact and not actually offering the oath are irregularities vitiating the trial. (*Sanderson, C. J. and Richardson, J.*) AFSAR KAHAN v. SHABU MONDOL. (1922) Cal. 148.

—S. 9—Offer to be bound by oath—Withdrawal of—Discretion

Where an offer is made by plaintiff to be bound by oath, the court has full discretion to call upon the deft. to accept or refuse the offer; and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result. It is not open to the plff. to withdraw the offer as in the case of an ordinary contract. (*Chevis and Harrison, JJ.*) KHAWAJ DIN v. MT. NUR.

65. C. 700.

—S. 11—Pre-emption—Offer by guardian of minor defendant to be bound by oath of plff.—Extent of minor's liability See (1921) DIG. COL. 860. PARBHU DAYAL v. JAMIL AHMAD, 44 A. 117 : 64 I. C. 646 : (1922) All. 160.

OCCUPANCY HOLDING—Mortgage—Payment of rent by mortgagee to zamindar—Effect of.

A mortgage of a tenancy does not extinguish it. The equity of redemption remains with the mortgagor and cannot be destroyed. A contract of mortgage between a mortgagor and mortgagee cannot, of itself, create a contractual relationship between the mortgagee and the zamindar. Payment of rent under such circumstances is not sufficient to create a contract of tenancy when none existed, but must be treated as payment made for and on behalf of the tenant who remains liable under his contract. (*Fremantle, J. M.*) GAURI SHUKUL v. RAM LAGAN LAL.

4 U. P. L. R. (B. R.) 35 : L. R. 3 A. 513 (Rev.)

—Non transferable by custom—Transfer by tenant—Recognition by landlord what constitutes—Acceptance of rent by gomastah or patwari

## OCCUPANCY HOLDING.

—Acquiescence. See LANDLORD AND TENANT OCCUPANCY HOLDING.

65 I. C. 882.

—Non-transferable—Sale of share—Rights of landlord to eject.

In the absence of proof of abandonment a sale of a share of a non-transferable occupancy holding does not entitle the landlord to khas possession. (*Woodroffe and Ghose, JJ*) SARAT CHANDRA DE v. MENORAMA DEBI

68 I. C. 295.

—Non-transferable—Suit for possession by purchaser—Defence—Co-sharer landlord in possession

A co-sharer landlord, as such, is entitled to raise a plea of non-transferability in a suit brought against him by the purchaser of a non-transferable occupancy holding for establishment of title and recovery of possession of the holding (*Newbould, J.*) JADU NATH MANDAL v. RA. CHARAN KOYAL.

64 I. C. 186

—Non-transferability—Compromise providing for sale in case of default to pay rent—Waiver. See LANDLORD AND TENANT,

1 Pat 153.

—Non-transferable — Execution sale — Right of decree-holder

A decree-holder, not being the landlord can, against the will of the judgment debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree where there is no local custom of inalienability. (*Coutts and Das, JJ*) RAGHUNATH SAHAY v. CHOWA MAHTON

3 Pat. L. T. 525;  
(1922) P. 602: 67 I. C. 882.

—Non-transferable—Rights of purchasers in execution of rent decree and mortgage decree respectively.

The purchaser in execution of a rent decree purchases the holding itself and is entitled to say that he takes the holding free of incumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is necessary, for him to annual. Where a holding is non transferable, a mortgage of it is of no effect as against the holding or the persons who purchases the holding in a rent execution. Such a mortgage cannot effectively create a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel (*Coutts and Ross, JJ.*) LALA MURLIDHAR v. SURAT LAL CHOUDHURY

(1922) Pat. 135:  
3 Pat L. T. 362: 66 I. C. 152:  
(1922) P. 555.

—Relinquishment by tenant—Effect.

Where an occupancy tenant relinquishes his holding in favour of the zemindar, the latter also becomes the transferee of any mortgagor's right which might have been created and is entitled to redeem. (*Stuart and Ryus, JJ.*) KUMAR SAITHWAR v. BISHUN MOHAN SAHAL.

L. R. 3 A. 533 (Rev.)

## OPIUM ACT (1878), s. 9.

—Surrender—Relinquishment—Necessity for—Agreement to relinquish—Enforcement of.

Unless a relinquishment of occupancy right is accompanied by actual surrender to the land, it is not operative. A mere agreement to relinquish occupancy rights, whether or not consideration, passes cannot be legally enforced. (*Kanharia Lal, J. C*) MT, BIBI SAIDUNNISSA v. FAIYAZ HASAN.

4 U. P. L. R. (O. C.) 76: 9 O. L. J. 319:  
69 I. C. 97

—Tenant's rights of relinquishment—Prejudice to sublessee or mortgagee—Effect. See LANDLORD AND TENANT—OCCUPANCY HOLDING.  
L. R. 3 A. 201.

—Transfer of — Involuntary transfer—Effect of.

The principle enunciated in *Dayamoyis case* 42 C. 172 viz that the transfer of the whole or part of an occupancy holding is operative against the raiyat where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, is no longer law in view of the decision of the Full Bench in *Chandra Binode Kunda v. Ala Bux* 48 C 148 Ref. (*Chatterjee and Panton, JJ.*) ABDUL SAMAD MONDAL v. BASIRUDDIN CHAUDHURY.

66 I. C. 220.

—Transfer of—Occupancy holding—Sale in execution at the instance of landlord money decreeholder—Validity of See LANDLORD AND TENANT,  
(1922) Pat. 49.

OCCUPANCY —Right — Permanent tenancy — Mere length of possession not effective to confer. See LANDLORD AND TENANT, PERMANENT TENANCY  
(1922) M. W. W. 146.

OPIUM ACT, (I of 1878) s. 3—Morphia—If opium.

Morphia is an intoxicating drug prepared from poppy and fulfils the requirements of the definition of "opium" in S. 3 of the Opium Act (*Shadi Lal, C. J. and Harrison, J.*) EMPEROR v. ROBINSON,  
3 Lah. 230: (1922) Lah. 216:  
68 I. C. 612: 23 Cr. L. J. 580.

—Ss. 5, 8 and 9—Contravention of terms of license or permit—Whether penal. See (1921) DIGEST COL. 862 MAIKU LAL v. EMPEROR.  
64 I. C. 135.

—Ss. 9 and 14 — Illegality in search — Conviction.

Mere illegality in the exercise of the right of search *e. g.* the omission to have search witnesses is not in itself sufficient ground for setting aside a conviction. 35 All. 351; 35 Cal. 557; 26 Mad. 124; 35 Bom. 225 foll. 53 I. C. 150 diss (*Coutts and Adams, JJ.*) LALU PUNDIT v. EMPEROR.

2 P. L. T. 626.

—S. 9 (c)—Opium found in a place accessible to many—Effect.

Where the place in which opium was found is one to which several persons have an equal right of access, the possession cannot in law be attributed to any one of them and cannot form the basis of a conviction. (*Das J.*) KHUSIRAM MAHA RAJ v. EMPEROR,

3 Pat. L. T. 132: 66 I. C. 328:  
(1922) P. 387: 23 Cr. L. J. 284.

## OPIUM ACT.

—S. 9 (c) and (2)—Possession of opium by authorised agent of retail vendor licensee—Liability of agent for mistake in register. See (1921) Dig. Col. 862, DUNI CHAND v. EMPEROR.  
66 I. C. 993 : 23 Cr. J. 337.

ORISSA TENANCY ACT, S. 236—*Shikmi tenant—Ejection.*

S. 236 of the Orissa Tenancy Act applies to Shikmi tenants of homestead land and they are not liable to be ejected upon mere notice to quit. 21 C. L. J. 478 foll. (*Das and Adami, JJ*) KANDURI SAHU v. ARJUN SAHU.

1 Pat 161 : (1922) P. 416.

OUDH ESTATES ACT — *Primogeniture—Reversioner.*

Under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and the reversioner during the life time of the widow has no more than an expectancy, and so has no interest in the property which he is competent to transfer or bind.

*Held* : in a suit for a declaration that a will was void the Court could only make a declaration binding on the widows and it was not within its competence to make a valid declaration that would create in reversioner's favour an interest in the property that did not otherwise exist. (*Sir Lawrence Jenkins.*) THAKURAIN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH.

(1922) P. C. 403

—S. 14—*Amendment of—Effect of.*

S. 14 of the Oudh Estates Act, as amended, should not be so interpreted as to convert an invalid bequest into a valid bequest. A void bequest can have no operation whatever. The result of the section is that where a valid bequest of taluqdari property had been made to an younger son before the Amending Act, such property in the hands of the legatee became taluqdari property again. (*Daniels and Lyle, A. J. C.*) KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD.

25 O. C. 189 : (1922) Oudh 236 :  
9 O. L. J. 235.

—S. 22 (11)—*Scope of Act—Adoption by Hindu widow—Rights of adopted son.*

The provisions of the Oudh Estates Act apply to Hindus, Mahomedans and Christians alike and the Act takes no account of any peculiarities of Hindu law. Where a widow is holding under the Act the heir is not determined until her death and the adoption must necessarily have preceded that event. It is not the law that because a widow was given a life estate under a will, a son validly adopted to her deceased husband should be deprived of his rights in favour of a collateral. 21 O. C. 374 dist. (*Daniels and Lyle, A. J. C.*) KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD.

9 O. L. J. 235 : 25 O. C. 189 :  
(1922) Oudh 236.

—S. 23—*“Ordinary law” meaning of—Male primogeniture sanad—Estate entered in list 4—Succession.*

The words “ordinary law” in S. 23 of the Oudh Estates Act refer to the law which would govern the parties apart from the statute and include any sanad giving title to the property in dispute.

## OUDH LAWS ACT, S. 9.

Where the dispute related to a succession to a Talukdari estate which had been entered in list 4, and the sanad relating to the property specifically laid down that on intestacy the estate was to descend to the nearest male heir held the latter was to be preferred to the widow.

A custom cannot be set up to prove a rule of succession directly contrary to the terms of the sanad. (*Viscount Cave*) BADRI NARAIN SINGH v. HARRAM KUMAR.

44 All. 449 : 9 O. J. 428 :

31 M. L. T. 195 (P. C.) : (1922) P. C. 289 :

27 C. W. N. 129 : 68 I. C. 1000 :

25 O. C. 313 : 49 I. A. 276. (P. C.)

OUDH LAND REVENUE ACT (III of 1901) Ss. 117 and 124—*Partition proceedings—Compactness—Duty to secure.*

No doubt in a partition case compactness should not be neglected where it would clearly be for the benefit of all the parties. But complete compactness would involve serious hardship in the disturbance of vested rights. The Board would not insist on it! (*Hapkins, S. M.*) SHAIKH WAHID ALI v. BASHIR-UD-DIN.

IL. R. 3 A 437 (Rev.) : 4 U. P. L. R. 77 (B. R.)

OUDH LAWS ACT, S. 9—*Pre-emption—Right to—Nature of—Pre-emptor's property subsequently sold—Rights of heir of pre-emptor and vendee from him—Gift to son—Donee if entitled to pre-empt—Cosharer—Rights—Pre-emption a personal right.*

The general principle is that the right of pre-emption runs with the land. It is settled law that a transfer by inheritance of the pre-emptor's property, subsequent to the sale which is to be pre-empted, transfers to the heir the right of pre-emption. A transfer of the pre-emptor's property by sale to a stranger subsequent to the sale to be pre-empted does not transfer the right of pre-emption to the vendee. A gift to a son of the pre-emptor falls within the general principle.

The expression “cosharer” in cl. (1) and (2) of S. 9 of the Oudh Laws Act denotes persons possessing interests in immoveable property. Under the statute mere relationship does not create the right of pre-emption as it does in certain cases of custom. Relationship under the Oudh Laws Act is a ground of preference only provided the relation satisfies the *sine qua non* of ownership in property. A survey of Ch. II of the Oudh Laws Act shows that the right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land. On general principle the incident and the burden respectively will follow such lands.

The ownership in the one land as in the other may be acquired in any of the various modes of acquisition of property known to law. It may be under a gift, by purchase or inheritance. A person is a co-sharer within the meaning of the sections of Ch. II of the Oudh Laws Act whether the property in virtue of the ownership of which he is a cosharer is acquired in one way or in another, and a person who proposes to sell the same, no matter how he acquired the ownership of it. The last vendee in chain of successive vendees of a property which bears the burden of pre-emption is as liable to deliver the property to a legitimate pre-emptor as is the first vendee, the general

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principle being that the assignee of property takes it subject to all the obligations or liabilities. When the property the ownership of which confers on a person the capacity of a cosharer, is transferred, the transferee acquires the status of a cosharer, subject always to all the obligations and liabilities with which the property is burdened. Consequently if an intending vendor has complied with the provisions of S. 10 of the Oudh Laws Act, by giving the proper notice to the pre-emptors, his successors in estate shall be deemed to have discharged the duty of giving the statutory notice, and the successor in the estate of the pre-emptor shall lose his right of pre-emption if his predecessor has not within three months from the date of the notice paid the price to the intending vendor. The right of pre-emption is a personal right in the sense that it is an interest protected solely against determinate individuals and not against the world at large which is the characteristic of a real right but to say that it is a personal right in the sense that it is an attribute of the status of the pre-emptor is based on a misconception. In one sense every right whether real or personal involves a personal relation. (*Simpson and Wazir Hasan, A. J. C.*) *MIRZA SADIQ HUSAIN v. MAHOMED KARIM.*

(1922) Oudh 289 : 90 L. J. 456

# **S. 9—Pre-emption—Right to Mortgage—Object of defeating right of pre-emption.**

The right of pre-emption in respect of a deed of mortgage arises, under S. 9 of the Oudh Laws Act when the mortgage is foreclosed. It also arises where it is shown that the transaction was an out and out transfer and the right of redemption reserved was merely nominal. In order to establish this it must be shown that the terms of the transaction are such as to render it practically impossible for the mortgagors ever to recover the property. If a genuine right of redemption is reserved there is nothing in the parties resorting to a mortgage instead of a sale for the purpose of avoiding pre-emption, (*Daniels, J. C. and Dalal, A. J. C.*) *SARJU PRASAD v. BISHESHAR PRASAD.*

24 O. C. 353 : 64 I. C. 744.

# **S. 9—Under proprietary tenure—Extent of.**

On a proper interpretation of S. 9 of the Oudh Laws Act, an under proprietary tenure may be any area of lands, whether constituting an entire mahal or only a small portion thereof. (*Dalal, A. J. C.*) *MAHOMED ABUL AZIZ v. BHAGWAN DAS.*

(1922) Oudh 101 : 65 I. C. 284

# **S. 9 (1) — Pre-emption — Co-sharer—Under proprietary tenure.**

If a vendor and pre-emptor are co-sharers in an under-proprietary tenure the pre-emptor has a preferential right over the vendees who is a co-sharer merely in the proprietary tenure in which the under proprietary tenure is situate. 32 All. 351 10 O. C. 351; 22 O. C. 297 dist. (*Dalal, A. J. C.*) *MAHOMED ABDUL AZIZ v. BHAGWAN DAS.*

(1922) Oudh. 101 : 65 I. C. 284

# **OUDH RENT ACT (XXIII of 1886)—Applicability of—Lease for agricultural purposes—Planting of trees—Transfer of lease.**

A lease for the planting of trees by the tenant of the land demised could not be considered to be

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an agricultural lease, and is transferable by sale on mortgage (*Fremantle, J. M.*) *NAND KISHORE v. BATUK PRASAD SINGH.* L. R. 3 A. 111 (Rev.) : 4 U. P. L. R. (B. R.) 69.

# **Succession—Occupancy tenancy—Agra Ten. Act, S. 22.**

There is no provision in the Oudh Rent Act corresponding to S. 22 of the Agra Ten. Act which limits the succession of collaterals to those whose share in the cultivation and therefore the ordinary Hindu law applies and the nearest collateral succeeds to a deceased occupancy tenant. (*Hopkins, S. M. and Fremantle, J. M.*) *BISHNATH SINGH v. MADHO SINGH.*

4 U. P. L. R. (B. R.) 29.

# **S. 3 (3)—Right to take leaves of trees—Notice of ejectment.**

In view of the definition of land in S. 3 (3) of the Oudh Rent Act a valid notice can be issued in respect of a grant of the right to take leaves of trees. (*Burn, S. M. and Pearson, J. M.*) *THAKUR RAGHUNATH PD SINGH v. SHEIKH BANDHU.*

L. R. 3 A. 495 (Rev.)

# **S. 3 (8) — Under proprietary right — Acquisition of.**

Where the conditions imposed on a lessee and the provision for resumption on failure to satisfy the conditions, are no longer operative there is nothing to prevent the lessee from getting under-proprietary rights. 1 O. L. J. 389 foll ; 17 O. C. 299 dist. (*Kanhaya Lal, J. C. and Dalal, A. J. C.*) *SHAIKH RUTAB ALI v. MAHOMED ZAMAN BEE.*

90 L. J. 101 66 I. C. 106.

# **S. 3 (8) — Under proprietary rights—Perpetual lease—Absence of provision for re-entry.**

A deed of lease styled a "perpetual lease" prescribed a rent of Rs. 102-2-0 payable annually by the lessee to the lessor. The lessee was to continue in possession from generation to generation and to have all sorts of proprietary powers. There was no provision for re-entry in favour of the grantor in any event. Held, that the lease created an absolute interest in the donee subject to a liability to pay Rs. 102-2-0. The donee therefore became an under-proprietor within the meaning of S. 3, Clause 8 of the Oudh Rent Act 24 Cal. 834; 30 All. 84, 25 C. W. N. 511; 17 Cal. 826; 43 All. 291 Ref. (*Dalal and Wazir Hasan, A. J. C.*) *KARIM DAD KHAN v. MT. BIBI GHAFURAN.*

90 L. J. 104 : 66 I. C. 110 : (1922) Oudh 42.

# **S. 3, cl. (10)—Permanent lessees, if a tenant.**

A permanent lessee is a tenant for the purposes of S. 108 of the Oudh Rent Act, by virtue of the provisions of S. 3, cl. (10) of that Act. (*Hopkins S. M. and Burn, J. M.*) *MT. THAKUR DEVI v. PARBHU.*

L. R. 3 A. 42 (Rev.)

# **S. 5—Notice of ejectment—Suit to contest Defence—Qabzadari.**

Appellant brought a suit to contest a notice of ejectment on the allegation, among others, that her ancestors were former proprietors whose proprietary rights were sold 35 or 36 years ago and that she had acquired qabzadari rights in

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the land in suit. *Held* that the expression *qabzadari* was ambiguous and the appellant should have stated whether she claimed occupancy right under S 5 of the Oudh Rent Act or expropriatory rights. (*Hopkins, S. M.*) **MT MAHARAJA v. MATHURA.** 4 U. P. L. R. 67 (B. R.)

# **S. 5—Scope of—Occupancy rights—Acquisition of.**

If it was the intention of S 5 Oudh Rent Act to limit occupancy right to persons who had lost the position of proprietors before annexation, the intention is not embodied in the section and courts cannot give effect to it. The conditions of occupancy rights as laid down in S 5, Oudh Rent Act are (1) that the tenant is altogether without proprietary or under proprietary right, (2) that he was a proprietor at sometime within 30 years prior to annexation (*i. e.*), 13—2—1856; (3) that the lands came into his occupancy on or before 13—2—1856, and (4) that they were in his possession on 24—8—1866 the date when occupancy right rules were approved by the Governor-General. (*Feard, S. M. and Hopkins, J. M.*) **LAL BAHADUR SINGH v. THAKUR TIRBHAWAN BAHADUR.** L. R. 3 A. 282 (Rev.)

# **S 7 (A)—Expropriatory rights gift by Hindu widows—Rights of reversioners.**

Where a Hindu widow makes a gift of a holding and then dies, the gift is not void but merely voidable by the reversioners and if they did not choose to avoid it but merely continued in cultivating possession of the land for more than 12 years, they could not acquire expropriatory rights. (*Hopkins, S. M.*) **KASHI PRASAD v. OUDH BEHARI.** 4 U. P. L. R. 8 (B. R.)

# **Ss. 9, 12—Occupancy holding—Life interest—Possession for 12 years—Acquisition of occupancy rights.**

Under S. 9 of the Oudh Rent Act a Hindu daughter succeeding to her father's occupancy holding acquires only a life estate in the holding. Unless she definitely surrenders that right and starts a fresh tenancy, she cannot super-impose upon the holding a fresh occupancy right by possession for more than 12 years under the Agra Ten. Act. (*Burn, J. M.*) **CHHEDWE v. LACHHMAN SINGH.** L. R. 3 A. 172 (Rev.)

# **S. 20—Applicability of—Relinquishment—Forcible dispossession.**

S. 20 of the Oudh Rent Act relates to the method by which a tenant avoids the liability to pay rent and does not apply where the question is whether there has been a relinquishment of forcible dispossession by the landlord. (*Hopkins, S. M.*) **SUKHDEO v. BUAJI SINGH.** L. R. 3 A. 419 (Rev.)

# **S. 33—Enhancement of rent—Declaration of occupancy right**

Under a decree of the Settlement Officer an old proprietor's *qabzadari* was maintained and the land was declared to be his occupancy land. There was, however, nothing to show that the rent was fixed in perpetuity. *Held*, that under S. 33 of the Oudh Rent Act the rent was liable to enhancement. (*Hopkins, S. M. and Fremantle, J. M.*) **MEHDI HASAN KHAN v. DEO KALI.** L. R. 3 A. 130 (Rev.)

# **OUDH RENT ACT, S. 61.**

# **S. 37—Hindu widow—Grant of agricultural lease—Status of tenants.**

Though a Hindu widow has only life-estate she is competent to grant agricultural leases carrying with them statutory rights of occupancy. (*Fremantle, J. M.*) **MAHOMED HASANKHAN v. CHATUR BHUI.** L. R. 3 A. 431 (Rev.)

# **S. 37—Land held without payment of rent—Assessment—Inclusion in holding—Fresh tenancy.**

Where the landholder assessed rent on a plot held by the tenant without payment of rent and included the land in the tenant's holding. *Held* this amounted to a change in the tenant's holding within S 37 of the Oudh Rent Act. and gave a fresh period of tenancy. (*Hopkins S. M. and Fremantle J. M.*) **KALUA SINGH v. MIRZA ASKHAR HUSAIN.** L. R. 3 A. 425 (Rev.) : 4 U. P. L. R. 76 (B. R.)

# **S. 37—Sub-tenancy—Death of tenant-in-chief without heirs—Effect on tenancy.**

On the death of the tenant-in-chief without heirs, the rights of sub tenants are extinguished. Mere payment of rent by a sub tenant direct to the *zemindar* does not make him a tenant-in-chief. (*Fremantle J. M.*) **RAM RATAN v. RAJA PRATAB BAHADUR SINGH.** L. R. 3 A. 430 (Rev.)

# **Ss. 39, 43, 52 and 107—Tenant under special agreement—Ejectment—Enhancement—Procedure.**

Tenants under special agreement are protected from ejectment by S 52—The talukdar can serve a notice on him for enhancement under S. 39, but it would be open to him to contest the notice under S. 43 (iv) on the ground he holds under a special agreement under the terms of which his rent is not liable to enhancement. If he fails to prove it, his rent will be enhanced. (*Fremantle, J. M.*) **JAGDISH BAHADUR SINGH v. RAM RATAN.** L. R. 3 All. 27 (Rev.)

# **S. 52—Tenants under special agreement—Liability to ejectment. See OUDH RENT ACT, Ss. 39, 43, 52.**

# **S. 55—Notice of ejectment—Different holdings—Legality—Multifariousness.**

A notice of ejectment cannot include different holdings of different tenants, but there seems to be nothing to prevent its including different holdings of the same tenant provided there is no objection of multifariousness. (*Hopkins, S. M. and Burn, J. M.*) **BADRI NARAIN v. MAHESH.** L. R. 3 A. 193 (Rev.)

# **Ss. 56 and 71—Notice of ejectment—Power to contest—Thekadar holding under agreement.**

A thekadar holding under an agreement made after the Act of 1886 cannot set up a special agreement and contest a notice of ejectment. (*Burn, J. M.*) **RAGHUBAR DAYAL v. RAM PHERAN.** L. R. 3 A. 522 (Rev.)

# **Ss. 61 and 145—Period of limitation for execution—Application under S. 61—Effect of.**

An application under S. 61 of the Oudh Rent Act cannot extend the period of limitation provided for execution of a decree by S. 145 of the Act.



**ODDH RENT ACT, S. 107.**

(*Kanharya Lal, J. C.*) KHUSHAL SINGH *v.* THAKUR CHANDRA PAL SINGH 25 O. C. 235.

—S. 107 (1)—*Favourable rent—Payable—Meaning of.*

For the purposes of S. 107 (1) of the Oudh Rent Act, the word "payable" means a portion of the reversioner proportionate to the valuation of the holding as compared with the valuation of the total assets of the mahal. (*Hopkins, S. M. and Fremantle, J. M.*) SISA RAM MISRA *v.* THAKURAM SRI RAM KUNWAR,

4 U. P. L. R. (B. R.) 85.

—S. 108—*Jurisdiction—Civil Court—Dispute as to the nature of the tenancy.*

Where the tenancy set up by the defendant is totally denied by the plaintiff, and there is no dispute as regards the nature of the tenancy, it is quite competent to the Civil Court to determine the genuineness or otherwise of the contract of lease set up in defence 21 O. C. 210 dist. (*Kanharya Lal J. C.*) SHEO RATAN *v.* DEO DATT.

9 O. L. J. 98 : 66 I. C. 119 ; (1922) Oudh 38.

—S. 108—*Permanent lessee—A tenant.*

A permanent lessee is a tenant for the purpose of S. 108 of the Oudh Rent Act (*Hopkins, S. M. and Burn, J. M.*) THAKUR DEVI *v.* PARBHU;

L. R. 3 A. 42 (Rev.)

—S. 108 (2)—*Suit for rent—Arrears of paramasana—Forum.*

A suit for arrears of paramasana rent will lie in a revenue Court under S. 108 (2), Oudh Rent Act in the same way as arrears of rent of any other kind. (*Kanharya Lal, J. C.*) SAT DEO *v.* JAI NATH. 9 O. L. J. 141 : 4 U. P. L. R. (O. C.) 43. (1922) Oudh 75 : 67 I. C. 808.

—S. 108 (5 A)—*Transfer of muafi—Suit for possession—Jurisdiction of Civil and Revenue Court.*

A suit for resumption of a muafi khairati after its transfer is triable solely by the Revenue Courts under the provisions of S. 108 (5 A) of the Oudh Rent Act. It does not make any difference that the suit is framed as one for declaration of the invalidity of the transfer. 6 O. C. 110 ; 22 O. C. 186 dist. (*Lyle, A. J. C.*) GOPI CHARAN *v.* DURGA PRASAD. 65 I. C. 702

—S. 108 (8)—*Grove—Cutting down trees—Effect of—Ejectment by notice—Rent free land—Land held without payment of rent—Distinction.*

The law is the same in Oudh as in the Province of Agra in which it has been held that when land has ceased to be grove and has been brought under cultivation the land-holder is at liberty to treat the occupier as a tenant and to eject him by suit.

Where a tenant of grove has cut down the trees and is cultivating it without concluding any agreement with his landlord for an agricultural lease, the latter can eject by notice under S. 127 of the Oudh Rent Act. There is a distinction between land held "rent free" and land held "without payment of rent." The term "rent free" implies that the land is held under an agreement, express or implied, exempting it

**ODDH RENT ACT, S. 136.**

from payment of rent. (*Hopkins, S. M. and Porter, J. M.*) PANCHAM LAL *v.* SIRDAR NIHAL SINGH. L. R. 3 A. 308. (Rev.)

—S. 108 Cl. (8)—*Permanent lease—Istimari lease.*

An istimari lease *prima facie* is a perpetual lease and protects the lessee's heirs from ejectment (*Hopkins, S. M. and Burn, J. M.*) DIN DAYAL SIFAT ALI KHAN. L. R. 3 A. 339 (Rev.)

—S. 108, Cl. 10—*Suit under—Nature of—Claim of tenancy.*

A suit under S. 108 cl. 10 of the Act lies in the Revenue Court only as between a tenant and his landlord. A suit between two persons claiming to be rival tenants of the same landlord is outside the purview of that section. (*Hopkins, S. M. and Burn, J. M.*) MT. THAKUR DEVI *v.* PARBHU L. R. 3 A. 42 (Rev.)

—S. 108 cl. (15)—*Co-sharer Transferee from widow—Right to sue for profit.*

To enable a person to file a suit against the landlord for his share of the profits it is not necessary that he should be an absolute owner. A transferee from a Hindu widow may be a co-sharer within the section. 2 O. C. 64 ; 34 A. 26, Ref. (*Kanharya Lal, J. C. and Dalal, A. J. C.*) MAHOMED MASUD ALAM *v.* MAHOMED MAHOMUD ALAM. 24 O. C. 369 : 9 O. L. J. 66 ; 66 I. C. 21 : (1922) Oudh 40.

—S. 127—*Ejectment—Notice—Person admitted to possession by Zemindar's predecessor or mortgagee.*

It is not competent to a Zemindar to eject by notice under S. 127 of the Oudh Rent Act a person who had been admitted to the land by the Zemindar's predecessor or a mortgagee from heir, even though the mortgage had been redeemed. (*Burn, J. M.*) RAM NARESH *v.* BENT MADHO. L. R. 3 A. 72 (Rev.)

—S. 127—*Right of tenant to eject trespasser.*

It is open to a tenant to eject a trespasser under S. 127 of the Rent Act. (*Hopkins, S. M.*) RAM HAKASH *v.* BAS DEO UPADHIA. L. R. 3 A. 72 (Rev.)

—S. 136—*Service of process—Mode of Notice of ejectment.*

On a question arising as to whether a notice of ejectment was properly served the process server's report was to the effect that the respondent's wife informed him that the respondent had gone somewhere and that she did not know where he had gone and when he would return and he then posted the notice on the respondent's house. Held, that the notice was bad for non-compliance with S. 136 of the Oudh Rent Act. (*Hopkins, S. M.*) MD. BAKSH KHAN *v.* BAIJU. L. R. 3 A. 422 (Rev.)

**CHAPTER VII A—Applicability of—Lands held casually and accidentally without rent.**

Chap. VII A of the Oudh Rent Act applies to lands held rent free and not to lands which are unrented or held casually and accidentally without payment of rent. (*Fremantle, J. M.*)

# **ODDH TALUQDARS ACT, s. 6.**

**BHAIYA CHANDRA PAL SINGH v. THAKURAIN HAR NATH KUAR.** L R. 3 A 33 (Rev.)

**ODDH TALUQDARS ACT (I of 1869) S. 6—Old mortgage—Decree dismissing suit for redemption—Subsequent suit for redemption: See (1921) DIG. COL. 867 BRIJ KISHORE v. BAJRANG BAHADUR SINGH.** 64 I. C. 271.

**—S. 22—Family agreement—Prescribing line of inheritance—Effect.**

Where 3 brothers executed a deed providing that as regards their shares their *najib-ul-tarfain* wives and children should be their heirs, and that children and wives not falling in the above description should only get maintenance and that on failure of the first category, the second should succeed.

**Held**, the deed did not prescribe a line of inheritance varying the ordinary law (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) **MOHAMED YAKUB KHAN v. MOHAMED SHAHID ALI KHAN** 25 O. C. 21 : 9 O. L. J. 160 : (1922) Oudh 87 : 67 I. C. 556.

**ODDH TALUKDARI TENURE — Sanads — "Successor" meaning of.**

In an Oudh Talukdari primogeniture sanad, 'successor' means those designated persons who would succeed in the event of an intestacy and not persons who take by sale, gift or bequest. (*Sir John Edge*) **MOHAMMAD ABDUL GHANI v. FAKHR JAHAN BEGAM** 49 I. A. 195 (P. C.) 44 A. 301 : 20 A. L. J. 994 : 43 M. L. J. 453 : 27 C. W. N. 53 : 31 M. L. T. 21 (P. C.) 25 O. C. 95 : 9 O. L. J. 369 : L. R. 3 P. C. 198 : (1922) P. C. 281 : 24 Bom. L. R. 1268 : 68 I. C. 254 (P. C.)

**PAPER CURRENCY ACT (II of 1910) S. 26—Promissory notes—Contravention of the Act—Mortgage in renewal of pronote—Enforceability.**

Where on a settlement of accounts between the parties a certain sum of money was found due and pro-notes were executed for the said sum, the fact that the pronotes offend S. 26 of the Paper Currency Act does not prevent the creditor from suing for the debt evidenced by the pronotes or from enforcing a mortgage executed in lieu of the said pronotes.

There is no provision of law making pronotes in a prohibited form inadmissible in evidence, as there is in respect of unregistered documents or unstamped documents L. W. 463, 40 M. 727, 32 M. L. J. 354 : 1917 M. W. N. 778; 33 M. L. J. 302 Ref. (*Spencer and Devadoss, JJ.*) **NATARA JULU NAICKER v. SUBBRAMANIA CHETTIAR.**

45 Mad 778 : 43 M. L. J. 695 : 16 L. W. 705 : (1922) M. W. N. 450 : (1922) Mad. 181.

**PARTITION—Compromise decree—Fresh suit—Other property included.**

In a partition suit a compromise decree was passed. The properties were to be held in equal shares and the decree reserved liberty to the parties to apply for partition as occasions arose. On a fresh suit for partition of the properties held in

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equal shares along with some other property ; **Held** that the liberty reserved would not enable the plaintiff to apply for partition of the properties when there was no order in the decree itself for such partition. "The liberty to apply" did not empower the Court to deal with matters outside the scope of the order. (*Chatterjee and Pearson, JJ.*) **HANSESWAR PAL v. BEPIN BEHARY PAL.** (1922) Cal. 197.

**—Compromise with some defendants—Dismissal of suit—Right of other defendants to continue the suit.**

It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff. But this principle does not apply to cases where it is found as a preliminary point that plaintiff is not entitled to any share. 31 Bom. 271 foll. Hence where in the course of a partition suit, a compromise was arrived at with some defendants and the compromise petition stated that in consequence of a release deed executed by plaintiff's mother, he was not entitled to a share at all, the other defendants were not entitled to proceed with the suit *qua* their shares. (*Raymond, A. J. C.*) **CHOITHRAM MANGHAMMAL v. LALCHAND.** 15 S. L. R. 195 : 66 I. C. 808.

**—Co-owners—Who are.**

A partition can be effected only as between co-owners. By co-owners is meant either joint tenants in common or co-parceners, all of whom must at the date of the partition have a legal interest in the property partitioned. (*Maung Kim, J.*) **PO MAUNG v. ANUG DIN.** 1 Bur. L. J. 26.

**—Co-sharers—Effect of partition—Parties to suit for partition—Mortgagee.**

Whatever may be or may have been the rights of the parties before the partition with regard to the portions of land which were going to be the subject matter of the partition the partition created new rights and it was under the partition that the suit lands were allotted to the plaintiffs and they became entitled to exclusive possession.

81 P. R. 1911, foll.

Only owners and co-sharers are necessary parties to a partition proceeding and a mortgagee has no claim to be made a party to it.

2 P. R. 1918 Rev foll (*Abdul Raoof, J.*) **MOHAMMAD DIN v. MUHAMMAD.** 3 Lah. L. J. 377 : 67 I. C. 425.

**—Co-sharers—Lease of undivided land—Subsequent partition—Effect of—Distinction between lease and mortgage**

Where subsequent to the creation of a lease over a portion of joint property in the exclusive occupation of one co-sharer with the consent of the others, a partition is effected among the co-sharers whereby the property leased is allotted to another, the rights of the lessee are not in any way affected. 1 C. W. N. 62, foll.

The difference between a lessee and a mortgagee of an undivided share in joint property (homestead

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and tank) is that in the case of a lease followed by possession of the property demised the title of the lessee is complete, while in the case of a mortgage the land is merely hypothecated and no title thereto is perfected until the security is enforced. 11 A. or 11 A. dist. (*Richardson and Cuming, JJ.*) BAINADDI MANDAL v KAILAS CHANDRA SARDAR 35 C. L. J. 166 · 64 I. C. 448.

—Decree—Assignment of—Rights of purchaser.

Where an assignee of a partition decree executes it and obtains possession of the property he has a good title to the property partitioned and does not require a conveyance for perfecting his title, 3 C. W. N. 30 dis, (*Pratt, J.*) MA THA v MAUNG PO THIN 1 Bur. L. J. 130.

—Easements—Right to—Implied grant to the several coparceners See EASEMENTS ACT Ss. 7 AND 13. 36 C. L. J. 408.

—Equities — Transfer of undivided — Shares to different persons — Prior transfer of Specific plots—Mode of allotment.

Where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different portions of the property. The owner of certain property mortgaged an undivided half share in it to A, who subsequently foreclosed the mortgage and became the owner. Subsequently the remaining half share was sold to B. It was found as a fact that prior to the mortgage the owner had sold certain plots of land but this was not known to A or B. On a question arising at a partition between A and B it was held that the plots so sold should be allotted to B's share of the property. (*Daniels, A. J. C.*) QAZI WALIUL HAQ v. MT. BIGGAN. 9 O. L. J. 355 : 68 I. C. 977.

—If can be effected orally. See EVIDENCE ACT S. 91. 1 Bur. L. J. 111.

—Minor—when bound — Bonafide allotment—Full knowledge of facts—guardian's act when binding.

Though a partition can be entered into during the minority of some of the members of a joint Hindu family, it is open to the minor members to show that the partition was unfair or prejudicial to their interest and therefore not binding on them. In the case of a co-owner who is only interested along with a minor in one or more items of property, when division is effected, such division must be a fair one and not prejudicial to the interests of the minor. Wherever an adult person deals with a minor through the minor's guardian, it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by an act or omission on his part. The duty is all the greater when the minor's guardian is a young widow having no independent advice and the adult co-owner knows everything about

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the property. (*Spencer and Devadoss, JJ.*) PARAMASIVAM PILLAI v. MEENAKSHISUNDARAM PILLAI. 16 L. W. 721 : (1922) M. W. N. 732.

—Parties to suit—co-sharers—Transfer of a share, if necessary.

The transferee from one of several co-sharers can bring a suit for partition without his impleading his transferor, though the latter may be a proper party. (*Coults and Das, JJ.*) NANDKESHWAR MISRA v. SUDARSHAN. 68 I. C. 804.

—Parties—Persons interested — Effect of partition

Persons holding interests in a village of a nature subordinate to the interests which is the subject of the partition cannot be ejected on the ground that the land in their occupation has been allotted to a different co-sharer at the partition. A party is not necessarily entitled to actual possession of every land allotted to him in a partition proceeding. (*Wazir Hasan, A. J. C.*) LIAQT HUSAIN v. NAROTAM DAS. 4 U. P. L. R. (J. C.) 1 : 65 I. C. 780.

—Plaintiff's want of title to share — Defendant's claim to share.

Although it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff, yet where the case of the plaintiff fails on the ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply, and there is no suit for partition and consequently for determining the defendant's share. The maximum applicable is "*cessante ratione, cessat ipsa lex*". (*Raymond, A. J. C.*) CHAITHRAM MANGHANMAL v. LACHAND. (1922) Sindh 4

—Principle underlying.

The principle of partition is that, if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made. If on the contrary no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share, which would fall to the plaintiff by partition. A claim by a co-owner to partition can not ordinarily be resisted. (*Saunders, J. C.*) HARDANDAS PALADROY v. SUNDER. (1922) U. B. 4 : 4 U. B. E. (1921) 57 : 64 I. C. 949.

—Proceedings — Entries in — Binding nature of — Effect of.

The rule that partition proceedings are binding upon the parties does not depend only upon the consideration that any alteration will affect the value of the shares, but also on the principle of *res judicata* that there should be a determination of litigation. In partition all land is brought into hotchpot and, if any co-sharer claims any proprietary right or right of severalty, he must assert his rights. The result of a partition is the same as if a decree defining the rights of parties had been given *inter partes*. A mistake apparent

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upon the face of the record can be corrected if it does not injure any of the parties. But a party cannot be allowed to sleep on his rights during partition and then ignore the result to assert them as if the matter was *res-integra* (*Hopkins, S. M. and Fremantle, J. M.*) MOHAN SINGH v. BHOLA 4 U. P. L. R. (B. R.) 25.

———*Right to—Coshare's Inconvenience—Party wall and Stair case.*

The inconvenience and difficulty of partitioning the subject matter is no answer to a claim for partition by a co-owner. It is open to a court to order partition of a stair case and party wall in a proper case. 10 C 675, 13 C. L. J. 322, 7 Bom. L. R. 482 36 B, 275 Ref. (*Banery, J.*) RAHMATULLAH v. DHARAM SINGH 20 A. L. J. 90 L. R. 3 A 93 : 64 I C, 948 (1922) All. 185.

———*Settlement entry—Decision of civil court—Partition on basis of settlement entry—Application for correction of entry.*

On an application by the proprietors of a patti for the correction of the khewat it was found that the entry was the same as at the settlement that the Civil Court decree hearing that entry was never brought to the Revenue Court for correction of the papers and that the applicant's predecessor in interest was a party to the partition and had an opportunity of claiming proprietary rights in the land. *Held* that the application was not sustainable, (*Burn S. M. and Pearson, J. M.*) RATAN LAL v. BIRKISHORE, L. R. 3 A. 461 (Rev.)

———*Suit for—Essentials of action.*

In order to succeed in a partition action there must be not only unity of title but also unity of possession. (*Coutts and Das, J.J.*) NANDKESHEWAR MISRA v. SUDARSHAN. 68 I. C. 804.

———*Suit for—Parties—Maintenance holder if a necessary party—Mother.*

In a suit for partition of joint property all the shareholders must be represented before the court. But a person who has no present interest in the property but who would become entitled to a share in lieu of maintenance is not a necessary party. (*Mookerjee and Chotzner, J.J.*) JADU NATH SARKAR v. HARAN CHANDRA SARKAR. 36 C. L. J. 217.

———*Suit for—Reliefs to be claimed—Separate suit for accounts for anterior period—Not allowed.*

When a person files a suit for partition of certain properties he must include therein all the claims he has at that time relating to the subject matter of the suit. A subsequent suit for accounts relating to a period prior to the partition will not lie. (*MacLeod, C. J. and Coyajee, J.*) VISHNU MORESWAR DABHOLKAR v. GANGADHAR GANESH DABHOLKAR. 46 Bom. 823 : 24 Bom. L. R. 302 : (1922) Bom. 9 (1).

———*Suit for—What properties to be included—Decision on questions of disputed title—Parties to the suit.*

## PARTITION ACT, S. 4.

In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the property included in the suit are the joint properties as alleged, of the parties to the litigation. It is not the law that a question cannot be raised and tried in a partition suit unless its solution interests each of the parties to the litigation. A suit for partition may and does often involve the investigation of disputed questions of title, and an attempt to avoid them can only lead to needless multiplicity of litigation. The Court has ample authority to direct the successive trial of the issues separately affecting different defendants and even to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the whole case.

There is no reason why disputed questions of title should not be decided in the course of a suit for partition of joint properties. The court which is one of general jurisdiction administering both legal and equitable remedies may determine issues of title, investigate disputes between parties claiming the same share, and then proceed with the partition so as to dispose of the whole controversy between them. Where there is conflicting claim to share in the land under the same right under which partition is sought the determination of the conflict is incidental to the partition and cannot be avoided before the partition is directed. (*Mookerjee and Cumming, J.J.*) ANNA-PURNA DEBYA v. GOLAPMANI DEBYA. 35 C. L. J. 530 : (1922) Cal 307 : 68 I. C. 482.

PARTITION ACT, (IV of 1893) S. 2—*Inconvenience—Remedy.*

If a decree for partition is found to cause undue inconvenience it is open to either party to apply for its modification by the application of the Partition Act. (*Saunders J. C.*) HARDANDAS PALADROY v. SUNDER (1922) U. B. 4 : 4 U. B. R. (1921) 57 : 64 I. C. 949.

———S. 2—*Co-owners—Partition decree—Inconvenience—Procedure.*

If any party to a decree for partition finds it inconvenient in actual practice it is open to him to apply under S. 2 of the Act. (*Banerji, J.*) RAHMATULLAH v. DHARAM SINGH. 20 A. L. J. 90 : L. R. 3 A. 93 : 64 I. C. 948 : (1922) All. 185.

———Ss. 2 and 9—*Order for partition and sale—Order for sale of item set apart for the share of one of the parties.*

If in a suit for partition there are two parcels of land one capable of partition and the other not so capable, the court can order the sale of the latter. But an order directing the sale of one of the allotments obtained after partition is not within S. 2 or S. 9 of the Partition Act. (*Mookerjee and Chotzner, J.J.*) JADUNATH SARKAR v. HARAN CHANDRA SARKAR 36 C. L. J. 217.

———S. 2—*Partition of house—Impracticability—Power to auction, See (1921) Dig. Col. 870, GANDA RAM v. SONAYYA RAM. 66 I. C. 885.*

———S. 4—*Option, when to be exercised—Whether it is taken away.*

## PARTITION ACT (1893), S. 4.

A preliminary decree was passed in a partition suit declaring defendants 3 and 5 to be entitled to buy plaintiff's share or allow his share to be divided. Defendants 3 and 5 appealed and plaintiff filed a cross-objection to the effect that the option to purchase could not be legally restricted to defendants 3 and 5. This cross-objection was not pressed. In the trial Court after this the first defendant who was admittedly owner of half share was given option to purchase on his application. — *Held* that the preliminary decree in the suit could not take away from defendant No. 1 the option of purchase which was given to him under S. 4 of the Partition Act of 1893. 12 C. L. J. 525 and 45 Cal. 873 followed.

The fact that the objection taken by the plaintiff in appeal was dismissed is of no assistance to the defendants 3 to 5. (*Newbould and Pantou, JJ.*) KIRODI NARAIN BASU v. MRINALINI DAS.

(1922) Cal. 129.

—S. 4 — Partition of dwelling house — Transferee from co sharer — Value of — Share — Payment of. See (1921) DIG. COL. 870 KHANDERAU DATTATRAYYA v. BALKRISHNA.

46 Bom. 341 : 64 I. C. 917 : (1922) Bom. 121.

**PARTNERSHIP** — Accounts — Death of partner — Continuation of business — Representatives of deceased partner — Right of. See (1921) DIG. COL. 870. MAHOMED KAMIL v. HEDAYATULLA.

48 Cal. 906 : 26 C. W. N. 463 : (1922) Cal. 122 : 64 I. C. 861.

—Accounts—Suit for—Suit for partial Settlement of accounts when maintainable.

In regard to suits by one partner against another for a partial account, the general rule as applied in India is that if the account is sought in respect of a matter which though arising out of partnership business or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account having regard to the rights of the parties under the contract. There is no rule of law that a partial account can be ordered only under exceptional circumstances. 32 M. 176; 1 A. L. J. 24 Rel.

Where accounts had been rendered properly up to a certain date during the course of the partnership a suit for accounts of the rest of the period would be. (*Abdul Raoof and Campbell, JJ.*) HARI MAL MELA RAM v. KIRPA RAM BRIJ LAL. 2 Lah. 351 : 66 I. C. 478 : (1922) Lah. 195.

—Authority of partner — Negotiable instruments—Power to execute.

In the case of partnerships, not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. Express authority is necessary for that purpose. 10 L. B. R. 321 ; 39 B. 261 ; 40 M. 727 dist. (*Robinson, C. J. and Duckworth, J.*) MAUNG PHO MYA v. DAWOOD AND CO. 66 I. C. 584.

—Loans—Partner advancing money in excess of his share of the capital—Right to interest—Suit for recovery of the money extent of liability of other partners. See CONTRACT ACT, SS. 43 AND 253. 64 I. C. 188.

## PARTNERSHIP.

—Minor—Presumption of benefit Transactions in the usual course of business. See MINOR 25 O. C. 6.

—Suit for accounts barred—Assets realized later—Suit for share—If barred.

Where a suit by a partner for general account is barred, and afterwards a particular asset is received by the other partners, a suit for a share in the same is likewise barred. (1871) 5 H. L. 656 explained. (*Lord Phillimore*). GOPALA CHETTY v. VIJAYA RAGHAVACHARIAR.

45 Mad. 378 : 43 M. L. J. 305 :

30 M. L. T. 283 : (P. C.) 16 L. W. 200 :

(1922) M. W. N. 386 : 26 C. W. N. 977 :

L. R. 3 P. C. 165 : (1922) P. C. 115 :

20 A. L. J. 862 : 24 Bom. L. R. 1197 :

36 C. L. J. 308 : 49 I. A. 181 (P. C.)

—Property of—Right of partners to dispose of—Rights of—Creditors See CONTRACT ACT, S. 262. 64 I. C. 719.

—Rights of partners — Rival business—Starting of. See (1921) DIG. COL. 872 PULIN BIHARI ROY v. MAHENDRACHANDRA GHOSAL.

67 I. C. 10

—Suit—Interest.

Interest is not unially allowed in partnership suits except on sums advanced in excess of the capital agreed to be contributed. (*Scott Smith and Abdul Raoof, JJ.*) MT. RAM PIARI v. SULTAN BAKSH. 3 Lah. 382.

—Suit in the name of—Suit by one of the partners—Maintainability.

It is competent to one of the partners to bring a suit in the name of the partnership and it is not necessary that all the partners should have been named in the plaint as plaintiffs or should have signed the plaint. (*Dhobley A. J. C.*) SHRIRAM SHANKERLAL v. MADHO PATIL. 68 I. C. 425 (1).

—Suit—Parties—Suit for the recovery of a debt due to the partnership.

As a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with a partnership. It is not open to the surviving partners alone to see for recovery of a debt due to the firm. (*Ayling, J.*) MUTHAYYA CHETTY v. SOMASUNDARAM CHETTY. 16 L. W. 527 : 68 I. C. 927.

—Surety bond for managing partner—Liability for loss—Onus of proving loss.

Were a surety bond was executed on behalf of the managing member of a partnership, whereby losses arising in the business should be deducted from the security money : *Held*, the onus was on the other partners to show that loss had occurred. (*Abdul Raoof and Harrison, JJ.*) KANSHI RAM v. MT. HARO. 4 Lah. L. J. 214.

(1922) Lah. 235.

—Test of—Creditors jointly advancing money to another—Right to a share of the profits—No relation of partners *inter se*. See COMPANIES ACT, S. 4. 65 I. C. 368.

## PART PERFORMANCE

**PART PERFORMANCE**—Doctrine of—Applicability—Suit for joint possession on declaration of title as heir of last owner—Plff. if can question unregistered transfer by last owner. See (1921) DIG. COL. 873 MEHER ALI KHAN v. SRI MATI AROATUNNESSA BIBI 67 I. C. 167.

—Doctrine of—Applicability of—Unregistered lease—Delivery of possession—Effect of—Specific performance See REGN. ACT, Ss. 17 (1) (d) AND 49. 26 C. W. N. 329

**PATENTS ACT (II of 1911) S 38**—Registration of Patent—User of design before—New or original design.

Where the designs in question had been in use in the locality from long before the date when the registration of the patent was applied for by the plaintiff and it is not possible to say that those designs were new or original, the plaintiff is not entitled to the protection under the Patents Act. A combination of materials would not be entitled to protection unless it was a combination of a character which involved the exercise of any special inventive power or had some originality about it. (*Kanhayyalal and Sulaiman, JJ*) RAM SAHAI v. ANGNOO. L. R. 3 A. 513 : (1922) A. 496.

**PATNA**—High Court, Rules—R. 45 E, Ch XI Vol. I—*Vakalatnama*

The mere signing by the pleader of the *Vakalatnama* with the word 'received' without date, without any indication as to the party from whom he received or without any certificate that he was satisfied that the person from whom he received it was the party himself or a servant or relation or agent is irregular. (*Miller, C. J.*) MULICK and Jwala Prasad, JJ.) BAMBALI DAS. (1922) P. 608 (2).

—Ch II, Rr. 13 and 16—Appeals—Presentation to Registrar—Long Vacation—Presentation of appeals to Assistant Registrar—Not proper—Absence of Registrar—Presentation to be made to Judge sitting for vacation. See COURT FEES ACT, (BIHAR & ORISSA AMENDMENT ACT II OF 1922) S 1 (1922) Pat. 365.

**PATNI**—Decree for rent—Purchaser of patnidar's right, and title after decree, if personally liable—Property passing into the hands of third person.

Where a person purchased the right, title and interest of the patnidar of a patni mahal after a decree for rent had been passed against the patnidar, Held: the purchaser is not personally liable for the decree if the property passes out of his hands to a third party before the institution of the execution proceedings. For rent accruing due prior to the transfer, a transferee of a tenure is not personally liable, (*Das and Ross, JJ.*) INDER CHAND BOTHRA v. SURENDRA NARAIN SINGH. (1922) P. 162 : 1 Pat. 49 : 3 Pat. L. T. 318. (1922) Pat. 137 : 66 I. C. 711.

**PENAL CODE, S. 21**—Public Servant—Tax collector of a municipality.

The definition of public servant in S. 21, I. P. C. includes a tax collector in a Municipality. (*Miller, C. J. and Ross, J.*) GOVERNMENT ADVOCATE, BIHAR AND ORISSA v. GANGA PRASAD. 1 Pat. 423. 3 Pat. L. T. 559 : (1922) P. 532.

## PENAL CODE S. 73.

—S. 21 (8)—Public servant—Agent of the Society for Prevention of Cruelty to Animals—Madras City Police A. & S. 53.

An agent of the Society for the Prevention of Cruelty to Animals appointed a member of the City Police under Act III of 1888 is a public servant within the meaning of S. 21 (8) I. P. C. 3 C. L. J. 475 Rel. (*Wallace, J.*) NATARAJA PILLAI *in re*, 16 L. W. 794 : 31 M. L. T. 369 (H. C.)

—S. 21 (10)—Public servant—Patwari of a village—Berar Land Revenue Code S. 158

The patwari of a village entitled to collect cesses as if they were land revenue is a public servant. (*Batten, J. C.*) LOCAL GOVERNMENT v. MADHO PATWARI- 68 I. C. 157 : 23 Cr. L. J. 557.

—Ss. 23 and 379—Trespass by cattle—Seizures—Wrongful loss—Cattle Trespass Act S. 22

Where a cow is found trespassing on a field and doing damages to crops, it is no offence for the owner of the field to seize the cow and detain it for a period less than 24 hours with promise to release the cow on a payment of compensation not exceeding the pound charges which would have to be paid had the cow been impounded (*Batten, J. C.*) RAM RATAN v. EMPEROR. 23 Cr. L. J. 511 : 68 I. C. 47.

—S. 24—Wrongful loss—Wrongful gain—Need not be permanent but might be temporary. See PENAL CODE, Ss. 403 AND 405. 68 I. C. 157.

—Ss. 34 and 300—Except 4—Death caused as a result of injuries inflicted by four assailants—Liability.

Where the death of the deceased was the result of the cumulative effect of the injuries caused by all the four assailants conjointly the case is within S. 34 of the Penal Code and all of them are liable for murder, 3 P. R. 1919 (Cr.) foll. (*Abdul Raoof and Petman, JJ.*) ALLAH DITTA v. EMPEROR, 4 Lah. L. J. 277 : (1922) Lah. 260.

—S. 34—Applicability of—Evidence of distinct acts.

In order to justify the application of S. 34 evidence of some distinct act by the accused, which can be regarded as part of the Criminal Act in question, must be required. (*Oldfield and Ramesam, JJ.*) AYDROSS v. EMPEROR. 17 L. W. 21 : (1922) M. W. N. 800.

—Ss. 34, 395 and—Use of deadly weapons by some—Conviction of all, if legal.

Where in the course of a commission of dacoity, some alone use deadly weapons, S. 34 applies to the case and all are liable to conviction under S. 397. (*Brasher, J.*) DANGAR KHAN v. EMPEROR. 68 I. C. 817 : 23 Cr. L. J. 593.

—Ss. 59 and 304 (1)—Transportation for 14 years by High Court—Enhancement of sentence—Power of High Court See (1921) DIG. COL. 875. SAYYAPUREDDI CHINNAYYA v. EMPEROR. 30 M. L. T. 192 (P. C.)

—S. 73—Solitary confinement—Practice.

Separate sentences of solitary confinement are not illegal, but as a matter of practice a sentence

## PENAL CODE S. 75.

of more than 3 months' solitary confinement should not be passed on a person convicted at one trial for more than one offence (*Brasher, J.*)  
DANGAR KHAN v. EMPEROR. 68 I. C. 817 :  
23 Cr. L. J. 593

—Ss. 75 and 511—Conviction under S. 511, I. P. C.—Applicability of S. 75. See (1921) DIG. COL. 876 EMPEROR v. BANNE,  
64 I. C. 142 : 22 Cr. L. J. 750

—Ss. 97, 149 and 325—Private defence of property—Right exceeded—Unlawful assembly—Grievous hurt.

When it was found that six accused were driving their cattle and one of them exceeded the right of private defence with regard to property, all of them cannot be convicted of being members of an unlawful assembly. The actual assailant could be convicted of grievous hurt. 26 P. R. 1914 Cr. 1011. (*Shadi Lal, JJ.*) AHMAD v. EMPEROR 23 Cr. L. J. 249 66 I. C. 185

—Ss. 97, 99 and 100—Private defence—Evidence of, not to be ignored though accused set up another defence. See (1921) DIG. COL. 877 GHULAM RASUL v. EMPEROR.

4 P. L. R. 1922.

—S. 99—Right of private defence—Extent of shooting after retreat—Offence

Where there were two rival factions in a village and while one of the factions was taking certain cattle to the pound it was beset by the other faction which was armed with lathis and a gun, the former faction is justified in repelling the attack, if necessary, by the causing of death of the assailants. Where, however, the assailants retreat and subsequently one of them is shot dead by a member of the attacked party, the latter become members of an unlawful assembly and are guilty of the offence of culpable homicide. (*Lindsay and Sulaiman, JJ.*) NANKU KHAN v. EMPEROR.  
I. R. 3 A. 20 (Cr.)

—S. 100—Right of private defence—Extent of—No offence against person but against property.

The burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code rests upon the accused. S. 100, I. P. C. gives the right of private defence of the body only against actual assailants. It does not authorise the killing or causing of hurt to persons who may in the future when reinforced by others become assailants. The right arises only on the occurrence of an offence, or of an attempt to commit an offence, and as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed. (*Scott Smith and Broadway, JJ.*) NARAINDAS v. EMPEROR.  
3 Lah. 144 : 4 Lah. L. J. 91 : (1922) Lah. 1 :  
68 I. C. 113 : 23 Cr. L. J. 513.

—Ss. 109 and 120 B.—Sanction—Conspiracy—Acts done in pursuance of—Joint trial.

Where the allegations of the prosecution support a case of conspiracy to forge documents, for which sanction is required, it does not follow that in the absence of such sanction, offences for

## PENAL CODE S. 121

which no sanction is required by law should not be tried. 42 Cal. 957 foll.

Where the accused were charged with the offence of conspiracy and acts of cheating were set out in the charge as acts done in pursuance thereof, it is open to the prosecution to prove such acts in order that from them the existence of the conspiracy should be interred.

When once a charge of conspiracy is framed, anything done in pursuance of the conspiracy forms part of the same transaction and can be tried at the trial for conspiracy.

The offence of abetment by way of conspiracy does not require sanction, though criminal conspiracy itself requires it (*Newbould and Suhrawardy, JJ.*) ABDUL SALIM v. KING-EMPEROR.  
35 C. L. J. 279 : 69 I. C. 145

23 Cr. L. J. 657 : 49 Cal. 573 : (1922) Cal. 107 :  
26 C. W. N. 680

—Ss. 109 and 161—Abetment—Illegal gratification—Dismissal of prosecution—Offer of bribe afterwards. See (1921) DIG. COL. 879 SHAMSUL HUQ v. EMPEROR 64 I. C. 369  
23 Cr. L. J. 1

—S. 120 B—Criminal conspiracy—Sanction—Acts done in pursuance of—Joint trial it bad See PENAL CODE, Ss. 109 AND 120 B.  
49 Cal. 573 : 35 C. L. J. 279

—S. 121—Waging war—Elements of  
A person who takes part in an organised armed attack on the constituted authorities, that attack having for its object the subversion of British Raj and the establishment of another Government, is guilty of the offence of waging war against the King under S. 121 I. P. C. (*Oldfield and Krishnan, JJ.*) KUNHI KADIR In re  
42 M. L. J. 108. (1922) M. W. N. 71  
15 L. W. 311 : 30 M. L. T. 125 : (1922) Mad. 126 :  
65 I. C. 859 : 23 Cr. L. J. 203

—Ss. 121 and 124 A—Waging war—Abetment—What constitutes—Incitement to violence—Speech of doubtful import—Benefit of doubt.

*Per Shah A. J., C.* So long as a man only tries to inflame feeling, to excite a state of mind he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war 34 B. 394 foll. It is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the waging of war. It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator. The mere fact that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section ; but the court ought to be satisfied that he has instigated the waging of war (i. e.) the use of violence for the purpose of effecting innovations of a general and public nature.

*Per Crump, J.* Instigation is the active suggestion or stimulation of another to do an act and the act contemplated by S. 121 I. P. C. is the waging of war. Waging of war is the attempt to accomplish by violence any purpose of a public nature.

## PENAL CODE S. 141.

Where in order to establish a republic in this country the accused actively suggested to his audience that they should use violence or stimulated them to use violence to achieve that purpose he is guilty under S. 121, I. P. C. But whereupon the worst construction of the speech it merely amounts to a prophecy or even a threat that violence may be necessary in future it does not constitute an offence under S. 21 I. P. C. (*Shah, A. C. J. and Crump, J.*) **EMPEROR v. HASRAT MOHANI.**

24 Bom. L. R. 885 : (1922) Bom. 284.

—S. 141—Common object—Resistance to execution of law—Overt act.

Where a person is charged with contravening an order of the Superintendent of Police prohibiting the collection of an assembly without a license, overt act must be proved to show resistance under S. 141 I. P. C. Mere words when there is no intention of carrying them into effect will not be sufficient. (*Mullick Coutts and Das, JJ.*) **EMPEROR v. ABDUL HAMID.**

3 Pat L. T. 585 : 4 U. P. L. R. (Pat) 79 (1922) Pat 274 : 68 I. C. 945 : 23 Cr. L. J. 625. (F. B.)

—Ss. 141 and 147—Unlawful assembly—Easement or customary right—Person having a right—Want of actual enjoyment—Effect of—

No person can have a right to prevent by force another person dealing with his own land merely because he may have some right of easement or customary right over a portion of that land of which right he was not at the time in actual enjoyment. (*Ashworth, A. J. C.*) **LILA v. EMPEROR.**

9 O. L. J. 291  
4 U. P. L. R. (O. C.) 74 : (1922) Oudh. 228.

—Ss. 145 and 141—Offence under—Elements of—Evidence.

To constitute an offence under S. 145 of the Penal Code, it is necessary that the prosecution should establish that there was an assemblage of at least five persons; that the object of the meeting was any of the five objects mentioned in section 141, I. P. C., that the accused shared that object with at least four others of the meeting; that the accused intentionally joined the meeting having knowledge of the meeting, or he continued therein after having had that knowledge, that such command to disperse was in the manner prescribed by law; that accused joined or continued in such unlawful assembly after it had been commanded to disperse; and that he did so knowing that it had been commanded to disperse. (*Moti Sagar, J.*) **GIRDHARA SINGH v. EMPEROR.**

3 Lah. L. J. 529 : 4 U. P. L. R. (Lah.) 11.  
21 P. L. R. 1922 : (1922) Lah. 135 :  
64 I. C. 373 : 23 Cr. L. J. 5

—Ss. 147 and 333—Assault—Rioting—Obstructing public servant—Separate conviction and sentence.

Seven men were convicted under Ss. 147, 149 and 333 and 149, and 225 I. P. C. There was a spontaneous attack on the police without any preconcerted object and a prisoner in police custody escaped as a result of the attack. *Held,*

## PENAL CODE S. 147.

that the conviction under S. 147 I. P. C. could not stand. (*Harrison, J.*) **KALLU v. EMPEROR.**  
4 Lah. L. J. 448 : (1922) Lah. 31 : 67 I. C. 721 :  
4 U. P. L. R. (Lah.) 95

—S. 147—Object of assembly to rescue a person—If an offence.

Where the object of the accused who had been charged with being members of an unlawful assembly was to rescue a person who was being assaulted and in the course of rescuing him grievous hurt was caused, the assembly does not become an unlawful assembly. (*Jwala Prasad, and Ross, JJ.*) **AMBIKA SINGH v. EMPEROR**

1 Pat. 212 : (1922) P. 498.

—Ss. 147 and 366—Offences under—Separate offences

Where it was proved that the accused carried away a woman not merely to bring pressure on her mother but also to marry her against her will they are guilty under S. 366, I. P. C. It was a necessary ingredient for completion of the offence under S. 366, I. P. C. to use force and a separate sentence under S. 147 I. P. C. is not justified 4 P. R. 1901 Cr. foll. (*Abdul Quadir, J.*) **KHIZAR v. EMPEROR** 4 Lah. L. J. 322 : (1922) Lah. 410.

—Ss. 147 and 355—Offence under—Same transaction—Separate sentence—Illegal.

One K. was found guilty by a panchayat, of having enticed away a married woman, and was sentenced to pay a fine or in default to have his face blackened and to ride round the village. The accused executed the sentence against K's will and he was found guilty of offences under Ss. 147, 342 and 504 I. P. C. and a separate sentence was passed under each section, *Held* that the offence committed by the accused was only one offence, *viz.*, that of carrying out the sentence of the panchayat and the several convictions were wrong (*Harrison, J.*) **KARAM SINGH v. EMPEROR.** 67 I. C. 729 : 23 Cr. L. J. 457.

—Ss. 147 and 448—Rioting—Charge against nine accused—Criminal trespass—No case against five of the accused—Effect of

Where nine accused are charged with rioting and house trespass and five of them are found to have had no common object, the conviction of the rest for rioting is unsustainable. (*Ramesam, J.*) **SINNASWAMI MUDALI In re.** 16 L. W. 526.

—S. 147—Rioting—Conviction—Common object—Difference in—Conviction if legal.

Where six persons were charged and convicted of an offence under S. 147 I. P. C., the common object stated by the prosecution was the assault on the complainant. The Magistrate found that three of the accused went to assault the complainant while the other three went to take away his cattle. *Held*, that on the findings of the Magistrate there was no common object shared by five persons so as to constitute an offence under S. 147 I. P. C. and that the conviction under that section must fail as regards all the accused. (*Walmsley and Suhrawardy, JJ.*) **AMINULLA v. EMPEROR** 26 C. W. N. 536 : 35 C. L. J. 353 : (1922) Cal. 191.



## PENAL CODE S. 147.

## —S. 147—Scope of

Where the petitioner though outwardly pretending to try to pacify the mob, in reality incited the mob and took part in the doings of the mob to overawe the Government servants by attacking them and to cause loss to Government property without provocation; *Held*, that he committed an offence under S. 147 though he personally did no violence (*Mullick J.*) *GADADHAR BHAGARIA v. KING EMPEROR.* (1922) P. 311.

## —Ss. 147 and 325—Separate sentences for riot and hurt.

Separate sentences for the offences of rioting and grievous hurt cannot legally be imposed upon a member of an unlawful assembly, where the offence of rioting was not itself complete until the grievous hurt was actually inflicted that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting, (*Campbell, J.*) *BISHUA v. EMPEROR,* (1922) Lah 405.

## —S. 147—Unlawful assembly—Decree of civil court—Delivery of symbolical possession—Judgment debtor a trespasser—Assertion of title by force—If an offence

Where in pursuance of a decree of court, the decree holder was put in symbolical possession of property under O. 21 R. 85 C. P. Code, the judgment-debtor thereafter is only a trespasser, and in taking possession of the property and ousting the judgment-debtor by force, the decree-holder does not commit an offence under S. 147, I. P. C. (*Jwala Prasad and Coutts, JJ.*) *RAM KISHNA SINGH v. EMPEROR.* 3 Pat L T. 335.

(1922) P. 197 : 66 I. C. 817 : 23 Cr. L. J. 321.

## —S. 147—Unlawful assembly—Rioting—Common object—Liability of members.

A person who is the leader of an unlawful assembly whose common object is to assault passers by commits the offence of rioting punishable under S. 147 of the Penal Code. (*Macleod, C. J. and Shah, J.*) *EMPEROR v. SUJATALLI NEAMATALLI.* 24 Bom. L. R. 110 : 66 I. C. 192 : 23 Cr. L. J. 256.

## —S. 149—Offence under special acts if within the section.

The definition of "offence" in S. 149 I. P. C. does not cover offences under special Acts. (*Oldfield and Ramesam, JJ.*) *AYDROSS v. EMPEROR.* 17 L. W. 21 : (1922) M. W. N. 800.

## —S. 151—Offence under—Essentials of

On a charge under S. 151 of the Indian Penal Code it is not sufficient to establish merely that in the opinion of the Magistrate, who ordered the particular assembly to disperse, such assembly was likely to cause a disturbance of the public peace it is necessary to establish by evidence to the satisfaction of the Court that the assembly was in fact likely to cause such disturbance. 22 P. R. 1887 Ref. (*Moti Sagar, J.*) *GIRDARA SINGH v. EMPEROR.* 3 Lah. L. J. 529 :

4 U P. L. R. (Lah.) 11 : 64 I. C. 373 : 23 Cr. L. J. 5 : 21 P. L. R. 1922 : (1922) Lah. 135.

## —Ss. 181, 116—Offer of bribe to public servant—Essentials of offence.

## PENAL CODE S. 182

The accused in the course of a conversation with the Municipal Commissioner of Bombay, after thanking him on behalf of his cousin for some departmental concessions shown to him by the Commissioner said "my cousin wishes to give you Rs. 5,000." On his being prosecuted under Ss. 116 and 161 I. P. C., *held*, under the circumstances there was no offer of a bribe, or any instigation to the Commissioner to do anything forbidden by S. 161.

Per *Macleod, C. J.*—To bribe or attempt to bribe a public servant is only punishable under the I. P. C. as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification.

Illustration (a) to S. 116 is only an example of abetment of an offence under S. 161. There are many other ways of instigating a public servant to commit an offence under S. 161. besides by means of a direct offer of a bribe.

The words used in conversation, did not legally amount to an offer—But they did indicate a state of mind in the cousin which could result in bribery. The distinction between an offer and an invitation for offers to be made is well recognised in the law of contracts and there is no reason why the same distinction should not apply in criminal law.

A person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement.

Per *Shah, J.* Where the inference suggested by what happened is equivocal and where the explanation put forward by the accused is reasonably possible, the theory of innocence cannot be said to have been sufficiently negated by the prosecution. (*Macleod, C. J. and Shah, J.*) *EMPEROR v. AMIRUDDIN SALEBHOY TYABJEE,* 24 Bom. L. R. 534 : 67 I. C. 818 : 23 Cr. L. J. 466.

## —S. 174—Disobedience to summons—Non-attendance on account of illness—Sufficient excuse.

The fact that a person is so incapacitated by illness as to be obliged to give up his ordinary avocations would be a sufficient excuse for him not to attend a Court in obedience to a summons. It is not necessary that he should have been so dangerously ill that he could not move. (*Ryves, J.*) *BOHRA BIRBAL v. EMPEROR.* 20 A. L. J. 192 : L. R. 3 A. 55 (Cr.) : (1922) A. 82 : 65 I. C. 864 : 23 Cr. L. J. 208.

## —S. 174—Offence under—Verbal order—Disobedience to,

Disobedience to a verbal order of a cantonment magistrate to attend does not constitute an offence under S. 174 I. P. C. in the absence of proof that the order issued by the Magistrate was issued in his capacity as magistrate or that he was legally empowered to issue such order (*Abdul Quadir, J.*) *RAM CHAND v. EMPEROR* 23 Cr. L. J. 230 : 66 I. C. 70.

—S. 182—Applicability of—Report of assault and obstruction—Subsequent withdrawal. See (1921) Dig. Col. 882 *ALI AHMAD v. EMPEROR.* 2 P. L. R. 1922 : (1922) Lah. 313.

## PENAL CODE S. 182.

—S. 182—*False information—Burden of proof—Belief in truth of information.*

On a prosecution for an offence under S. 182, I. P. C. the mere fact that the information was shown to be false does not throw the burden of proof on the accused that when he gave the information he believed it to be true. It is incumbent on the prosecution to show that the only reasonable inference was that he must have known or believed it to be false. (*Simpson, A. J. C.*) GAYA BARHAI v. EMPEROR.

9 O L J. 342 : 4 U. P. L. R. (O. G.) 81 : 69 I. C. 81 : 23 Cr. L. J. 641

—S. 182—*Giving false information to Police—Subsequent proceedings under Ss. 379 and 411.*

Where the accused gave false information to the police that his horse was stolen when in fact he himself had sold it and subsequently instituted proceedings under Ss. 379 and 411, *Held* : in making a report the accused clearly gave false information to the police which he knew to be false and he must have known that it was likely that he would thereby cause the police authorities, if they found the horse answering to this description, to take it from the possession of its rightful owner. On these facts an offence under S. 182 is clearly made out. (*Stuart, J.*) INCHARAM v. THE KING EMPEROR

44 All. 647 : (1922) All. 272

—Ss 182 and 211—*Scope of—False charge—False information—Offence.*

Where there have been Court proceedings in consequence of a report to the police, then S. 211 is the appropriate section at any rate where the case is a series one. But this does not of necessity make a prosecution under S. 182 illegal.

7 M. H. C. R. 5 : 15 I. C. 992 : 34 A. 522 : 52 C. 180 : 5 C. W. N. 727 : 29 I. C. 747 Ref (*Higginbotham, J.*) MA SAW YIN v. EMPEROR.

11 L. B. R. 43 : 64 I. C. 839 : 23 Cr. L. J. 55.

—S. 188—*Essentials of—Disobedience of order under S. 144, Cr. P. Code—Procedure to follow*

As it is essential for a prosecution under S. 188, Penal Code that the disobedience of the order "causes or tends to cause obstruction, annoyance or injury to any person lawfully employed", a magistrate cannot give sanction to prosecute unless he is satisfied that there was a *prima facie* case satisfying all the essentials of the offence. The prosecution for disobeying an order under S. 144 Cr. P. C. might be started either by sanction under S. 195 Cr. P. C. or by an order passed under S. 476 Cr. P. C. (*Jwala Prasad, J.*) PARMESHWAR v. EMPEROR

3 Pat. L. T. 268 : (1922) Pat. 204 : 4 U. P. L. R. (Pat.) 34 : (1922) P. 84 : 67 I. C. 205 : 23 Cr. L. J. 381.

—S. 188—*Order for ejectment under S. 219, C. P. Tenancy Act—Disobedience—Offence.*

Disobedience to a summary order of ejectment by the Dy. Commissioner under S. 219, C. P. Ten. Act constitutes an offence under S. 181, I. P. C. (*Batten, A. J. C.*) HIRA SINGH v. EMPEROR.

17 N. L. R. 88 : (1922) Nag. 209 : 64 I. C. 499 : 23 Cr. L. J. 19.

## PENAL CODE S. 194.

—S. 188—*Order under S. 144, Cr. P. Code—Legality of, it could be questioned in a prosecution under S. 188, I. P. C. See (1921) Dig. Col. 883 JIRAT DIN MAHOMED v. EMPEROR.*

67 I. C. 200 : 23 Cr. L. J. 376.

—S. 191—*False evidence—Correction or retraction of statement in deposition*

It is open to a witness to correct himself on second thought or on being reminded of any fact which might have escaped his memory. The subsequent correction or retraction by a witness of this statement in the same depositions does not necessarily predicate the existence of an intention to give false evidence with regard to the statement so corrected or retracted, if the correction or retraction can be otherwise satisfactorily explained. Where on an examination of the entire deposition there is not enough ground for thinking that two statements are necessarily inconsistent, sanction to prosecute should not be granted. (*Kanharya, Lal J. C.*) WILLIAM v. EMPEROR.

25 O. C. 139 : (1922) Oudh 198 : 69 I. C. 92 : 23 Cr. L. J. 652.

—S. 193—*Deposition of witness—Omission to interpret—C. P. Code O. 18 Rr 5 and 6—Non-compliance with—Perjury—Evidence Act, S. 91.*

A person can be charged and convicted for perjury even though his prior deposition has not been taken down in strict compliance with O. 18 Rr 5 and 6, C. P. Code.

The provisions of O. 18 Rr. 5 and 6 C. P. C. are directory and non-compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury. If the deposition has not been read over to the witness in the presence of the presiding Judge it does not prove itself under S. 80 of the Evidence Act but may be proved in some other way. The judge who recorded it can prove it or the accused can admit it. 45 C 825 foll. (*Prideaux, A. J. C.*) MIRABUX v. EMPEROR.

18 N. L. R. 192 : 68 I. C. 36 : 23 Cr. L. J. 500.

—Ss 193 and 423—*Fabricating false document—Intent to use in judicial proceeding—“Fraudulently” meaning of*

The accused having failed to obtain a certain woman in marriage, executed a document purporting to convey certain lands to this woman as in lieu of dower and described her therein as his wife.

*Held*, as the object of the accused was only to secure the person of the woman and which he could do only by judicial proceedings, his intention was to use the document in such proceedings and he was therefore guilty under S. 193 I. P. C.

He was also guilty under S. 423 I. P. C. (*Teunon and Ghose.*) LEGAL REMEMBRANCE v. AHI LAL MANDAL.

48 Cal. 911 : 66 I. C. 996 : 23 Cr. L. J. 340.

—Ss 194 and 211—*Police enquiry—False charge—Offence.*

It is difficult to affirm the existence of an intention to cause, or of knowledge that the false evidence is likely to cause, a person to be

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convicted of a capital offence, when the proceedings in which the evidence were given is one in which such a conviction is not legally possible. It follows *a fortiori* that the offence of a person accusing another falsely of murder to a head constable in an enquiry under S. 134 of the Cr. P. Code would not fall under S. 194 of P. Code. (Campbell, J.) MAHOMED HAYAT v. EMPEROR (1922) Lah. 133 : 65 I. C. 434 : 23 Cr. L. J. 82

—S. 196—Use of false evidence—Corruptly uses—Accused using false evidence in support of his defence. See (1921) DIG. COL. 885 RAMA NANA HARGAYNE v. EMPEROR 46 Bom. 317 : 64 I. C. 503 23 Cr. L. J. 23

—S. 211—Applicability of—Institution of proceedings.

The term "institution" in S. 211 of the I. P. C. means the institution either by the accused himself, or by the police or others in consequence of the accused's actions, in some Criminal Court 3 P. R. 1888 Cr. foll. (Campbell, J.) MAHOMED HAYAT v. EMPEROR (1922) Lah. 133 : 65 I. C. 434 : 23 Cr. L. J. 82

—S. 211—Offence under—Direction for prosecution of complainant—Difference of opinion between trial court and appellate court

Where in a case of theft the Trial Court believing the complainants convicted, while the Appellate Court set aside the conviction and directed prosecution of the complainant under S. 211, I. P. C. Held that where there are separate opinions of two different tribunals it may be taken as generally a normally safe guide to suggest that definite expressions as to the malice of either party are undesirable and the order for prosecution was set aside. (Bucknill, J.) RAGHUPAT SAHAI v. EMPEROR (1922) Pat. 26 : 3 Pat. L. T. 93 : (1922) P. 160 : 66 I. C. 336 : 23 Cr. L. J. 272.

—S. 211—False charge—Charge to whom to be made—Complaint.

To fall under S. 211, I. P. C. the false charge must be made to some person in authority (i. e.) to a person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a police officer 6 C. 620; 30 C. 415; 26 B. 150, 32 M. 8 Ref. (Simpson, A. J. C.) GAYA BARHAI v. EMPEROR.

9 O. L. J. 342 : 4 U. P. L. R. (O. C.) 81 : 69 I. C. 81 : 23 Cr. L. J. 641.

—Ss. 215 and 420—Offences under—Offence under S. 215 I. P. C. also falling under S. 420 I. P. C.—Penalty.

Where a cattle dealer takes a ransom for the restoration of stolen cattle and fails to restore that property to the owner in spite of the promise he is guilty of an offence under S. 420, I. P. C. and not of the minor offence under S. 215, I. P. C.

*Per Robinson, C. J.*—The general rule which should guide the courts is to convict of and punish for the most serious offence that is established, provided of course, that the accused has been charged with and has had an opportunity

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of meeting the charge of that offence. (Robinson, C. J. and Macgregor, J.) NGA SHAN v. EMPEROR. 1 Bur. L. J. 179

—Ss. 215 and 511—Stolen property—Promise of recovery in lieu of payment of money—Theft not detected

Where some time after the commission of a theft, the accused proposed to find out the stolen articles on their being paid some money but took no steps after receiving the money, to find out the thieves they are guilty of an attempt to commit an offence under S. 215, I. P. C. 20 A. 389 not foll. (Rafiq and Stuart, JJ.) HARGYAN v. EMPEROR 20 A. L. J. 927.

—S. 225—Arrest by private person after commission of offence.

If a person after committing a nonbailable and cognizable offence escapes, but on being arrested by a private person who did not actually see him commits the offence resists and obstructs him, he is not guilty of an offence under S. 225, I. P. C. (Abdul Raoof and Abdul Kadir, JJ.) ALAWAL v. EMPEROR. 19 P. L. R. 1922 : (1922) Lah. 73 : 4 U. P. L. R. (Lah.) 21 : 64 I. C. 371 : 23 Cr. L. J. 3.

—Ss. 225, 186 B and 352—Warrant of arrest—Rescue of person arrested and tearing up warrant—Improper warrant—Effect of issue of.

Where a woman had been arrested in pursuance of a warrant but the accused rescued her and tore up the warrant and it was found that the warrant had not been properly issued. Held that the accused was guilty of an offence under S. 352 I. P. C. but not under S. 225-B, I. P. C. (Stuart J.) GOKUL v. EMPEROR. 20 A. L. J. 921 : L. R. 3 A 174 (Cr.)

—S. 225 B—Execution of warrant in Civil Court—Rescuer—Offence. See (1921) DIG. COL. 887 SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v. BARODA KANTA. 66 I. C. 1003 : 23 Cr. L. J. 347.

—S. 228—Contempt of court—Insult to presiding judge by accused—Trial—Summary procedure—Intention.

The accused, a pleader of 14 years' standing, was tried by the District and Sessions Judge for rioting and other offences. During the progress of the trial the accused took no part in the case. He did not cross examine the prosecution witnesses nor did he call any witness in defence. At the close of the prosecution case when required by Judge to make a statement under S. 342 Cr. P. Code, the accused made a statement in writing in the course of which he stigmatised the trial Judge as "a prejudiced judge". The trial judge asked the accused if he was willing to withdraw the above words but he declined to do so. The trial Judge thereupon framed a proceeding under S. 480 Cr. P. Code, found the accused guilty of contempt of court and sentenced him to pay a fine.

On appeal Held *Per Macleod C. J. and Pratt J. (Shah J.)* dissenting that the accused was guilty of the offence charged. The intention to insult the Judge was made out first by the

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words themselves and secondly by the conduct of the accused.

*Per Macleod, C. J.* The law regarding contempt is not different in India to what it is in England. To say that the trial Judge is prejudiced is an insult and the words *prima facie* carry with them an intension to insult. It lies on the person uttering them to provide an explanation to show there was no such intension. A court of appeal should not lightly interfere in appeal with the decision of a Judge in a matter of contempt. The test is whether the court below was wrong in holding there was contempt and not whether the appellate court would come to the same conclusion.

*Per Shah, J.* An accused person like any other can be guilty of an offence under S. 228, I. P. C. if he contravenes the terms of the section by any act or words of his own. While a reasonable latitude ought to be given to an accused person in making his own defence, he cannot be allowed to act in any manner which offends against the Section.

*Per Pratt J.* The motive of the accused in using the expression was to support his defence. But if the words are an offence the excellence of the motive will not make them lawful. The only question is whether the insult was intentional and this intension is an inference attaching to the words themselves. This inference is not rebutted by any excuse as to the motive with which the accused used the words or the object that he thought would be attained by so doing. (*Pratt, J. on a difference of opinion between Macleod, C. J. and Shah, J.*) *EMPEROR v. VENKAT RAO.* 24 Bom L. R. 386 : (1922) Bom 261 : 66 I. C. 821 : 23 Cr. L. J. 325

## —S. 228—Essentials of offence

The gist of the offence under S. 228, I. P. C., is not whether the Court or office was insulted, but whether any insult was offered and intended. (*Shadi Lal, C. J.*) *DALIP SINGH v. EMPEROR.*

2 Lah. 308 : 4 U. P. L. R. (Lah.) 9 : 64 I. C. 377 : 23 Cr. L. J. 9 : 24 P. L. R. 1922

## —S. 228—Intention, a necessary ingredient.

In a case under S. 228 it is material to prove that the act complained of was done intentionally. (*Abdul Quadir, J.*) *INDAR v. CROWN.*

(1922) Lah. 187.

## —S. 273—Knowing or having reason to believe—Noxious food or drink—Presumption if, to be made,

There is no warrant in law for the presumption that the accused knew or had reason to believe that an article of food would be unfit for consumption and like other ingredients of the offence, this has to be proved. (*Gokul Prasad, J.*) *MUKUND RAM v. THE KING EMPEROR*

(1922) All. 273

## —S. 294 (A)—Offence under keeping a lottery—What constitutes.

Where it is shown that the accused kept an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys and which they held out to the public as the place where the lottery would be

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drawn, they are guilty of an offence under S. 294 A, I. P. C. even though the lottery was not actually drawn. (*Krishnan, J.*) *RAMASWAMI MUDALIAR In re.* 16 L. W. 757

—S. 295—Damaging mosque by placing rafters—Insult to religious feelings—Knowledge—See (1921) DIG, COL. 888, *SOHANA RAM v. EMPEROR* 67 I. C. 586 : 23 Cr. L. J. 426.

—S. 297—Placing obstacles in the way of burying a person—Absence of violence—If an offence in law.

Where as a result of political differences, the complainant was boycotted, and obstacles put in the way of burying his son but no violence was actually used no offence under the law was committed. (*Stuart, J.*) *AMANAT v. KING-EMPEROR.* 20 A. L. J. 93 : L. R. 3 All. 14 (Cr.) : (1922) All. 184 : 65 I. C. 424 : 23 Cr. L. J. 73.

—S. 299—Explanation—Suffering from injury not fatal to ordinary men—See (1921) DIG COL. 889 *AINUDDI CHOUK IDAR v. EMPEROR* 68 I. C. 100 : 23 Cr. L. J. 344

—Ss. 300, 302, 304 and 326—Death caused by lathi blow—Attack on master—Sudden provocation—Death caused—Intention.

Every sane person of the age of discretion is presumed to intend the natural and probable consequences of his own acts. In deciding what the natural and probable consequences of an act are the court will presume that every actual consequence is a natural and probable consequence unless the contrary is affirmatively shown. Having regard to the great frequency with which a lathi used in a *melce* lights on the head even though not specially aimed at it, and the still higher percentage of cases in which a blow on the head with a lathi results in the death of the victim from a fractured skull, it is contradictory to say that a person taking part in an assault with lathis does intend to break the victim's arm or leg but does not intend to break his skull an injury which is undoubtedly sufficient in the ordinary course of nature to cause death.

1 N. L. R. 134 Rel. on.

If an assault cannot be prevented by any thing short of killing the assailant then the right of private defence is not exceeded. Where a zemindar was attacked by his tenant and the other tenants apprehending danger to their landlord attacked the assailant with lathis and inflicted blows which eventually caused his death. Held, that the accused were under grave and sudden provocation sufficient to deprive ordinary men of their self control and their case fell within S. 304 I. P. C. (*Halifax, A. J. C.*) *JAIPAL KUMBI v. EMPEROR.* (1922) Nag. 141.

23 Cr. L. J. 313 : 66 I. C. 665.

—Ss. 300 and 302—Murder—Grave and sudden provocation—Woman of loose character—Refusal to admit husband—Extenuating circumstance—Sentence.

Where the accused killed his wife who had long been known to him to be a woman of loose character and who had again and again denied access to him the act cannot be said to have been

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done under grave and sudden provocation. The court however reduced the sentence of death to one of transportation for life. (*Shadi Lal, C. J. and Abdul Qadir J.*) *GHAZI v. EMPEROR*  
4 U. P. L. R. (Lah.) 49. 65 I. C. 572 :  
23 Cr. L. J. 140.

—S. 300—*Murder—Injury likely to cause death—Death caused by single blow—Offence.*

Where a man strikes another on the head with a not very formidable weapon one blow only no greater intention can be attributed to him than that of causing injury likely to cause death. But each case must depend on its own facts, on the circumstances surrounding the assault, on the motives and the particular weapon used. If the accused had been actuated by a fierce motive urging him on to commit a serious hurt and if he had used a heavy bamboo, or weighted stick or club then, having regard to the injury actually caused and to the great violence used the Court would have no option but to hold him guilty of murder. 2 L.B.R. 125 ref. (*Robinson, C. J. and Duckworth, J.*) *NGA KHAN v. EMPEROR.*  
65 I. C. 495 : 23 Cr. L. J. 111.

—Ss. 300 and 326—*Murder—Intention to cause death or bodily injury sufficient to cause death—Knowledge—Presumption*

In the absence of any evidence to indicate that a blow on a more vital part it must be held that the offender inflicted the blow where he intended. The fourth para. of S. 300, I. P. C. can never be invoked in a case where there was intention of causing specific bodily injury to a particular person. 111n. (d) shows that it only applies to a case of dangerous action without an intention to cause specific bodily injury to a person. Wounds which actually cause death must be held to be grievous hurt within S. 326 I. P. C. 42 A. 302 Dist. (*Ashworth, J. C. and Simpson, A. J. C.*) *RAM ASRE v. EMPEROR.*  
9 O. L. J. 490

—S. 300 Exp. (1)—*Grave and sudden provocation—Ground of mitigation.*

Where the accused saw his wife actually committing adultery there cannot be the least doubt that grave and sudden provocation must have been caused. 8 P. R. 1890, and 8 P. R. 1899 Cr. foll. The rule contained in S. 300 exception (1) does not contemplate that in order to entitle an accused to earn the mitigation provided for, the act must immediately follow the provocation. (*Scott Smith and Abdul Raoof, J.J.*) *KADIR BAKSH v. EMPEROR.*  
23 Cr. L. J. 563 :  
68 I. C. 403.

—Ss. 300, Exp. 2 and 301—*Right of private defence—Lathi blow—No pre-meditation—Death—Excessive user of force.*

Accused a servant employed to watch the crops of a field, went round one night and saw a man cutting the crop at midnight. The thief on seeing the accused tried to run but accused, who was armed with a lathi at once struck him a blow on the head felling him to the ground; the victim of the blow eventually died.

*Held*, that under Exception 2 to S. 300, Penal Code, the accused exceeded the right of private

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defence of property. The conviction of the accused should be under S. 304 and not under S. 325, I. P. C. (*Tudball, J.*) *EMPEROR v. KALLU.*  
64 I. C. 133 : 22 Cr. L. J. 741

—Ss. 302 and 304—*Causing death—Superstition—Snake bite—Tattooing.*

Where the accused professed to render people immune from death by snake-bite by tattooing them and in proof of his assertion allowed a poisonous cobra to bite one of the persons tattooed with the result that the victim died. *Held*, that the accused was guilty of culpable homicide not amounting to murder in the absence of proof that he honestly believed and was justified in believing that tattooing gave such immunity. Even if he did so honestly believe the accused would be guilty of a rash and negligent act under S. 304, I. P. C. (*Heald, J.*) *NAG BA TU v. EMPEROR*  
11 L. B. E. 56 :  
64 I. C. 843 : 23 Cr. L. J. 59.

—S. 302—*Evidence.*

Accompanying the murderers with the deceased and returning the next day without the deceased and subsequent disappearance of accused were held to be not sufficient to prove accused's complicity in the crime of murder. (*Shadi Lal, C. J. Martineau, J.*) *ALU v. THE CROWN.*  
(1922) Lah. 171

—Ss. 302 and 34—*Murder—Attack with lathi—Intention—Natural and probable—Consequence.*

When one man sets up trouncing another with a heavy lathi, and still more when two or more do so, it is more than likely that one blow at least will land on the head of the man attacked, however careful his assailants may be to avoid the head and that he will die of a fractured skull in consequence.

Every person of the age of discretion is presumed to intend the natural and probable consequences of his act and every actual consequence will be presumed to be a natural and probable consequence until the contrary is affirmatively proved. (*Hallifax and Dholey, A. J. C.*) *LOCAL GOVERNMENT v. JAILAL RAUT.*  
64 I. C. 838 :  
23 Cr. L. J. 54

—S. 302—*Murder—Attack with lathis—Concerted attack—Intention to kill.*

Where a number of men armed with lathis make a concerted attack upon another man and practically kill him on the spot inflicting injuries to the head the result of blows which must have been struck either with the intention to kill or at any rate with the intention to cause hurt such of the strikers must have known to be imminently likely to result in the death of the person struck in the case at least of the ringleaders the penalty prescribed by the law as the proper penalty in cases of murder will be inflicted. (*Mears, C. J. and Piggot, J.*) *SIPAI SINGH v. EMPEROR.*  
20 A. L. J. 900 : L. R. 3 A. 161 (Cr.)

—S. 302—*Murder—Death caused by poison—Guilty knowledge—Proof.*

Where a wife who was carrying on a liaison with a stranger wanted to marry the stranger and acting on his advice put some sugar containing arsenic in the food prepared by her for her

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husband under the impression that the sugar would make her husband submissive to her will and the husband died of the effects of the arsenic *Held* that the wife not having been aware that she was administering a poison to her husband, was not guilty of murder. (*Shadulal C. J. and Martineau J.*) MT. HUSSAINI v. EMPEROR.

4 Lah. L. J. 445.

———S. 302—Murder—Conviction on purely circumstantial evidence—When safe. *See* CRIMINAL TRIAL.

4 Lah. L. J. 235.

———S. 302—Murder—Conviction—Sentence—Extenuating circumstances—Age and sex when relevant.

Generally the age or the sex of a murderer cannot of itself be sufficient for a lenient sentence. If there are other reasons which very nearly justify the passing of the lesser sentence but do not quite do so, or when it is doubtful whether they do so or not, then the youth or the sex of the criminal may certainly tip the scale to the side of mercy 11 C. W. N. 994 : 6 Cr. L. J. 154 foll. (*Halifax, A. J. C.*) KACHRIA MAHAR v. EMPEROR.

18 N. L. R. 101 : (1922) Nag. 65.

64 I. C. 277 (N)

———S. 302—Murder—Sentence—Mitigated sentence, reasons for.

When a Judge does not pass the normal sentence, viz., the sentence of death in a case of murder, he is bound to record his reasons and he must find there are really extenuating circumstances and not merely absence of aggravating circumstances. (*Robinson, C. J. and Macregor, J.*) EMPEROR v. NGA SHWE HLA,

1 Bur. L. J. 96

(1922) L. B. 32

———S. 302—Murder—Sentence—Youth of accused how far an extenuation.

Youth alone in every case is not such an extenuating circumstance as would justify the imposition of the lesser penalty in case of murder, but it should be taken into consideration with the other facts of the case. Where no extenuation is shown and the offence is deliberately committed mere youth alone would not entitle the accused to the lesser penalty. (*Robinson, C. J. and Macregor J.*) NGA BA THIN v. EMPEROR.

1 Bur. L. J. 70.

———S. 302 and 326—Offence under.

In a case where as a result merely of a boyish quarrel just a short time before the accused stabbed the deceased with a penknife four inches in length there can be no conviction for murder or culpable homicide not amounting to murder where the *corpus delicti* is not established. The offence of which the accused is guilty is voluntarily causing grievous hurt by an instrument used for cutting. (*Abdul Raoof and Moti Sagor, JJ.*) GULAM MUHAM-UD-DIN alias CUMUN v. THE CROWN.

(1922) Lah. 26 (1)

———S. 302—Offence under—Approver—Corroboration.

Where there is no sufficient corroboration of the approver's story, the accused cannot be convicted (*Chevis and Harrison, JJ.*) EMPEROR v. SAID SHAH.

(1922) Lah. 311

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———S. 302—Uncorroborated evidence—Interested witness.

Where the accused was convicted on the uncorroborated evidence of an interested witness who was a collateral though not a near relative of the deceased, whose family had enmity with the accused. *Held*, it would not be safe to sustain the conviction upon the evidence of such a solitary witness. (*Shadi Lal, C. J. and Martineau, J.*) PREM SINGH v. CROWN.

(1922) Lah. 76.

———Ss 304 and 323—Charge under S. 304—Conviction under S. 323—Death of person assaulted—Effect on proceedings *See* 1921 DIG. COL 891 HAZARA SINGH v. EMPEROR

(1922) Lah. 227

———S. 325—Scope.

Where there were 3 persons on the side of the appellants and only two on the side of the deceased, who accidentally received injuries on the head from whom it was not clear and subsequently died, the presumption is that the appellants were the first to attack and were not acting in self defence. They committed an offence under S. 325, and not under S. 304 (*Broadway, J.*) WARYAM SINGH v. EMPEROR

3 Lah. L. J. 589 : 67 I. C. 817 : 23 Cr. L. J. 463.

(1922) Lah. 394 (2).

———S. 323—Self defence.

Where a constable pursuing some rioters wounded one of them by a gun shot whereupon the others assaulted him in the course of an attempt to snatch away his gun and thus prevent further harm being done, held, at that stage they were only acting in self defence and could not be guilty of an offence under S. 323 of the Penal Code. (*Abdul Qadir, J.*) KHANUN v. THE CROWN

(1922) Lah. 75

———S. 361—Kidnapping from guardianship Complainant—Minor brother of the girl

A minor brother cannot be the guardian of his sister and he cannot therefore be a complainant in respect of an offence under S. 361 I. P. C. against his sister (*Martineau, J.*) KARURA v. MAM RAJ.

67 I. C. 831 : 23 Cr. L. J. 479 :

3 Lah. L. J. 588.

———S. 361 Expln—"Include" meaning of.

The word "include" in the explanation to S. 361 of the Penal code is not intended to limit the protection which the section gives to parents and minors, but rather to extend that protection by including in the term lawful guardian any person, lawfully entrusted with the care or custody of the minor 24 Mad. 284 foll. (*Scott Smith, J.*) BAZ v. EMPEROR.

3 Lah. 213.

(1922) Lah. 380 : 68 I. C. 620 : 23 Cr. L. J. 588.

———S. 363—Kidnapping—Not a continuing offence.

Kidnapping is not a continuing offence. (*Lindsay, J. C.*) EMPEROR v. GOKARAN

24 O. C. 329 :

64 I. C. 842 : 23 Cr. L. J. 58.

———S. 366—Kidnapping—Minor—leaving home for purpose of illicit intercourse.

Where it is proved that the accused took two minor girls from lawful guardianship with the object of seducing them to illicit intercourse, he

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is guilty of an offence under S. 366 I. P. C. even though it is shown that the girls left their home with the intention of having illicit intercourse with the accused. (*Sanderson, C. J.*) *EMPEROR v. SAJDAR REZA*. 49 Cal. 905 : (1922) Cal. 508

—S. 366—Minor temporarily in custody of third party—Consent of party if a defence to offence

Allowing a child to be in the custody of a servant or friend for a limited purpose or time does not determine the guardian's right to legal possession. Hence kidnapping a child while in the custody of such person and marrying her to another, even if done with the consent of such person, is an offence under S. 366 Penal Code. (*Scott Smith, J.*) *BAZ v. EMPEROR*. 3 Lah. 213 : (1922) Lah. 380 68 I. C. 620 : 23 Cr. L. J. 588.

—S. 366—Offence under—Kidnapping or abduction—Illicit intercourse—Intention—Proof of—Surrounding circumstances.

There are two ingredients of an offence under S. 366 I. P. C. First there must be kidnapping or abduction as defined in S. 361 or 362 I. P. C. and secondly the kidnapping or abduction must be done with the intent or with the knowledge or with the object that certain things will happen as specified in S. 366 I. P. C. The intent with which a woman is abducted or kidnapped is more or less a matter of inference. There may be cases where the matter is capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or abduction had been brought about. Again the circumstances of the case thought incriminating to outward appearances may yet be capable of a perfectly good and reasonable explanation and may be fully compatible with the innocence of the accused. In such cases it would be for the accused to explain away the incriminating circumstances and to prove that he had no improper or sinister object in view. (*Moli Sagar, J.*) *CHANDU SINGH v. EMPEROR*. 5 Lah. L. J. 574 : 67 I. C. 731 : 23 Cr. L. J. 459.

—S. 373—Girl under 16.

It is necessary for the prosecution to prove in a case under S. 373 I. P. C. that the girl is under the age of 16 years. (*Walmesley and Suhrawardy, JJ.*) *ABDUL GOHUR SIKDAR v. EMPEROR*. 26 C. W. N. 972 : 38 C. L. J. 152 : (1922) Cal. 505.

—S. 373—Offence under—Proof of intention or knowledge—Onus.

The onus of proving an offence under S. 373 I. P. C. lies on the prosecution but proof of intention or knowledge, such as is mentioned in the section must be almost entirely a matter of inference from circumstances. Where all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose, the burden of proving that she intended to wait until the age of majority had been reached is on the accused. 12 M. 273 : 18 A. 24 : 23 C. 164 Ref. (*Walmesley and Suhrawardy, JJ.*) *KHETRAMANI DAS v. EMPEROR*. 35 C. L. J. 451 : (1922) Cal. 539.

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—S. 376—Rate—Offence—Proof of—Evidence of complainant.

In cases of rape, it would be quite unsafe to convict an individual merely on the accusation of the woman who had been raped. (*Chevis, J.*) *KANSHI RAM v. EMPEROR*. 67 I. C. 827 : 23 Cr. L. J. 475

—S. 379—Doubt whether act done under a bona fide claim—Conviction not justified.

Where some persons were convicted under S. 379 for cutting certain trees and it was doubtful whether the cutting was done under a bona fide claim. Held the conviction was not justified; they must in any case have the benefit of the doubt. (*Adami, J.*) *MADHUSUDAN DAS v. THE KING EMPEROR*. (1922) P. 12.

—S. 379—Land in cultivatory possession of accused—Ownership of such crops. See (1921) DIG. GOL. 893. *MAHOMED ATA v. EMPEROR*. L. R. 3 A. 1 (Cr) : 67 I. C. 498 : 23 Cr. L. J. 402.

—S. 379—Theft—Bona fide claim of title—Summary trial—Prejudice—Interference.

Where there is a clear plea of bona fide title raised in a case under S. 379, I. P. C., the Magistrate should leave the parties to have their rights determined by a Civil Court. Every attempt should be made by a Criminal Court to maintain the auction-purchaser in possession of the property unless a clear right to possession is established in any other person. Where from the nature of the dispute and particularly from the plea taken by the accused it is obvious that the case involves a complicated question of right and title, the Court should not try the case summarily.

Where a Magistrate tries summarily a case which should not have been so tried, and it appeared that the accused was prejudiced thereby the High Court was not precluded from interfering with the decision merely because the Magistrate exercised his discretion in choosing the mode of trial. (*Jwala Prasad, J.*) *BHIM BAHADUR SINGH v. EMPEROR*. (1922) Pat. 10 : (1922) P. 265.

—Ss. 379 and 426—Theft and mischief—Difference—Bona fide claim to right and possession of trees. See (1921) DIG. COL. 894. *GAINU PANDAY v. EMPEROR*. 68 I. C. 40 : 23 Cr. L. J. 504.

—S. 380—Theft—Essentials of—Property left as security with complainant—Property secured in shop of accused—Opening of shop and taking possession of property—Offence.

Where articles attached by the complainant in execution of a money decree and left in his possession under a bond in form No. 15 A of App. E. C. P. Code were, in claim proceedings subsequently adjudged to the accused, and he, instead of taking delivery thereof through court, broke open the locks of the shop in which they were kept and took forcible possession of them in complainant's absence. Held that, as the accused only took his own property secured in his own shop, and did not intend to cause wrongful loss to complainant or wrongful gain to himself,

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he could not be convicted of theft. (*Phillips, J.*)  
LAKSHMINARAYANA CHETTIAR *In re*.

42 M. L. J. 490 : 16 L. W. 15 : (1922) Mad. 405.

—Ss. 381 and 379—Charge under S. 379  
—Conviction under Ss. 109 and 381—Legality  
of standing by a thief if abetment—Cr. P. Code,  
Ss. 236 and 237 See (1921) DIG. COL. 894 GOVIND  
MAHTO v. EMPEROR. 3 Pat. L. T. 127.

64 I. C. 510 : 23 Cr. L. J. 30

[Same case reported again in 66 I. C. 334  
23 Cr. L. J. 270.]

—Ss. 384 and 385—Extortion levied by  
picketing—Boycott of foreign cloth.

Where the accused picketed the shop of the  
complainant and made him pay a fine for selling  
foreign cloth by threats directed against his business  
explicitly and impliedly against his person,  
they are guilty of extortion under Ss. 384 and 385  
I. P. C. (*Stuart, J.*) CHATAR BHUI v. EMPEROR.  
L.R. 3 A 165 Cr. : 20 A. L. J. 877 : (1922) All. 529.

—S. 392—Sentence of fine only—Illegal.

Under S. 392, a sentence of imprisonment is  
quite essential and hence a mere sentence of fine  
is illegal, (*Mears, C. J. and Banerjee, J.*) BADRI  
PRASAD v. EMPEROR. 44 All. 538 : 20 A. L. J. 388.

4 U. P. L. R. (A) 67 : (1922) All. 245 :

66 I. C. 418 : 23 Cr. L. J. 274.

—S. 395—Dacoity—Essentials of offence  
—Evidence necessary for.

An act of aggression on the part of one of two  
conflicting claimants, does not constitute the  
serious crime of dacoity or robbery. (*Schwabe,  
C. J. and Krishnan, J.*) NARAMBAN *In re*,  
15 L. W. 552 : (1922) M. W. N. 326.  
(1922) Mad. 195.

—Ss. 403 and 405—Criminal breach of  
trust—Essentials of offence—Temporary mis-  
appropriation.

Criminal breach of trust is a series of criminal  
misappropriation by a person entrusted with the  
property misappropriated and a dishonest appropri-  
ation even for a short time is none the less an  
offence. Consequently the offence of criminal  
breach of trust is committed even where the act  
of the accused caused wrongful loss for a time  
only. 8 Bom. L. R. 951 Ref. (*Batten, J. C.*)  
LOCAL GOVERNMENT v. MADHO. PATWARI.

23 Cr. L. J. 557 : 68 I. C. 157.

—S. 403—Criminal misappropriation—  
Marriage presents.

A general proposition, that whenever marriage  
negotiations break down the relatives of the lady  
have a right to retain the presents made with a  
view to the marriage, cannot be laid down. The  
element of dishonesty on the part of the accused  
has to be proved beyond doubt (*Walmsley and  
Sunrawardy, JJ.*) NASIR KHAN MISTRI v. FYAZ  
HOSSAIN. (1922) Cal. 57

—S. 403—Wandering cow—Taking pos-  
session of—Offence—Rights and liabilities of  
finder.

A person finding a property of which, from  
nature of it there must be an owner, must take  
reasonable care of it and endeavour to find out

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the owner, but he is not bound to adopt extraor-  
dinary means for the discovery nor is he bound  
to be out of pocket in discovering the owner  
by means of advertisement. Where the accused  
person took possession of a wandering cow of  
which no owner could be discovered he is not  
guilty of an offence under S. 403 I. P. C. (*Iwala  
Prasad, J.*) SARAJUL HAQUE v. EMPEROR,  
67 I. C. 497 : 23 Cr. L. J. 401.

—S. 406—Criminal breach of trust—  
Duty of prosecution—Entrustment—Proof of. See  
(1921) DIG. COL. 896 GOWRI NARAIN BARUA v.  
TILBIKRAM CHETRI. 65 I. C. 1004 :

23 Cr. L. J. 220.

—S. 406—Pledge—Sub pledge by pledgee if  
an offence.

In the absence of a contract to the contrary, it  
is open to a pledgee to make a sub pledge of the  
property pledged and if he does so, he does not  
commit an offence under S. 406, I. P. C. (*Wazir  
Hasan, A. J. C.*) SARJU PRASAD v. EMPEROR,  
90 L. J. 421 : (1922) Oudh 280.

—S. 408—Breach of trust—Duty of  
claim of right.

It is not for the Criminal Court to usurp the  
functions of a Civil Court and assist a complainant,  
in recovering from the person to whom they were  
disposed of goods which were made over to the  
accused to dispose of, merely because the accused  
did not dispose of them in accordance with the  
instructions given to him. Where a person  
entrusted with the sale of jewellery pledges them  
in good faith so as to raise money, he cannot be  
convicted of an offence under S. 408 I. P. C. as  
possession of the jewellery was rightly obtained  
and bona fide parted with. (*Pratt, J.*) R. M. P.  
A. ANNAMALAI CHETTY v. BASCH.  
65 I. C. 1000 : 23 Cr. L. J. 216 : (1922) L. B. 17.

—S. 409—Breach of trust by agent—Dis-  
posal of property entrusted for sale—Recovery of.

Where the owner of a sewing machine gives it  
to an agent to be sold for money and the latter  
pledges it, it is not open to a Criminal Court to  
order the pledgee to deliver possession of the  
machine to the owner on the ground that the agent  
had exceeded his authority (*Macgregor, J.*)  
SINGER SEWING MACHINE CO. v. YEN KUN.  
1 Bur. L. J. 45.

—S. 411—Possession of stolen property and  
wearing it—Failure to explain the source.

Where the accused was found wearing some of  
the stolen articles while some other articles  
were found in his possession soon after the  
theft, and where he sold stolen property  
and received his share of the price but could  
not properly explain how they came into his  
possession and admitted that he had received  
them from a person convicted of theft. Held:  
the accused was guilty of receiving stolen  
property knowing it to be stolen (*Abdul Quadir,  
J.*) ABDUL RAHMAN v. EMPEROR,  
(1922) Lah. 80.

—S. 411—Receiving stolen property—  
Father and son living together—Conviction of



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both. See (1921) DIG. COL. 897 EMPEROR v. FARRUKH HUSAIN, 67 I. C. 588 : 23 Cr. L. J. 423.

—S. 411—*Receiving stolen property—Possession of wife—Conviction of husband.*

In the absence of anything to connect the husband with the possession of stolen property, he cannot be convicted of an offence under S. 411, I. P. C. in respect of stolen property found in the possession of his wife, (*Stuart, J.*) KHUSHI RAM v. EMPEROR. L. R. 3 A. 17 Cr. : 20 A. L. J. 162 : 4 U. P. L. R. (A) 14 : (1922) A. 83 : 67 I. C. 338 : 23 Cr. L. J. 386

—S. 411—*Stolen property—Joint possession—Master and servant.*

Where certain stolen articles were found in a Nohara of which the accused was joint owner and which was at that time in the charge of a disreputable person, the accused cannot be convicted under S. 411, I. P. C. (*Shadi Lal, J.*) GANESHI LAL v. EMPEROR. 4 Lah. L. J. 484

—Ss. 415 and 420—*Cheating—Property—Examination Certificate*

The necessary ingredients of cheating are (1) deception of any person and (2) (a) fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property; or (b) intentionally inducing that person to do or omit to do any thing which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind reputation or property. Where an accused gets a certificate from an Inspector of schools on a false representation, he is no doubt guilty of deception but the second ingredients on the offence as aforesaid is wanting and he cannot be convicted of cheating. (*Dhobley, A. J. C.*) LOCAL GOVERNMENT v. GANGARAM. 18 N. L. R. 52 : (1922) Nag. 229 : 67 I. C. 619 : 23 Cr. L. J. 443

—Ss. 417 and 420—*Cheating—Taking complainant to another village on pretence of buying a buffalo and obtaining deed of divorce when intoxicated—Jurisdiction of Second class Magistrate to try.* See (1921) DIG. COL. 897. BAKHTAWAD SINGH v. EMPEROR, 67 I. C. 583 : 23 Cr. L. J. 428.

—S. 417—*Essence of offence—Place of trial—Criminal misappropriation, how distinct* See CR. P. CODE S. 179. 67 I. C. 623.

—S. 420—*Cheating—Evidence of.*

To establish an offence under S. 420 I. P. C. it is necessary to show that deception has been practised and that by that deception a person has been fraudulently or dishonestly induced to part with property, (*Lyle, A. J. C.*) MOHAN v. EMPEROR. 23 Cr. L. J. 664 : 69 I. C. 152

—S. 420—*Cheating—Essentials of offence—Dishonest intention.*

To constitute cheating within S. 420 I. P. C. there must be proof of a fraudulent or dishonest intention at the time of the commission of the act alleged as an offence. (*Prideaux, A. J. C.*) JAFFER AYUB KATCHI v. EMPEROR. (1922) Nag. 195 : 67 I. C. 621 : 23 Cr. L. J. 589.

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—S. 420—*Cheating—Inducing by false personation to part with property and subsequently offering to credit the value thereof against sum due under an alleged contract unfulfilled.* See (1921) DIG. COL. 898 ASWINI KUMAR CHATTERJEE v. EMPEROR 65 I. C. 1005 : 23 Cr. L. J. 221

—S. 423—*Essentials of—"Fraudulently" meaning.*

"Fraudulently" in S. 423 of the Penal Code does not connote deprivation of property. It is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same. (*Teunon and Ghose, JJ.*) LEGAL REMEMBRANCE v. AHI LAL MANDAL. 66 I. C. 996 : 23 Cr. L. J. 340 : 48 Cal. 911.

—S. 425—*Mischief—Wrongful loss—Unlawful means—Digging a trench so as to remove lateral support to a wall.* See (1921) DIG. COL. ATHI IYER *In re*. 68 I. C. 831 : 23 Cr. L. J. 607.

—S. 425—*Scope of—Destruction of one's own property—No wrongful loss to another.*

The principal ingredient of an offence under S. 425 is that there must be an intention to cause wrongful loss or damage to the public or to any person, of the property in question belongs to the accused himself, no offence of mischief can be committed, (*Jwala Prasad and Coultis, JJ.*) RAM KRISHNA SINGH v. EMPEROR

3 Pat. L. T. 335 : (1922) P. 197 : 66 I. C. 817 : 23 Cr. L. J. 321.

—Ss. 426 and 447—*Mischief—Criminal trespass—Criminal intention—Absence of.*

To sustain a conviction under Ss. 426 and 447 I. P. C. the presence of a criminal intention is necessary. (*Abdul Kadir, J.*) BENARI DAS v. EMPEROR. 53 P. L. R. 1922.

—S. 430—*Offence under—Mischief—Erecting a bund across a channel.*

Where the accused was charged under S. 430 I. P. C. for having erected a bund across a channel flowing through his land with the result that the supply of water to the complainant's land was reduced. Held that in the absence of a claim of easement or contract for the supply of water by the complainant, the accused could not be convicted. (*Krishnan, J.*) BUDDA REDDI *In re*.

69 I. C. 95 : 23 Cr. L. J. 655 : 16 L. W. 793 : 31 M. L. T. 421 (H. C.)

—Ss. 445 and 457—*Offence under S. 457—Elements of—"Fastened" meaning of.*

The entry of the accused into a house by merely pushing the shutters of the door does not come under any of the 6 clauses of S. 445 I. P. C. defining house breaking. The door could not be said to be fastened when its shutters were merely closed. The term "fastened" implies something more, such as chaining the shutters or tying them with a rope or bolting them or locking the door. The accused's conviction under S. 457 I. P. C. could not stand. (*Dhobley, A. J. C.*) LEDGAR v. EMPEROR. 23 Cr. L. J. 278 : 66 I. C. 422.

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—S. 447—*Essentials of.*

S. 447 requires it to be affirmatively and positively proved that the complainant was in possession of the land in dispute with respect to which criminal trespass is said to have been committed. (*Jwala Prasad J.*) PARMESHWAR LALL MITTER v. EMPEROR, 3 Pat. L. T. 347 :

(1922) P. 296 : 67 I. C. 618 : 23 Cr. L. J. 440.

—S. 447 — *Essentials of offence — Annoyance or insult*

The main ingredients of S. 447, I. P. C., is that the trespass must be with the intention of annoyance or insulting someone, or must be with the intention of committing an offence. Where there is nothing on the record to show any such intention the conviction of a criminal trespass is impossible. (*Sultan Ahmed, J.*) DAMODAR DAS v. EMPEROR, 65 I. C. 446

3 Pat. L. T. 499 : 23 Cr. L. J. 95.

—Ss. 457 and 451—*House breaking and house trespass—Difference.*

Where the accused was found inside a house at night with the intention of committing theft, but the evidence showed that the door of the house entered was neither chained nor locked, and there was no evidence that accused entered by any other passage; *Held*: that, as entry into the house by merely pushing in the shutters of the door does not come under any of the six clauses of S. 445 of the Penal Code which defines "house breaking", the accused's conviction under S. 457 cannot stand. The act falls under S. 451 I. P. C. (*Dhobley, J. C.*) LADGA v. EMPEROR.

(1922) Nag. 27

—S. 460—*Applicability of — Death caused by some of the companions of accused—Retreat after house trespass.*

The accused and certain others committed house trespass by night and were retreating on being detected. While they were running away a neighbour caught hold of the accused and some of his companions inflicted injuries on the neighbour of which he died immediately. *Held* that the accused was not guilty of an offence under S. 460 I. P. C. The section must be limited in its application to offences committed at the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time. (*Abdul Qadir, J.*) MAHOMED v. EMPEROR, 2 Lah. 342.

65 I. C. 628 : 23 Cr. L. J. 164.

—Ss. 464 and 465—*Making of false document—Addition to entries in account book.*

Every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within S. 464 and the false document must have the character or tendency described in S. 463 I. P. C. An entry in his books by the creditor making an assertion of a right to interest not purporting to have been agreed to by the debtor does not constitute an offence under Ss. 464 and 465 I. P. C. (*Scott Smith, J.*) BADAN SINGH v. EMPEROR.

3 Lah. 373.

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—Ss. 467 and 471—*Forgery — Conviction—Comparison of handwriting—Opinion of Judge.*

A conviction for forgery should not safely be based entirely upon a comparison of the handwriting. But the Court is competent to see for itself whether certain handwritings placed before it are similar or not. (*Jwala Prasad and Adam, JJ.*) UDHAB SANTARA v. EMPEROR.

65 I. C. 428 : 23 Cr. L. J. 74

—S. 467—*Forgery of valuable security—Receipt of money order—False signature.*

Accused No. 1 was the creditor of a person for Rs. 88. To pay off his debt the debtor got out the sum from his father by a postal money order drawn in his name. When the money order arrived at the place, accused No. 1 received the money direct from the postman and had the acknowledgment signed by accused No. 2 under the representation that accused No. 2 was the payee. Neither accused informed the debtor of the money order or the receipt of money:—

*Held*, that the accused were guilty of forging a valuable security, e. g., the money order acknowledgment, an offence punishable under S. 467 of the I. P. C. (*Macleod, C. J. and Shah, J.*) EMPEROR v. JOGIDAS BABU.

24 Bom. L. R. 99 : (1922) Bom. 82 :

66 I. C. 328 : 23 Cr. L. J. 264.

—S. 477 A—*Forgery—False entries in accounts to cover misappropriation.*

Where it is found that the accused made false entries in the accounts to cover his own defalcations he cannot be convicted under S. 477 A I. P. C. 19 All. 305 : 5 A. 532 : 8 A. 653 : 5 A. 221 foll. (*Gokul Prasad, J.*) SHUJA-UD DIN AHMAD v. EMPEROR, 20 A. L. J. 662 : L. R. 3 A. 143 Cr. (1922) All. 435 : 68 I. C. 834 : 23 Cr. L. J. 610.

—S. 494—*Bigamy — Daughter married by mother without father's knowledge—Subsequent marriage arranged by father. See (1921) DIG. COL. 901 GAJJA NAND v. EMPEROR.*

2 Lab. 288 : 64 I. C. 500 : 8 P. L. R. 1922 : (1922) Lah. 139 : 23 Cr. L. J. 20.

—S. 494—*Bigamy—Mahomedan law — Ahamadiyans—Apostacy—Remarriage.*

The Ahamadiya faith is within the pale of Mahomedanism and a Mussalman who embraces the Ahamadiya faith does not become an apostate. Where a Mahomedan husband becomes an Ahamadiya and thereafter the wife treating him as an apostate marries another, she is guilty of bigamy. There is no question of the application of *Mens rea* in the case of offences under S. 494 I. P. C. (*Oldfield and Krishnan, JJ.*) NARANTA KATH AVULLAH v. PARAKKAL MAMMU.

43 M. L. J. 663 : 16 L. W. 626.

—S. 498—*Offence under—Complaint by husband—Contents of. See (1921) DIG. COL. 902. BRAHMA DAT v. EMPEROR.*

64 I. C. 134 : 22 Cr. L. J. 742.

—S. 499 — *Defamatory statements — Privilege—Pleadings.*

There is no absolute privilege in respect of defamatory statements in pleadings in India.

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23 C. 867 foll. 38 C. 880; 14 C. L. J. 31; 14, B. 97; 3 A. 815; 48 C. 388 Ref. (*Chatterjee and Suhrawardy, J.*) *DHIRO KOCH v. GOBINDA DEV.* 65 I. C. 204.

## —S. 499 Exception 9—Defamation—Complainant—Privilege—Extent of.

Exception 9 to S. 499 I. P. C. can only afford protection. When the defamatory statement has been made in good faith for the protection of the interests of the person making it or of any other person or for the public good. A complainant making an insolent and gratuitous statement—imputing immorality to a woman, cannot possibly bring himself within that exception, because it cannot be said that the statement he made was made in good faith for the protection of himself or of any other person or for the public good. Nor can the protection which is given upon principles of public policy to a witness be given to a complainant who when asked by the Magistrate to state his grievance deliberately makes a defamatory statement without any justification. (*Macleod, C. J. and Kanga J.*) *DINSHAJI EDALJI v. JEHangIR* 24 Bom. L. R. 400 : (1922) Bom. 381 69 I. C. 94 : 23 Cr. L. J. 654.

## —Ss 499 (Excep 9) and 500—Defamation—Plea of bona fides.

The terms 'pichlag' and 'lawaris' do not mean an illegitimate child and are not defamatory.

In a contest relating to an office, such an allegation made to disqualify the rival candidate would be covered by Exception 9 to S. 499 Penal Code. (*Abdul Kadir, J.*) *THAKARIA v. PURAN SINGH*, (1922) Lah. 452 (2) : 67 I. C. 589 : 23 Cr. L. J. 429.

## —S. 499 Excep. 9—Defamation—Good—faith—Privilege.

There is no absolute privilege in respect of statements made in Court. The accused must show that the imputations were made in good faith and for his own protection. This is a matter of evidence. (*Walmsley and Suhrawardy, J.*) *BANGA CHANDRA DE v. ANNODA CHARAN CHOWDHURY*. 35 C. L. J. 527. (1922) Cal. 76

## —Ss. 500 and 504—Defamation—Badmash—Berman—Offensive epithets.

A person calling another a "badmash" and "beiman" is guilty of an offence under S. 504 I. P. C. and not under S. 500 I. P. C. (*Martineau, J.*) *BAKHTAWAR LAL v. EMPEROR*.

51 P. L. R. 1922 : 4 Lah. L. J. 480 : (1922) Lah. 459 (1)

## —S. 500—Excommunication from caste—Publication—Defamation.

Where a number of persons professing a particular faith met together and resolved for proper reasons not to associate with a person excommunicated by their religious head and sent a copy of the resolution to the person in question it does not amount to defamation. (*Pratt, J.*) *NAG ON THIN v. EMPEROR*. 1 Bur. L. J. 39 : 66 I. C. 80 : 23 Cr. L. J. 240

## —S. 504—Kirar—Arora styled as—Offence.

## PENSIONS ACT (1871), S. 7.

Aroras belong to the Kirar caste. Though the word Kirar may sometimes have a somewhat contemptuous signification and though the Aroras may not be pleased to be called so, still calling an Arora, a *kirar* under provocation is not an offence. The affair is a trivial one and should never have been brought before the court. (*Chevis, J.*) *MAHOMED BAKHSH v. EMPEROR*.

4 Lah. L. J. 230 : (1922) Lah. 45 : 65 I. C. 635 : 23 Cr. L. J. 171.

—S. 506—Criminal intimidation—Deterrent sentence—When justified See (1921) DIG. COL. 904. *GOSSAIN MISER v. EMPEROR*. (1922) Pat. 14. (1922) P. 267.

## —S. 511—Attempt—Offence—What constitutes—Impossibility of performance of act attempted—Effect of.

The real difficulty in distinguishing between preparation and attempt arises in determining where a given act or set of acts passes from the former stage into the latter. Where the commission of an offence requires the performance of a series of acts and the person commences this series with the view to carry it out to its completion, he has in the language of S. 511, I. P. C., done an act towards the commission of the offence in the attempt to commit the offence. 2 A 105 Ref.

*Per Batten, J. C.*: It is now settled law that an attempt is possible even when the offence attempted cannot be committed. (*Drake Brookman and Batten, J. C.*) *SHIAMJI v. EMPEROR*.

5 N. L. J. 16 : (1922) Nag. 40 : 65 I. C. 994 : 23 Cr. L. J. 210.

## —Ss. 511 and 420—Attempt—Preparation—cheating.

There is a wide difference between the preparation and an attempt to commit an offence. Preparation consists in devising or arranging means necessary for the commission of an offence while an attempt is the direct movement towards the commission after the preparations are made. In the case of a mere preparation the Court assumes that better reason would prevail at any moment and the man would change his intention to commit a crime before the actual consummation hereof. Where a clerk in a Railway company to weigh goods entered the gross weight of certain goods at a figure above its actual weight in a register but had not filled up other particulars fixing liability upon the railway company, the writing of the false figure constituted a mere preparation for commission of the offence of cheating and was therefore not punishable. (*Jwala Prasad, J.*) *LAKSHUMI PRASAD v. EMPEROR* 65 I. C. 492 : 23 Cr. L. J. 103.

## PENSIONS ACT. (XXIII of 1871) S. 6—Applicability of Rights—Funeral expenses out of jagir income.

S. 6 does not apply to a suit for declaration that funeral expenses cannot be claimed to be paid out of income of a Jagir. 72 P. R. 1889 Ref. to. (*Chevis, J.*) *ASAD ALI v. MT. SHARIF-UR-NISSA*. 1922 Lah. 365.

## —S. 7—Pension—Attachment of, when permissible.

**PENSIONS ACT (1871), S. 11.**

A pension is ordinarily not attachable for sale in execution. If the decree-holder wants to bring this within the exception and show that this individual's pension happened to be attached for sale he should have done so by appropriate proof (*Mears C. J. and Ryves, J.*) **MAZHAR ALI KHAN v. MAHFAZ HASAN.** 44 All 697 :

20 A. L. J. 679 · L. R. 3 A 469 :  
(1922) All. 429 : 68 I. C. 854.

—Ss. 11 and 12 — *Pension, What is — Endowment by Moghul Emperor — Subsequent management by the British — Allowance to descendants — Not assignable.*

An endowment made of the revenue of some villages by Akbar in favour of the descendants of a famous Saint, was taken over for management by the British Government, and out of the funds a portion was directed to be paid regularly in perpetuity to the descendants of the Saint. A suit was brought by the plaintiff to enforce his rights on a mortgage of this allowance by a descendant of the suit, *Held*, it was a pension within the meaning of S. 11 of the Pensions Act and as such the assignment was null and void under S. 12. 4 Bom. 432, followed (*Lindsay and Gokul Prasad, JJ.*) **HARNAM DAS v. FAIYAZI BEGAM.**

44 A. 354 (1922) All. 22 L. R. 3 A. 130 ·  
20 A. L. J. 172 : 65 I. C. 645

**PLEADER**—See **LEGAL PRACTITIONER.**

**PLEADINGS**—Alternative case—Suit for right of way on allegation that a lane belonged to plff.—Claim of easement can be allowed where the plea of ownership is not substantiated See (1921) Dig. Col. 912 **DHARAMDAS KAUSALYDAS v. RANCHHODJI DAHYABHAI,** 46 Bom. 200 ·  
(1922) Bom. 199 : 64 I. C. 517.

—Amendment — Legal representative of deceased plaintiff—Not to be allowed to set up a claim not open to original plaintiff. See C. P. CODE, O. 6, R. 17. 15 L. W. 72.

—Case not set up in plaint—Not to be accepted in appeal—Practice—Remand—Amendment of plaint—opportunity to defendant to raise defences and let in evidence, See **PRE EMISSION.** 20 A. L. J. 464.

—*Inconsistent case—When allowed and when disallowed—Reason of the rule—Ejectment*

Neither party to a litigation can be allowed to set up at the hearing an entirely new and inconsistent case. 11 M. I. A. 7 and N. W. Ry. Co. v. *Electrotype Co., Ltd.* (1914) A. C. 461. Ref.

The reason for the rule has been stated to be in substance that the parties might otherwise be seriously prejudiced. The plaintiff might have received no notice that the point would be raised by the defendant and would presumably be not prepared with the necessary evidence, and conversely, the defendant might be seriously embarrassed if the plaintiff were permitted to spring a surprise upon him in the shape of a new case. Consequently when an objection of this kind is taken, the test to be applied is whether the party aggrieved has really been taken by

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surprise. (*Mookerjee and Panton, JJ.*) **GONDLI BIBI v. JOYLAH ABDIN.** 26 C. W. N. 294 :  
35 C. L. J. 103 · (1922) Cal. 254.

—Limitation — Facts necessary for—Not pleaded or issue raised—If entertainable in second appeal See **LIMITATION.** 1 Pat. 23.

—No plea Set up and no issue framed—Court if can find on point. See C. P. CODE, O. 8, R. 2. (1922) Pat. 154.

—Alternative case — Suit on tenancy—Decree on the strength of permissive possession

The mere fact that the plaintiff has failed to prove the particular tenancy set up by him is no bar to his getting a decree on showing that the possession of the debt was permissive and not adverse as pleaded by him 25 A. 256 ; 24 A. 90 Ref. (*Kanhaya Lal and Sulaiman, JJ.*) **BALKISHAN v. RAGHUBAR DAYAL** L. R. 3 A. 485.

—New case—Not to be set up, unless pleaded.

Where a mortgagee of joint family properties brings a suit to enforce the mortgage on the ground that it was executed for necessity he cannot set up on appeal a new case that as the defendants had not been born on the date of the mortgage they could not dispute its validity. (*Piggot and Sulaiman, JJ.*) **RAM RATAN MISIR v. KAPIL DEO SINGH** L. R. 3 A. 541.

—New case—Suit for possession—Mortgage challenged as fraudulent—Redemption.

Where a plaintiff has sued for possession on the ground that a mortgage of the property was fraudulent and void and fails in proving his case he cannot turn round and change his case and claim redemption, on the footing that the mortgage is good and enforceable, 17 C. W. N. 219 ; 5 C. L. J. 527 ; 5 C. L. J. 653 ; 3 C. W. N. 325 Ref. (*Chatterjee and Pearson, JJ.*) **NITYA GOPAL TEWARY v. RAMSAMI ROY.** 67 I. C. 394.

—Notice to quit—Allegation in plaint—No specific denial in written statement—Admission of sufficiency of notice—Waiver of objection to notice. 1 Bur. L. J. 87.

**POLICE ACT (V of 1861)**—Nature of suit—Suit for recovery of property—Offer to pay moneys found to be binding on estate See (1921) Dig. Col. 906 **AMMALU AMMAL v. K. A. KRISHNA NAIR.** 30 M. L. T. 38.

—S. 29—Overstaying leave by police officer—Reasonable cause—Conviction. See (1921) Dig. Col. 906, **JAGADISH CHANDRA BOSE v. EMPEROR.** 66 I. C. 67 : 23 Cr. L. J. 237.

—S. 29—Unreasonable order of transfer not complied with—Another order served—Prosecution for disobedience of the first order—Conviction if legal.

Where a police officer was served with one order of transfer and then with another order which he could reasonably have construed as cancelling the previous order and did not comply with the first order, he could not be convicted of wilful breach or neglect of a lawful

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order made by a competent authority. (*Das, J.*)  
**PARMANAND LAL v THE KING EMPEROR.**  
 (1922) P. 207.

—Ss. 30 and 32—*Resistance execution of law or any legal process—Offence created by statute—Bye Law—Force of—Notification under the Police Act prohibiting meetings in general.*

Per *Mullick and Coutts, JJ.* (*Das, J.*, dissenting) the words of S. 30 of the Police Act are sufficiently general to enable the superintendent of Police to issue a general notification containing a prohibition against conveying or collecting assemblies or directing or promoting processions without a license. If the person or persons against whom the notice is directed convenes or collects an assembly or promotes or directs a procession without license he or they will be punishable under S. 32 of the Act.

There is nothing in the Act which renders a person liable to punishment for joining an assembly or procession which has already been convened or collected, if he has no notice that the convenor or promoter has omitted to take out a license; but if after becoming aware that the person whose duty it was to take out a license has failed to do so, he persists in remaining with the assembly or procession then it may be said that he shares the common object of such persons to resist the execution of the Superintendent's order. His conduct may then amount to an offence under S. 141 I. P. C.

When a notification is issued by an executive authority in exercise of a power conferred by statute, that notification is as much a part of the law as if it had been incorporated within the body of the statute at the time of its enactment. The command is in every respect, a command by the appropriate legislative authority (*Mullick, Coutts and Das, JJ.*) **EMPEROR v. ABDUL HAMID.**

3 Pat. L. T. 585 (1922) Pat. 274 :  
 4 U. P. L. E. (Pat.) 79 : 68 I. C. 945 :  
 23 Cr. L. J. 625

—S. 42—*Illegal arrest—Excise officer—Trial.*

Where a complaint is made against a police sub-Inspector for illegal arrest within the period of limitation prescribed by S. 42 of the Police Act, the trial can proceed in spite of the section. (*Lindsay, J.*) **SHANKAR LAL v. EMPEROR.** (1922) All. 264 :  
 65 I. C. 433 : 23 Cr. L. J. 81.

**POSSESSION—Actual possession not possible—Effect.**

If a land is such over which nobody can exercise possession, possession would ordinarily follow title. (*Coutts and Das, JJ.*) **LALA GIRJ PRASAD v. JUGUL KISHORE.** (1922) P. 503.

—Meaning of—If equivalent to actual user—Cases of waste, jungle and diluviated lands. See LIM. ACT, ART. 142.

26 C. W. N. 724.

**POSSESSORY RIGHT—Heritability.**

The possessory right of a trespasser is heritable. (*Wazir Hasan, A. J., C.*) **GHULAM SARWAR KHAN v. MAHOMED ALI KHAN.** (1922) Oudh. 98 : 65 I. C. 398.

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**POSSESSORY TITLE—Good against all but true owner**

Whether possession originated lawfully or not the person in possession is entitled to the property and the trees thereon as against all the world except the true owner. (*Broadway, J.*) **SIDHU v. DHANNA.** 2 Lah. L. J. 271 :  
 67 I. C. 948.

**POWER OF ATTORNEY—Construction—Strict construction—Power to sign a mortgage—Power to contract debt.**

Powers of attorney should be strictly construed. A power to sign a mortgage does not carry with it a power to contract a debt on a mortgage or enter into the transaction but a power to execute a mortgage carries with it the power to enter into the transaction itself. 6 C. L. J. 493 dist. (*Coutts and Das, JJ.*) **RAM LAL SINGH v. MT. BIBI SHAHRUNNISA.** 3 Pat. L. T. 442 : (1922) P. 559 :  
 67 I. C. 315.

**PRACTICE—Abandonment of plea—If can be raised again on appeal. See (1921) Dig. Col. 907.**  
**GHULAM SARWAR v. NAYAZ ALI.** 64 I. C. 185.

—Abandonment of point—If can be raised again.

Where a party abandons any point of appeal he cannot be allowed afterwards to take up a point once abandoned. Where therefore the only point raised was a point of limitation which was decided against the appellant, he cannot be allowed to raise a new point of estoppel. (*Pratt and Fawcett, JJ.*) **DODDAVA v. YELLAWA.** (1922) Bom. 233.

—Adjournment granting of—Payment of money on condition precedent—Effect of failure to pay.

On a suit coming on for hearing, an adjournment order was made conditional on payment of a certain sum of money and "If the money is not paid by 1st June the suit will be dismissed with costs". The sum was not paid and the contention being, raised that the suit became *ipso facto* dead, held, that if the order of adjournment contained the words "In default the suit will stand dismissed" no further order would have been necessary, but as it stood, a further order of court was necessary before the suit was treated as dead. (*Greaves, J.*) **SEWRATAN v. KRISTO MOHAN SHAW.** 48 Cal. 802 : (1922) Cal. 320 : 66 I. C. 481.

—Adjournment—Refusal—Prejudice—Retrial.

Where on the day to which a small cause suit had been posted for trial both parties applied for time on the grounds that one of the material witnesses was unwell, that another had not brought the documents summoned, and that a third had not been served, and the court refused the adjournment and tried the case on the merits, held that it was a proper case for the grant of an adjournment and there should be a retrial. (*Suhrwarder and Cuming, JJ.*) **KHETRA NATH DAS v. MAHANANDA DAS.** 65 I. C. 599.

—Admission by counsel—Liability.

Per *Fawcett J.* Parties are bound by admission of their counsel, unless he has been induced or

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misled by some circumstances to make a statement under a mistake. (*Pratt and Fawcett, JJ*)  
DODDAVA v. YELLAWA. (1922) Bom. 233.

— — — Appeal—Delay in presentation—Ex parte order excusing delay—Delay of respondent to get order vacated by motion. See LIM ACT, S. 5.  
16 L. W. 662

— — — Appellate Court—New plea when allowed.

An appellate Court will not allow a new point to be raised before it for the first time when it involves the taking of fresh evidence. (*Ryves and Gokul Prasad, JJ*) AJODHIA PRASAD v. MT MAJIDAN.  
L. R. 3 A. 49 : 20 A. L. J. 92 :  
(1922) All 346 : 64 I. C. 932

— — — Appellate court—New plea—Question of law—Interpretation of document.

A question depending on the interpretation of a cause in a deed is one of law and may be raised for the first time on appeal. (*Robinson, C. J. and Macgregor, J.*) KO THINE v. ISMAIL CASSIM MORAD.  
1 Bur. L. J. 117 : 68 I. C. 887

— — — Appellate Court—New question of fact—When allowed.

Where a will was never set up either in the pleadings, at the hearing or in argument in the Court below, nor put forward even in the ground of appeal, an appellate court would not entertain it, the question being one of fact which the respondents had no opportunity to meet. (*Daniels and Lyle A. J. C.*) KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD. 9 O. L. J. 235 : 25 O. C. 189.  
(1922) Oudh 236

— — — Contempt—Contempt of Subordinate Court—Power of High Court to take action. See CONTEMPT.  
24 Bom. L. R. 16.

— — — Costs—Proportionate costs—Mofussil and High Court—Difference See COSTS.  
68 I. C. 664.

— — — Costs—Costs not following the event—Erroneous exercise of discretion—Interference on appeal. See C. P. CODE, S. 35.  
64 I. C. 962

— — — Costs—Omission to bring proper provision of law to the notice of court—Disallowance of costs.

In this case the Judicial Committee disallowed costs to the successful appellant on the ground that he had failed to place before the High court the provision of the statute which entitled him to the relief claimed. (*Lord Buckmaster*). NATHU KHAN v. THAKUR BURTONATH SINGH  
42 M. L. J. 444 : 20 A. L. J. 301 :  
26 C. W. N. 514 : L. R. 3 (P. C.) 82 :  
24 Bom. L. R. 571 : 15 L. W. 635 :  
(1922) M. W. N. 323 : 35 C. L. J. 417 :  
(1922) P. C. 176 : 66 I. C. 107 (P. C.)

— — — Costs—Wrong procedure and dilatoriness—Depriving successful appellant of costs. See PRIVY COUNCIL—COSTS. 20 A. L. J. 476 (P. C.)

— — — Costs—Divorce—Husband's liability for wife's costs. See DIVORCE. 66 I. C. 494.

— — — Judgment—Statements made as to admissions made during trial—Appellate Court not to

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lightly ignore such admissions. See (1921) DIG. COL 910 SARAT CHANDRA MAITI v. BIBHABATI DEBI. 66 I. C. 433.

— — — Courts if can take notice of later events.

A court of law can take notice of subsequent events and do justice as between the parties. (*Mukerjee and Buckland, JJ.*) DINANATH MAHISH v. NABAKUMAR HAJRA. 35 C. L. J. 832

— — — Court fee—Calculation of—Long standing practice not to be departed from. See COURT FEES ACT, SS. 7 AND 17. (1922) Pat 79.

— — — Court hours in the United Provinces—Court dismissing case after 5 p. m., without notice to litigants—Material irregularity—Revision.

The usual court hours in the United Provinces have been fixed by the High Court to be between 10 30 a. m. and 4 p. m. and they cannot be altered without special sanction. This does not however fetter the discretion of subordinate courts, as for example to sitting after 4 p. m. to conclude the hearing of a particular case when it also suits the convenience of parties concerned.

Where however without any special reason or notice to the parties, the court took up a fresh case after 5 p. m. and dismissed it because plaintiff was absent, held it was a fit case for the interference of the High Court in revision. (*Piggott, J.*) BEVIS AND CO. v. RAM PRASAD  
44 All. 325 : 20 A. L. J. 138 : L. R. 3 A. 25 :  
(1922) All. 72 : 66 I. C. 167.

— — — Criminal appeal—Charge found to be false pending appeal—Instructions to government Pleader not to support—Conviction, valid—Appeal to proceed unless withdrawn See CRIMINAL TRIAL. L. R. 3 All. 2 Cr.

— — — Cross—Examination, stopping of—when improper.

The Courts have full power to prevent any abuse of the rights of cross-examination, in any manner appropriate to the circumstances of the case, but before passing an order stopping further cross-examination, it must satisfy itself that questions were being asked which could not affect the result of the suit, in short that the right of cross-examination was being abused. (*Daniels, A. J. C.*) BANKE LAL v. KANHAIYA LAL. (1922) Oudh 124.

— — — Delay in presenting appeal—Objection when to be taken See LIM. ACT, S. 5.  
16 L. W. 662.

— — — Document wrongly admitted by lower court—High Court in second appeal not to decide if there is other evidence to justify decree.

Where a document has been wrongly admitted by the courts below, it is not possible in second appeal for the High Court to say whether apart from that document there is sufficient evidence to justify the decree. That is a matter which must be considered by the lower court. 7 Cal. 293 reld to. (*Mookerjee A. J. C and Fletcher, J.*) UJIR ALI SIRDAR v. SHADHAI BEHARA. 35 C. L. J. 183 :  
(1922) Cal. 185 : 68 I. C. 1003.

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—English law—Principles applicable in the absence of statute—Justice equity and good conscience, *See* EQUITY (1922) Pat. 85

—Evidence—Party's absence from witness box.

Where the Small Cause Court dismissed plaintiff's case on the ground that he avoided going into witness box, without considering the evidence in the case, the High Court reversed its decision. (*Jwala Prasad, J.*) JANGI MAHATO v. MUNI MAHTO. (1922) P. 39.

—Ex-Parte order—Notice necessity of.

When a widow of one of the decree-holders got her name recorded in place of her husband without notice to other decree holders and when the other decree holders applied to be heard as to whether the order was wrong. *Held*: that the court is bound to decide whether the ex-parte order was correct. (*Macleod C. J. and Coyajee, J.*) MOHANLAL AMRIT LAL v. BAI MAHAJAVERI. (1922) Bom 280

—Fund in Court—Jurisdiction of another Court to deal with *See* (1921) DIG COL. 909. BINODE BEHARY BOSE v. HIRA SINGH.

64 I. C. 308

—Inconsistent pleas—Not allowed.

Where in pursuance of a compromise between the parties, the plaintiff got possession of the suit properties and the terms of the compromise were even subsequently enforced by courts of law as between them.

*Held*, that the defendants were precluded from disputing the title of the plaintiff to the lands by virtue of the compromise entered into by them with the plaintiff, and by virtue of which the plaintiff was put in actual possession of the lands and remained in possession for about 17 years, (*Walmsley and Ghose, JJ.*) JOGENDRA NATH BHO-MICK v. DINANATH DASS (1922) Cal. 313.

—Insolvency—Questions of title—Decision had on, to be arrived at *See* PRO. INS. ACT, S. 4. L. R. 3 A. 285.

—Issues—Necessity for defining at early stage.

In this case the Privy Council drew attention of the Courts in India to the importance of defining at the earliest moment in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of the litigation through the court. (*Lord Buckmaster*) BAWA MAG NIRMAL SITARAM v. SHET KASTURBAI MANIBHAI.

46 Bom. 481 : 26 C. W. N. 473 : 30 M. L. T. 268 (P. C.) : 24 Bom. L. R. 584 : 20 A. L. J. 871 : 66 I. C. 162 : (1922) M. W. N. 319 : 35 C. L. J. 421 : (1922) P. C. 163 : 49 I. A. 54. (P. C.)

—Judicial order—Vacating of—Remedy by petition—Nullity.

When the order or decree of a court is a nullity a party interested in showing it to be a nullity may apply to the court to vacate it and if the court is satisfied about the fact, it ought to do so. Such an application need not be filed under any section of the Code and the absence of a section does not render the application incompetent.

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(*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR v. KANDASAMI MUDALI 16 L. W. 330 : (1922) M. W. N. 674.

—New case—Point not raised in pleadings or issues.

Where in a case of alluvion, the question whether the accretions were gradual, slow or imperceptible was not raised in the pleadings or issues, the Board doubted if it was open to raise the point in appeal, (*Lord Carson.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJA OF VIZIANAGARAM 45 Mad. 207 : 26 C. W. N. 348 : 15 L. W. 389 : 42 M. L. J. 589 : 20 A. L. J. 438 : 49 I. A. 67 : L. R. 3 P. C. 105 : (1922) M. W. N. 381 : 35 C. L. J. 463 : (1922) P. C. 105 : 67 I. C. 1 (P. C.)

—New form of procedure.

A court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian law (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI v. CHAIDANYA GOSWAMI, (1922) Cal. 1 (1).

—New point in appeal—Evidence not let in—Not to be allowed *See* C. P. CODE S. 100. (1922) Bom. 148

—Parties—Non-joinder—Objection as to—Procedure. *See* C. P. CODE, S. 99 AND O. J. R. 9. 42 M. L. J. 133

—Patna High Court—Effect of Calcutta High Court rulings

With respect to matters regarding which there is a conflict of opinion between the Calcutta and other High Courts prior to the establishment of the Patna High Court, the latter will follow the Calcutta rulings, unless they are decidedly wrong. (*Jwala Prasad and Bucknill, JJ.*) AMRIT LAL v. MUKLIDHAR. 3 Pat. L. T. 422 : (1922) Pat. 229 : (1922) P. 188 : 67 I. C. 538.

—Pauper appeals—Security for costs, if can be demanded. *See* C. P. CODE, O. 41, R. 10. 3 Lah. 30.

—Plaint—Presentation of, at residence of Judge after the usual Court hours—validity of. *See* C. P. CODE, S. 26 65 I. C. 674.

—Pleader's fees—Dismissal for default—Withdrawal of suit

A withdrawal of a suit after several witnesses have been examined is not tantamount to a dismissal for default and pleader's fees should not be calculated as in the case of a suit dismissed for default. In the case of a withdrawal the opposite party is entitled to his full costs. (*Das and Adami, JJ.*) RAMKISHEN DAS v. BRUNI PROSAD 3 Pat. L. T. 314 : 65 I. C. 355.

—Pleading and Proof—Variance between—Rule against—Scope of.

As a general rule parties should be kept to their pleadings, but this is not of universal application and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose; first to appraise the defendant distinctly and specifically of the case he is called upon to

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answer; and secondly, to preserve an accurate record of the cause of action as a protection against second proceeding upon the same allegations. The test is whether the defendant will be taken by surprise if relief is granted on facts established by the evidence. A variance between a pleading a what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The court will depart from the rule that proof must conform to pleading where it is satisfied that justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of a further litigation for the determination of a controversy then substantially ripe for settlement. (*Mookerjee and Chotener, JJ.*) ANANDA-CHANDRA CHAKRABARTI v. BROJA LAL SINGH.

36 C. L. J. 356

—Point not raised in lower court—If can be allowed in second appeal.

Where a point taken in the Court of first instance, was not raised in the lower appellate Court it cannot be allowed to be raised in second appeal. (*Miller C. J. and Adams J.*) PIRTHI MAHTON v. JAMSHED KHAN 3 Pat. L. T. 403. (1922) P. 289 : 67 I. C. 656.

—Precedents—Not to be lightly unsettled

The Court should be reluctant to dissent from the view expressed in long established decided cases and thereby not only to unsettle the law but also to endanger the security of property and title, dangers which are not associated with changes brought about by legislative interventions. (*Mookerjee, and Pantou, JJ.*) ISAN CHANDRA BAKSHI v. SAFATULLA SIKDAR. 26 C. W. N. 703 : 35 C. L. J. 36 : (1922) Cal. 331 : 68 I. C. 219

—Precedents—Subordinate Courts—Duty to follow its own High Court.

A lower Court is bound to follow the ruling of that High Court to which it is subordinate in preference to the rulings of other High Courts where the two Courts differ. (*Gokul Prasad and Stuart, JJ.*) BADRI PRASAD v. MOHAR SINGH.

4 U. P. L. R. (A.) 15 : 65 I. C. 511

—Preliminary point—Disposal on—Remand.

Where an appellate court reverses the decree of the lower court and remands it for disposal on the merits, the lower court would be acting irregularly and unwisely if it disposes of the case on a so-called preliminary point involving a mixed question of law and fact not raised or argued on appeal. (*Spencer and Deva Doss, JJ.*) MULLAI THAYAMMAL v. SUBBARAYAN PILLAI.

(1922) M. W. N. 763 16 L. W. 802.

—Reversal and remand of suit—Point decided not open.

Where in appeal the High Court reverses a decree and remands the suit for trial, it is not open to the parties to re-agitate the point decided by the High Court. (*Richardson and Suhrawardy, JJ.*) SYED SADAQ REZA v. KHOSHMOHINI DASI.

(1922) Cal. 317.

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—Subsequent events.

In exceptional cases Courts can take cognizance of events since the institution of the suit where the adoption of such a course tends to shorten litigation. But where plaintiff sued on a breach of agreement, the pleadings of defendant cannot be taken advantage of to furnish a cause of action on failure of plaintiff to prove the alleged breach prior to suit. (1918) M. W. N. 199 ; 37 I. C. 962 Dist [P 439 C 1]. (*Chevis and Abdul Quadir, JJ.*) ARDULLAH SHAH v. MAHOMED SHAH.

4 U. P. L. R. (Lah.) 42.

(1922) Lah. 437 : 66 I. C. 616.

—Summons, issue of—Court's duty to enforce attendance.

When once a court issues summons for the attendance of a witness it is its duty, unless the applicant is guilty of gross laches, to help him and enforce the attendance of such witness. A refusal to issue summons is a grave irregularity and contravenes the recognised principles embodied in the C. P. Code. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH v. SHEO-NANDAN PRASAD. 1 Pat. 644 (1922) Pat. 200 3 Pat. L. T. 487. (1922) P. 276 : 68 I. C. 645.

—Trial—Evidence—Duty to consider—Finding of fact.

Where the decision on a question of fact is final, the duty of examining the parties and thoroughly sifting the evidence ought to be realised by the trial Court. (*Kanhaiya Lal, J. C.*) KANHAIYA v. AZIM-UL-LAH.

25 O. C. 69 :

(1922) Oudh 122

—Trial of suit—Landlord and tenant—Disputes between—Notice to quit—Validity of.

Where in an ejectment suit the principal question between the parties was as to the sustainability of the claim of occupancy rights set up by the tenants, and the court below after taking evidence on all the issues in a protracted trial, decided the question as to notice to quit and disposed of the case on that ground only, Held that having regard to the longstanding disputes between the parties and the protracted trial of the case, the court below ought to have declared the rights of the parties so as to constitute a binding decision between them. The mere fact that a question as to the sufficiency of notice has not been taken at the previous stages of a case does not prevent a party from urging it as a defence at the time of the final disposal of a claim for ejectment. (*Spencer and Devadoss, JJ.*) SARAVANA PERUMAL PILLAI v. SUBBAYAN.

31 M. L. T. 430 (H. C.)

PRE-EMPTION—Consideration—Vendee mortgaging back to vendor for portion of consideration—If binding on pre-emptor.

Part of the consideration for a sale was a mortgage of the property executed by the vendee to the vendor. The sale was pre-empted subsequently, and on a suit being brought on the mortgage held, the sale and the mortgage formed part of the same transaction and hence the pre-emptor was bound by the mortgage. (*Ryves and Gokul Prasad, JJ.*) BECHAN SINGH v. KISHUN MAL.

44 All. 348 : 20 A. L. J. 164.

L. R. 3 A. L. 122 : 4 U. P. L. R. (A.) 23 :

(1922) All. 25 : 65 I. C. 542.



## PRE-EMPTION.

—Custom—Evidence of—Entries in *wajib-ul arz*.

In pre-emption cases entries in *wajib-ul arz* constituting merely an expression of the wishes of the co-sharers as to certain practices which they approve, unsupported by any other evidence are utterly insufficient to establish the custom (*Tudball and Sulaiman, JJ.*) CHAHAL *v.* DWARKA 64 I. C. 484.

—Custom—Mahal—Co-shares—Partition—Effect of.

It was proved that in a village there was a custom of pre-emption among co-sharers in the same Mahal as against co-sharers in a different Mahal. The village was subsequently partitioned, the old mahals being broken up and new ones formed. *Held*, in the absence of any evidence to the contrary, the old custom would continue even after partition 6 A. L. J. 180 ref. 8 A. L. J. 1013 foll. (*Rafique and Piggott, JJ.*) JOKHAN SINGH *v.* SABHAJAT SINGH. L. R. 3 A. 151 : 20 A. L. J. 223 : 65 I. C. 832 : (1922) All. 182.

—Custom not proved—Contract set up in appeal—Remand how to be made.

A pre-emption suit based on custom, was dismissed as alleged custom was not proved. In appeal, the claim was based on contract, and the appellate court recorded a finding to the effect that a contract of pre-emption stood proved between the parties, and remanded the suit to be tried on the merits.

*Held* the proper procedure should be to remand the suits, directing the plaintiff to amend his plaint basing his claim on the ground of contract thus giving an opportunity to the defendants to urge their defence to the new plea and to give evidence if they think it necessary. (*Rafique and Piggott, JJ.*) BASDEO RAI *v.* IHAGROO RAI. 44 A. 571 : 20 A. L. J. 464 : L. R. 3 A. 350 : 4 U. P. L. R. (A.) 80 : (1922) All. 281 : 66 I. C. 572.

—Custom recorded in *wajib-ul arz*—Dastur dehlī—Value of. See (1921) Dig. Col. 917 BHAGWAN DAS *v.* BADRI PRASAD. 64 I. C. 416.

—Custom—Mixed question of fact and law—Interference in Second appeal when justified. See C. P. CODE, S. 100. L. R. 3 A. 504.

—Custom—Sale of house property—Katra Amar Singh—Amritsar City—Instances in neighbouring sub-divisions.

*Held*, on the evidence in the case, that the custom of pre-emption in respect of sales of house property by reason of vicinage in Katra Amar Singh of Amritsar City had not been established. 5 P. R. 1909 appr. Where the sub-division in question is bounded on some sides by sub-divisions in which the custom of pre-emption does exist and on other sides by sub-division in which it does not exist, cases of pre-emption in adjoining mahallas are not of much value. (*Chevis and Le Rossignol, JJ.*) VAISHNO DAS *v.* HEM RAI. 4 Lah. L. J. 371.

—Custom—Town—Instances—Length of custom—Judgment based on compromise—Evidentiary value of.

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In suits for pre-emption in respect of property situate in a town, however probable and fair seeming the plaintiff's claim may be, he should never be relieved from the burden of proving the existence of the alleged custom in the special locality in which the property is situate, proof of its existence in neighbouring *Mohallas* being at best only supplementary of the evidence required of the plaintiff. Where the instances cited are all of them more than 40 years old, they are not sufficient to prove the custom. (*Scott-Smith, J.*) RAMJI DAS *v.* MAM CHAND. (1922) Lah. 367 : 67 I. C. 953.

—Custom—Wajib-ul-arz—Village partitioned into several mahals—Subsequent *wajib-ul-arz*—Containing special provision giving right of pre-emption among co-sharers of these mahals *inter se*. See (1921) Dig. Col. 917 PARBHU DAYAL *v.* JAMIL AHMAD. 44 All. 117 : (1922) All. 160 : 64 I. C. 646.

—Custom—Whole village owned by descendants of one family—Custom among Such co-sharers giving right of pre-emption to near relations—Purchase of entire village by outsiders—Custom no longer holds good. See (1921) Dig. Col. 918 MAKUND SINGH *v.* GOPI PRASAD. 64 I. C. 110.

—Decree—Nature of—Money required. if an antecedent debt. See HINDU LAW—DEBTS. 4 U. P. L. R. (A) 43.

—Decree for—Deposit—Deduction of decree amount—Deduction of costs—Intention of parties—Immaterial.

Plff's suit for pre-emption was decreed on payment of Rs. 99 and they were also allowed costs. *Held*, the plff could deposit the decree amount deducting costs. 10 I. C. 434 foll. It is immaterial what the decreeholder intended to do. The test is whether he has sufficiently complied with the terms of the decree. (*Chevis and Scott Smith, JJ.*) KAPURIA MAL *v.* WALI MAHOMAD. 4 Lah. L. J. 354 : 2 Lah. 294 : 65 I. C. 250 : (1922) Lah. 142 : 23 P. L. R. 1922.

—Decree—Non-compliance with—Right of appeal as to price.

The mere fact that a pre-emptor has not complied with a pre-emption decree in the matter of the payment of the purchase money is no bar to his appealing against the decree so far as the price is concerned, 76 P. R. 1890 ; F. B. ; 67 P. R. 1895 foll. (*Martineau, J.*) MUHAMMAD KHAN *v.* GHULAM QADIR. 4 Lah. L. J. 397 : (1922) Lah. 36 : 67 I. C. 844.

—Decree—Time fixed for payment—calculation of. See (1921) Dig. Col. 1919. HIMMUN *v.* FAIYA. 67 I. C. 772.

—Decree—If transferable. See (1921) Dig. Col. 919 MEHR KHAN *v.* GHULAM RASUL. 3 Lah. L. J. 553 : 64 I. C. 191 : (1922) Lah. 300.

—Exchange—Right to pre-empt.

There is nothing improper or illegal in parties evading the law of pre-emption by resorting to an exchange instead of a sale. 104 P. R. 1918 Ref. (*Broadway and Abdul Raoof, JJ.*) NARAIN SINGH *v.* WARYAM SINGH. 4 Lah. L. J. 356.

## PRE-EMPTION.

——— *Joint family property — Sale by a member.*

When a joint Hindu family property is sold by one of the members of the family a suit for pre-emption by another member of the same family is maintainable in Oudh. (*Wazir Hassan, A J. C.*) RAMADHIN SINGH *v* SURAJPAL SINGH

25 O. C. 57 : (1922) Oudh. 115 . 65 I. C. 772.

——— *Right to—Co-shares—Mortgage of entire share by conditional sale—Rights of cosharers to pre-emption—Partial pre-emption.*

Though a cosharer in a village has mortgaged his entire share of the properties by conditional sale, he remains a cosharer and as such entitled to pre-emption. Unless the pre-emptor claims to pre-empt the whole of the property sold, his action must fail. But if the vendor has included properties which the plaintiff has no right to pre-empt he can exclude them, 8 A. 462 ; 6 A. 423 Ref (*Kanhaiya Lal and Sulaiman, JJ*) MOHINDRA MAN SINGH *v* MAHARAJ SINGH

L R. 3 A. 600 : 20 A. L. J. 810.

——— *Right of Joint Hindu family—Sale by—Father—Necessity—Right of sons to pre-empt.*

In a joint Hindu family consisting of a father and his son, the father is presumably the managing member of the family and *prima facie* a sale by him is binding on his sons. 42 A. 264 Ref The sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of a joint family property made by the father as a manager and for legal necessity. (*Scott Smith, J.*) SUKHA RAM *v* KOTU RAM.

67 I. C. 76.

——— *Right of—Lease or sale—Test of—Existence of right of re-entry—Under proprietary right.*

In the case of a sale there is a right of pre-emption but in the case of a lease there is not. The first distinction between a sale and a lease is that in a sale ownership passes while in a lease it does not pass, but this distinction fails where a superior proprietor carves out of his title an under proprietary right and transfers that or a price paid. An under proprietor may be a sharer under S. 9 of the Oudh Laws Act in such a way that a sale by him of his under-proprietary right will give rise to pre-emption. When a holder of a superior right carves out an under-proprietary right and sells it, this also amounts to a sale and gives rise to a right of pre-emption. Yet such a transaction falls under the definition of a lease for it is a transfer of a right to enjoy the property. 8 O. C. 121 ; 14 O. C. 41 ; 17 O. C. 299 Ref (*Simpson, J.*) SAHIB BAKSH SINGH *v* THAKUR DIN SINGH.

9 O. L. J. 334 :  
4 U. P. L. R. (O. C.) 85 : (1922) Oudh. 229 :  
68 I. C. 966

——— *Right of—Perpetual lease—Under proprietary rights—Creation of. See (1921) DIG. COL 921. ZULFAN KHAN *v* SANT BAKSH SINGH.*

(1922) Oudh. 81 : 65 I. C. 97.

——— *Right of suit—Doubtful claim.*

In view of the decision of the Privy Council in 21 C. 496 P. C. a suit to enforce pre-emption in respect of a claim to what is really a doubtful

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title is not maintainable, (*Kanhaiyalal, J. C.*) BABU LAL *v* ALI AHMAD KHAN.

25 O. C. 258 : 9 O. L. J. 317 :  
4 U. P. L. R. (O. C.) 71 : (1922) Oudh. 223 :  
69 I. C. 110.

——— *Right of—Transfer of property pending suit—Lispendens.*

Pending a suit for pre-emption the vendee transferred the property to a third person under an exchange. The transfer was not made in recognition of the superior right of pre-emption, *Held*, that the transfer was effected by *lispendens* and that the defendant could not resist the plaintiff's claim (*Shadi Lal C. J. and Harrison, J.*) MUNSHI RAM *v* MAGHAR MAL

67 I. C. 304.

——— *Right to—Acceptance of mortgage money from vendee—Delay—waiver.*

Acceptance of mortgage money from the vendee and the omission to assert or exercise the right for a considerable time, do not amount to a waiver of the right. (*Marineau, JJ*) IMAM DIN *v* JALAL.

4 Lah. L. J. 204 : (1922) Lah. 42 : 67 I. C. 395.

——— *Right to—Cosharers—Partition of mahals—Effect of.*

Where there is a perfect partition of a village which is split up into a number of mahals, there is thereafter no community of interest between the cosharers of one mahal and those of another mahal and consequently the former cannot be regarded as cosharers of the property of the latter. 22 A. 1 foll (*Rafique and Lindsay, JJ.*) RUP SINGH *v* BHULLAN SINGH.

20 A. L. J. 956.

——— *Right to—Custom or contract—Pleadings—Amendment.*

Where the plaint in a pre-emption suit is expressly based on the custom of the village and not upon a contract between the co-sharers, the suit should be dismissed if the alleged custom is not proved. If the court thinks a contract of pre-emption is proved, the proper procedure is to allow the plaintiff to amend the plaint and give defendants an opportunity to meet the new case. On the facts, a prayer to amend the plaint in second appeal was refused. (*Rafique and Piggott, JJ.*) RAM GHARIB TEWARI *v* SHANKAR TEWARI.

(1922) All. 5 : L. R. 3 A. 636 :

20 A. L. J. 15 : 65 I. C. 242.

——— *Right to—Involuntary sale—Insolvency Sale by official Receiver.*

There is a right of pre-emption even in the case of an involuntary sale as in the case of a sale by the Official Receiver in an insolvency. (*Rafiq and Lindsay, JJ.*) BIRJ NARAIN RAI *v* KEDAR NATH.

20 A. L. J. 918.

——— *Right to—Omission to include whole of the land sold—Mistake—Rectification.*

If a man intentionally sues for less land than is covered by the sale, he loses his right of pre-emption, but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refused to correct his error, when it was pointed out to him he would be held to have forfeited his claim.

## PRE EMBTION.

It the vendee himself takes no objection to the error, or if he raises the objection too late, the right of pre-emption is not forfeited. 13 P. R. 1915 foll. (*Chevis, J.*) ALLAH RAKHIA KHAN v. KALA RAM. 67 I. C. 872.

———Right to—Purchaser joining one having inferior rights—Effect of—Purchase money—Sale deed—Intention of parties—Estoppel.

If a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of a pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. 48 P. R. 1907 toll. Persons who by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different, 5 P. R. 1914 toll. Where the purchase money for a sale is paid by the various vendees in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed. (*Broadway J.*) YAKUB KHAN v. KARMAN. 66 I. C. 466.

———Right to—Sale of property of a share in litigation—Property not in possession.

It is not the law that no right of pre-emption arises in any case in which the vendor was out of possession and litigation would be necessary to recover possession of the property. The question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of the case and it is not correct to say that no sale can be the subject of pre-emption where legal proceedings are necessary to obtain possession of the property. Where a sale-deed definitely purported to sell not a share in a law suit but a two annas eight pies share in Zamindari property to which the vendor definitely and clearly stated his title, there is no reason or principle why a champertous purchase of this nature should be exempted from the liability to pre-emption to which other purchases are subject (*Daniels, A. J. C.*) GAJADHAR PRASAD v. MANRAKHAN (1922) Oudh 156 : 66 I. C. 684 : 4 U. P. L. R. (A) 41.

———Right to Relationship—Aziz qarib and Azeez based.

Death or divorce dissolves the tie and relationship between a woman and her husband under the Mahomedan Law, especially if the woman after the death of her first husband marries into another family. Consequently an uncle of the deceased husband of a Mahomedan widow cannot pre-empt a sale by her as being "aziz qarib" or "aziz based" (*Reque and Piggot, JJ.*) JAHANGIR KHAN v. SYED ABU RABAHAN. 20 A. L. J. 56 : L. R. 3. A. 23 : 64 I. C. 943.

———Right to sell by Mahomedan to Hindu—Law applicable—Intention of parties. See (1921)

## PRES. SMALL CAUSES COURTS ACT, S. 41.

DIG. COL. 922 SITARAM BAHU RAO DESHMUKH v. SYED JIAUL HASAN KHAN. 26 C. W. N. 221 : (1922) M. W. N. 63 : 4 U. P. L. R. (P. C.) 10 : 3 Pat. L. T. 86 : 24 Bom. L. R. 595 : 64 I. C. 826 (P. C.)

———Right to sale of resumed muafi land—Not included in twenty biswa zemindari—Wajib-ul-arz giving right of pre-emption on transfer by his sadar. See (1921) DIG. COL. 922 RADHA KISHUN v. ABBASI BEGAM 64 I. C. 480.

———Right to—Vendor owning some property and being mortgagee of another—Duty of pre-emptor.

A vendor had proprietary rights in a portion of the property and mortgagee rights in the remainder. In a suit by the pre-emptor only in respect of the property in which the vendor had proprietary right. Held that the pre-emptor ought to have claimed pre-emption in respect of the entire property sold with the result that he would have stepped into the shoes of the vendor in the entire property; but that the defendant not having raised the objection in the Courts below, should not be permitted to raise it on second appeal. (*Mears, C. J. Pigott, J.*) IQBAL HAIDAR KHAN v. MT WASI FATIMA BIBI L. R. 3 A. 597.

———Right to—Wajib ul-arz—Biradaram qaribickjaddi—First category—Uncle included. See (1921) DIG. COL. 923 SHIB LAL GIR v. DAMER SINGH. 64 I. C. 617.

———Right to—Wajib-ul-arz—Classes of pre-emptors enumerated—Rights *inter se* not given See (1921) DIG. COL. 923. MATHURA SINGH v. RAM LAL SINGH. 64 I. C. 486.

———Right to—Woman entering family by marriage—Ashkhas Jaddi. See (1921) DIG. COL. 924. RAM PAL v. MT. BATASHIA. 64 I. C. 191.

———Suit for—Parties—Joint Hindu family—Minor members.

In a suit for pre-emption against the sons of a vendee, a member of a joint Hindu family, where the superior right of the plaintiffs is not disputed and the genuineness of the price paid by the vendees is also admitted, the minor grandsons of the vendees are not necessary parties and their addition after the period of limitation does not bar the suit. 33 A. 279 foll; 85 P. R. 1915, 105 P. R. 1895, 105 P. R. 1917 Ref. (*Broadway and Abdul Qadir, JJ.*) RAM LUBHAYA v. RAM DAS. 3 Lah. L. J. 510.

———Suit for—Valuation for purposes of jurisdiction.

Any compensation found to be payable by the pre-emptor to the vendee on equitable grounds and not as a part of the price paid by the vendee is not to be taken into consideration in determining the value of a suit in a pre-emption case (*Le Rossignol and Harrison, JJ.*) CHIRAGH DIN v. SERAL DIN. L. R. 3 A. 386 : 68 I. C. 890.

PRES. SM. C. C. ACT, S 41.—Suit to eject tenant—Maintainable in City Civil Court, though application is cognizable by the Small Cause Court. See MADRAS CITY CIVIL COURTS ACT, S. 3.

16 L. W. 137.

## PRES. TOWNS INSOLVENCY ACT, S. 7

**PRES. TOWNS INSOL. ACT, (III of 1909) Ss 7, 30 and 52—Hindu Law—Joint Family Manager—Insolvency—Official Assignee's right—Possession of joint—Property—Right to—Alienation of a joint property for paying insolvent's debts—Validity against his minor sons.**

On the insolvency of the managing member of a Joint Hindu family the Official Assignee succeeds to (1) the undivided interest of the insolvent in the joint property and to his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there had been insolvency. He can alienate the interest in the joint property of the minor sons of the insolvent for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. The Official Assignee is not an alienee but the representative of the insolvent and is entitled to all his rights including the right to possession of the joint property except such rights as are in their nature personal to a member of the family as such. (*Sir Waller Schwabe, C. J. and Coutts Trotter, J.*) **THE OFFICIAL ASSIGNEE OF MADRAS v A. N. RAMACHANDRA AYYAR** 43 M. L. J. 569 : 16 L. W. 559 68 I. C. 898.

**S. 7—Powers of insolvency court—Questions affecting title to property of insolvent—Jurisdiction to determine—Effect of the decision of the Insolvency Court.**

A Hindu father sold some joint family property for discharging his debts and at the same time mortgaged other property of the family to the purchaser as a security against any loss which he the purchaser might sustain in case the vendor's sons, who were then minors, chose the sale. The father was subsequently adjudicated an insolvent and the Official Assignee in whom the properties of the insolvent vested, applied to the Court for a direction that the properties mortgaged be sold free of the incumbrances on the ground that the sale by the father was binding on the sons and the security was unnecessary. *Held* (1) that the Insolvency Court had power under S. 7 of the Presidency Towns Insolvency Act, to enquire into and adjudicate on the validity and binding character of the sale as against the minor sons of the vendor; (2) that the decision of the insolvency Court to the effect that the sale was valid and binding would operate as res-judicata in any subsequent litigation by the sons against the purchaser; and (3) that on the finding as to the validity of the sale the mortgaged properties could be sold by the Official Assignee free of the incumbrance and the proceeds of the sale distributed among the creditors of the insolvent. (1872) 8 Ch. A. 83, 86 Rel. (*Schwabe, C. J. and Odgers, J.*) **DORIA PPA IYER v OFFICIAL ASSIGNEE OF MADRAS.** 42 M. L. J. 141 :

(1922) M. W. N. 77 : 15 L. W. 368 : 65 I. C. 244

**S. 9—Insolvency—Application for adjudication of a firm as insolvent—Departure of**

## PRES. TOWNS INSOLVENCY ACT, S. 18.

*partner from place of business—Intention to defeat or delay creditors*

Under S. 9 of the Pres. Towns Ins. Act where one partner departs from his usual place of business, it is a matter personal to him and the firm cannot be adjudged insolvent. One man cannot as an agent for another depart from his usual place of business and the departure of one partner is not a constructive departure of the others. The departure from the usual place of business, with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them (*Marten, J.*) **MAHOMED HASHAM AND CO. In re.**

24 Bom. L. R. 861.

**Ss 13 and 18—Omission to serve notice—Irregularity—Waiver—Onus of proof.** See 1921 DIGEST COL. 926. **ALLAPITCHAY K. K. v. S. S. A. S. CHETTY.**

64 I. C. 54.

**Ss. 13 and 18—Omission to serve notice—Irregularity—Waiver—Onus of proof.** See (1921) DIG. COL. 926. **NATHMULL v. GONESHMULL JIVANNMULL.** 66 I. C. 886.

**S. 17—Hindu father—Insolvency—Adjudication—Vesting of sons interest in official Assignee—Remedy of sons.**

On the insolvency of a father governed by the Mitakshara law the whole of the joint family property including the interest of his sons, vests in the Official Assignee. But the sons have their remedy on their establishing that the debts of the father were illegal or immoral and that their sharers would not be liable for the same. 48 I. C. 526, 49 I. C. 848 not foll., 7 B. 438 11 B. 37 19 M. 74 42 C. 225 Ref. (*Shadi Lal C. J. Chevis and Abdul Raoof, JJ.*) **BIHARI LAL v SAT NARAIN**

3 Lah. 329.

**S. 17—Scope of—Effect of, on limitation.**

S. 17 of the Act is not an absolute bar to the creditor's right to institute a suit so as to enable the creditor to claim a deduction of the time during which the insolvency proceedings were pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed (*Macleod, C. J. and Shah, J.*) **SIDHRAJ BHOJARAJ v. ALLI HAJI**

24 Bom. L. R. 509 : 67 I. C. 757.

**S. 18—Jurisdiction of commissioner in insolvency to stay proceedings in District Court—Practice—Procedure.**

S. 18 of the Pres. T. Ins. Act applies to the familiar case where the insolvency Court has power to stay some ordinary civil court which may be pending at the date of the insolvency against the insolvent. It does not relate to some other insolvency pending in some other court of another province or in the District Courts of the province itself. The other insolvency is not a suit or other proceeding pending against the insolvent. The District Court is not subject to the superintendence of the commissioner in Insolvency and consequently the latter cannot

## PRES. TOWNS INSOLVENCY ACT, S. 36.

stay insolvency proceedings, in the former. (*Marten J.*) MANEKCHAND VIRCHAND PATNI *In re* 24 Bom. L. R. 872 : (1921) Bom. 390

—Ss. 36 and 4—Claim for rent cognizable under the Madras Estates Land Act—Judge exercising insolvency jurisdiction not competent to try See (1921) DIG. COL. 927 T. A. CHIDAMBARAM CHETTY IN THE MATTER OF 45 Mad. 31 : (1922) Mad. 143

—S. 36—Scope of—Order under section not to be made if circumstances require the institution of a suit. See (1921) DIG. COL. 928 QASH BEHARI GHOSE v. THE OFFICIAL ASSIGNEE OF CALCUTTA. 68 I. C. 341.

—S. 38 (1)—Registrar if could pass ex parte order for examination of a person—Application to set aside order, Nature of—If an appeal—Procedure—Rules under the Act. See (1921) DIG. COL. 929 ALBERT FELIX SELDANA RE. SUKHLAL KARMANI v. THE OFFICIAL ASSIGNEE. 48 Cal. 1089 : 66 I. C. 715.

—S. 49 (1) — *Crown debts — Priority — Conduct of soap factory by Government — Industrial instruction — Powers of the Government.*

It is not outside the statutory powers of the Government of India to conduct a soap factory for the purposes of education and demonstration to the people. A debt due to such a concern conducted by the Government from an insolvent is a debt due to the Crown and is recoverable in full in priority to other debts of the insolvent under S. 49 of the Pres. Towns Ins. Act. (*Coutts Trotter, J.*) SUBRAMANIA CHETTI AND CO. IN THE MATTER OF. 45 Mad. 156 : 30 M. L. T. 246 : 16 L. W. 46 : (1922) Mad. 243.

—Ss. 51, 52 and 57 — Goods in the order or disposition of the insolvent—Equity of redemption in goods pledged—Bona fide transferee after insolvency and before adjudication. See (1921) DIG. COL. 929. THE OFFICIAL ASSIGNEE OF MADRAS v. VELLIAPPA CHETTY. 45 M. 238 : 42 M. L. J. 155 : (1922) Mad. 441.

—Ss. 55 and 56—Right to apply under—Rights of creditor—Official Assignee.

An application under Ss. 55 and 56 of the Pres. Towns Insolvency Act should be made by the Assignee in whom the property of the insolvent official is vested and not by a creditor. If the Official Assignee when asked to take action refuses it may be that with the leave of the court a creditor may make such an application. (*Greaves, J.*) SURAJMULL MUNGLE CHAND *In re*. 26 C. W. N. 803

—S. 82—Misfeasance, neglect or omission—Distribution of assets without disposing of claims—Personal liability of official Assignee.

A creditor who lodges his proof in statutory form is entitled that it should receive attention without closing anything more.

In a case where the Official Assignee distributed the assets to some creditors, though at that time he had notice of the claims of others which were not disposed of, it amounts to misfeasance, neglect or omission within the meaning of the section and

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he would be personally liable for the amounts the creditors who have been deprived of.

It is impossible to pretend to distribute a bankrupt's estate with reasonable certainty unless the rules as to distribution are regarded by the Official Assignee as absolutely sacrosanct (*Rankin, J.*) *In re* ARCHIBALD GILCHRIST PEACE. 26 C. W. N. 653.

—S. 94 — Power to stay proceedings—sufficient reason of appeal See (1921) DIG. COL. 930. MOOLA DAWOOD AND SONS COMPANY *In re* 64 I. C. 546.

—S. 101—Registrar in insolvency—Reference to—Power of registrar to decide on validity of mortgage—Appeal from order of registrar. See (1921) DIG. COL. 930. LAL BEHARI SAHA *In re*. 26 C. W. N. 631.

PRESS ACT (III of 1910) S. 4 (1)—Good faith, if material—Individual officers if contemplated.

If the words in their plain grammatical meaning are of the nature mentioned in S. 4 (1) it is immaterial whether the editor acted in good faith or otherwise. The operative portion of S. 4 (1) (c) does not make the motive or intention of the writer material to deciding the question.

Where the article complained of referred only to the police officials at a certain place, they cannot be regarded as "the government established by law in British India." 22 Bom. 112 and 8 Bom. L. R. 421 referred to. (*Shadi Lal C. J.*) *Scott Smith and Martineau JJ.* RAJ PAL v. THE CROWN. 3 Lah. 405 [F. B.]

—Ss. 18 and 19—Powers of special bench.

The function of the special Bench constituted under S. 18 of the Press Act to hear and determine the application is circumscribed by the provisions of S. 19 (1) which empowers it to set aside the order of forfeiture if it appears to the Bench that "the words contained in the news paper in respect of which the order in question were made were not of the nature decided in S. 4 (1) (*Shadi Lal C. J.*) *Scott Smith and Martineau JJ.* RAJ PAL v. THE CROWN 3 Lah. 405. [F. B.]

PRESUMPTION—Delay in suit—Relinquishment of claim.

Procrastination is the usual habit of litigants and where the parties are closely related there must be constant talk and hope of sttlement with the interference of relations or neighbours who would like to get credit, if not money by taking sides. Consequently delay in filing a suit does not lead to an inference of relinquishment of rights to the plaintiff. (*Daniels J C and Dalal A. J. C.*) UMMESSALMA v. AMIJAD HUSAIN (1922) Oudh. 165 : 66 I. C. 448.

—Important witness not called—How to be avoided.

*Per Buckland, J.* If a party wishes not to have a presumption raised against him by the fact that an important witness has not been called, he should exhaust to the utmost of his power every means to bring that witness before the court. (*Mookerjee and Buckland, JJ.*) JOGENDRA KRISHNA ROY v. KUNPAL HARSHI AND CO. 49 Cal. 345 : 35 C. L. J. 175 : 68 I. C. 993.

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———Joint Hindu family—Bond in the name of the manager—Presumption that it is joint family property. See HINDU LAW, JOINT FAMILY, MANAGER. 26 C. W. N 406.

———Khewat—Entries in—Evidence of possession.

An entry in the khewat is at least prima facie evidence of possession and if there is nothing to show any alteration in the entry the legitimate presumption arises that the state of things indicated by the entry continued up to the date of the death of the person, whose name appears in the khewat if not beyond it, when possession may devolve on his heirs. 9 O. C. 161 *Asher v. White-lock* (1865) 1 Q. B. 1 Ref. (*Wazir Hasan, A.J.C.*) GHULAM SARWAR KHAN v. MAHOMED ALI KHAN. (1922) Oudh 98 : 65 I. C. 398.

———Revenue records—Entries in value of.

In the absence of any evidence to the contrary the entries in the revenue papers must be deemed to be correct. (*Wazir Hasan A. J. C.*) DURGA v. RAM PADARATH. 8 O. L. J. 495. 65 I. C. 749

PREVENTION OF CRUELTY TO ANIMALS ACT (IX of 1890) — Applicability of—Saran District.

The Prevention of Cruelty to Animals Act does not apply to the District of Saran in Bihar and Orissa. Consequently an accused committing an offence within that area under the Act is not punishable. (*Jwala Prasad, J.*) SENEHI SINGH In the matter of 65 I. C. 439 : 23 Cr. L. J. 87.

PRINCIPAL AND AGENT—Authority of agent—Ammukhtar—Possession of. See (1921) DIG. COL 932 JYOTI PRASAD CHATTERJEE v. DASRATH GHOSH. 36 C. L. J. 73

———Authority of agent—Contract of sale—Estate or house agent—Power to enter into contract.

An estate or house agent authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that; it means, to find a man willing to become a purchaser nor to find him and also make him a purchaser. (1900) 2 Ch 267 Ref. (*Mookerjee and Cumung, JJ.*) DURGA CHANDRA MITRA v. RAJENDRA NARAIN SINHA 36 C. L. J. 467.

———Authority—Construction.

The defendant handed to a broker the following letter, "I authorise you to procure a buyer of my divided portion of the above premises for Rs. 45,000 and on your sending same, I shall pay you as remuneration at 1 per cent on the purchase money". The offer was accepted by the plaintiff and the acceptance was communicated to the defendant. —Held: The offer contained in the said letter amounted only to an offer to be put into touch with intending buyers of the premises in question. It was in no sense an authority to the brokers to sell the plaintiff's property nor did it amount to an offer on the part of the vendor to sell the premises to whoever might be brought into

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touch with the vendor by the broker. If an owner of land instructs a broker or an estate agent to place it on his books and to find a purchaser for him that does not authorise the agent to enter into an open contract for sale of the land or to make any firm contract for sale binding the principal. (*Ghose, J.*) PURNA CHANDRA DUTT v. INDRA CHANDRA ROY. (1922) Cal 397.

———Authority—Construction of—Ambiguity—Bona fide interpretation.

If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings and the agent bona fide adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised, because he meant the order to be read in the other sense of which it is equally capable. L. R. 5 H. L. 325 Ref. (*Kumarasami Sastru, J.*) SEETHA-LAKSHMI AMMAL v. COOPERATIVE DISTRIBUTIVE SOCIETY, MAYAVARAM 15 L. W. 205

———Commission Agent—Duty to supply goods—Rate.

A commission agent is not liable to supply goods at a particular rate or otherwise than at the rate prevailing in the market at the time of supply. (*Lindsay and Kanhaya, Lal, JJ.*) FIRM OF BABU LAL KEDAR NATH v. FIRM OF RAM KHIALI RAM. (1922) All. 400.

———Fraud of agent—Liability of principal—Agent's act need not have benefited principal. See CONTRACT ACT, S 238 27 C. W. N. 18.

———Liability of principal—Agent's act or conduct—Holding out—Agent for vendor and purchaser.

If a firm allows its business to be transacted in its name by a manager or employee it assumes responsibility for what their manager or employee does. Where a land agent is acting for both the vendors and purchasers to the knowledge of both he could not be expected to attempt to get the best bargain possible as in the case of an agent acting for one party only. But he could be expected to give information as to value and in giving that information he is bound to be straightforward and not be negligent in making himself accurately acquainted with the facts before he gave it. (*Lord Dunedin.*) JOSEPH THORNES v. WILLIAM BROWN. 31 M. L. T. 104 (P. C.)

———Ratification—Execution of mortgage by agent in excess of powers under power of attorney. See (1921) DIG. COL 933 MAHOMED HANEEF v. ISRI PRASAD. 44 All. 77 : 64 I. C. 768.

———Relationship between—Agent not entitled to treat himself as principal—Unreasonable custom.

No agent can without the consent of his principal or without a term in his contract authorising him so to do, turn himself into a principal and use his own principal's money and the advantages which he has obtained from his position as agent make a profit for himself. An agent in the true sense of the word is a medium of communication between the two contracting parties and it is imperative that he should not divest himself of his character as agent and become a principal to the

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transaction. A custom to the contrary is unreasonable and cannot be imported into a contract of agency (*Piggott and Walsh, JJ.*) KISHORI LAL v. JIWAN LAL. 4 U. P. L. R. (A) 59 : 67 I. C. 231.

PRIVATE DEFENCE—Right of—Extent of. See PENAL CODE. S. 100. 4 Lah. L. J. 91.

PRIVY COUNCIL—Compromise—Minor—Procedure. See (1921) DIG. COL. 914 GOBIND CHANDRA PAL v. KAILASH CHANDRA PAL. 48 Cal. 994 : 30 M. L. T. 181 (P. C.) : L. R. 3 P. C. 7 : (1922) P. C. 186 : 66 I. C. 154 (P. C.)

Concurrent findings of fact—Interference.

Where both courts in India had come to the same conclusion on the question whether a certain lanka was formed by alluvion in contiguity with the plaintiff's land, the Board saw no reason for dissenting from the conclusion arrived at. (*Lord Carson*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAJA OF VIZIANAGARAM. 45 Mad. 207 : 42 M. L. J. 589 : 20 A. L. J. 438 : 49 I. A. 67 : L. R. 3 (P. C.) 105 : 15 L. W. 389 : 26 C. W. N. 348 (P. C.) 35 C. L. J. 463 : (1922) M. W. N. 381 : 67 I. C. 1 : (1922) P. C. 105

Concurrent findings of facts..

The concurrent findings of the courts below on a question of fact concludes the Privy Council. (*Lord Shaw*) MOHUNT BHUGWAN RAMANUJ DAS v. RAMKRISHNA BOSE. (1922) P. C. 185 : 26 C. W. N. 722 (P. C.)

Costs—Cause—Delay.

Where one of the parties was responsible for the protraction of the litigation on account of his dilatoriness, he was disallowed his costs though he succeeded in his claim. (*Sir Lawrence Jenkins*) MAHOMED SHER KHAN v. RAJA SETH SWAMI DAYAL. 42 M. L. J. 584 : 44 A. 185 : 30 M. L. T. 220 (P. C.) 49 I. A. 60 : 9 O. L. J. 81 : 20 A. L. J. 476 : 25 O. C. 8 : 24 Bom. L. R. 695 (P. C.) 35 C. L. J. 468 : 4 U. P. L. R. (P. C.) 50 : L. R. 3 P. C. 119 : (1922) M. W. N. 378 : 66 I. C. 853 : (1922) P. C. 17

Costs—Delay—Successful party deprived of costs.

Where the long delay in setting down an appeal for hearing was due to the appellants' fault and they in the meanwhile were watching commercial events to see if it would be worth while for them to go on with the appeal, held the circumstances justified the Board in directing the successful appellants to bear their costs in appeal. (*Lord Phillimore*) BEHARI LAL BULAKI RAM v. KUNDUN LAL. (1922) P. C. 361.

Costs—Wrong procedure and delay.

In a case in which the appellant finally succeeded, but all the delay was due to his wrong procedure and dilatoriness, their Lordships refused to grant him costs and to interfere with the order of the lower courts as to the same. (*Sir*

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*Lawrence Jenkins*) MUHAMMED SHER KHAN v. RAJA SETH SWAMI DAYAL.

44 A. 185 : 20 A. L. J. 470 : 42 M. L. J. 584 : 9 O. L. J. 81 : 30 M. L. T. 220 (P. C.) 49 I. A. 60 : 25 O. C. 8 : 4 U. P. L. R. (P. C.) 50 : 35 C. L. J. 468 : L. R. 3 P. C. 119 : (1922) M. W. N. 378 : 66 I. C. 853 : (1922) P. C. 17 : 24 Bom. L. R. 695 (P. C.)

Criminal appeal—Limitation See (1921) DIG. COL. 914 MURUGA GOUNDAN v. EMPEROR. 30 M. L. T. 180 (P. C.) : (1922) P. C. 162

Delay in Indian litigation condemned: In this case their Lordships condemned the delay in the litigation before them as a blot on the administration of justice. (*Lord Buckmaster*) RAJA RAI BHAGWAT DAYAL SINGH v. RAM RATTAN SAHU. 20 A. L. J. 26 : 26 C. W. N. 257 : 35 C. L. J. 121 : 42 M. L. J. 243 : (1922) M. W. N. 102 : 4 U. P. L. R. (P. C.) 7 : 24 Bom. L. R. 336 : 3 Pat. L. T. 229 : 15 L. W. 8 : 65 I. C. 69 : (1922) P. C. 91.

Official translation of record—Incorrect procedure.

Where there is a doubt as regards the correctness of an official translation of a document in the vernacular, the case has to be sent back to India, and there after recording evidence as to its correctness have the matter judicially corrected by the High Court. (*Sir John Edge*) MT. SASIMAN CHAWDHURAIN v. SHIB NARAIN CHOWDHURY. 1 Pat. 305 : 3 Pat. L. T. 133 : 15 L. W. 434 : 26 C. W. N. 425 : 42 M. L. J. 492 : 30 M. L. T. 242 (P. C.) : 20 A. L. J. 362 : 24 Bom. L. R. 576 : L. R. 3 (P. C.) 97 : 49 I. A. 25 : 66 I. C. 193 (P. C.) (1922) M. W. N. 368 : 35 C. L. J. 427 : (1922) P. C. 63.

Order in Council R 2—Certificate of High Court—Conclusive effect.

Under R 2 of the Order in Council of 1838, which remained in force until repealed in 1920, a certificate of a High Court to the effect that the value of the subject matter in dispute in the appeal amounts to Rs. 10,000 and upwards was conclusive and could not be attacked before the Board.

*Obiter*—the sum of money actually at stake may not represent the true value; the true determination of the questions at issue may affect rights and liabilities of a value beyond the limit for appeals. (*Lord Shaw*) RADHAKRISHNA AYYAR v. SUNDARSWAMIER. 43 M. L. J. 323 : 49 I. A. 211 : 45 Mad. 475 : 27 C. W. N. 1 : 16 L. W. 18 : 31 M. L. T. 31 (P. C.) : (1922) P. C. 257 : 20 A. L. J. 937 : 36 C. L. J. 450

Printing of records—Unnecessary matter included.

Their Lordships characterised the printing of unnecessary matter and its inclusion in the record as a scandal and a hindrance to the proper administration of justice. (*Sir John Edge*) RANI BIAI RAJ KUNWAR v. THAKUR JAI INDRA BAHADUR SINGH. 25 O. C. 260 : 31 M. L. T. 69 (P. C.) : 9 O. L. J. 385 : 4 U. P. L. R. (P. C.) 76 : (1922) P. C. 318 : 36 C. L. J. 511 : 68 I. C. 876 : 49 I. A. 262 : 43 M. L. J. 682 : 44 All. 435 (P. C.)

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———*Printing of records—Unnecessary printing.*

The Privy Council disapproved of the printing of an enormous mass of wholly irrelevant and unnecessary matter which had been allowed in the case. (*Viscount Cave*). SHEO DARSHAN SINGH v. THE DEPUTY COMMISSIONER PARTA GARH.

43 M. L. J. 167 : 35 C. L. J. 593 (P. C.)

———*Records—Printing of—Duty of appellant*

Where an appellant relies upon certain documents in support of his arguments it is his duty to have them printed and if in the hope that the respondent would do so he omits to print them and the latter does not print the appellant cannot rely on such documents. (*Daniels, J. C. and Dalal, A. J. C.*) MUMTAZ-UNNISSA BEGAM v. WAZIR ALI.

65 I. C. 308.

———*Translation and printing of documents—Application for, to made to what Bench of the High Court.*

Applications for directions as regards the preparation of paper books in Privy Council Appeals should be made to that bench of the High Court taking Privy Council business and not to the bench that decided the appeal in the High Court (*Sanderson, C.J. and Richardson J.*) SHIVA PRASAD SINGH v. RANI PRAYAG KUMARI DEBI

26 C. W. N. 840 : (1922) Cal. 479

**PROBATE**—Scope of enquiry—Title of testator to property purported to be bequeathed—Validity of bequest—Enquiry if relevant. See SUCCESSION ACT. Ss. 105 AND 250.

**PROBATE AND ADMINISTRATION ACT (v of 1881)**—*Partly interested to oppose—Adverse claim*

A person denying the title of the testator to deal with certain property as his own and claiming adversely to him cannot be said to have an interest in the estate of the deceased as would entitle him to come in and oppose the grant of probate. —Held also, any dealing with the estate by the wife of the deceased, not authorized by his will or in excess of the powers conferred upon her by the will, could not affect the rights of the petitioner. (*Chatterjee and Pearson JJ*) MOHADEB KUDU v. BENOED LAL PATRA.

(1922) Cal. 181.

———**S. 4—Executor—Acceptance of office—Vesting.**

Per *Kumaraswamy Sastry J.* In the absence of the acceptance of the office by the executor, the property does not vest in him under S. 4 of the Act. (*Schwabe C. J., Coultis Trotter and Kumaraswamy Sastry JJ.*) RAJA OF BADRACHALAM v. VENKATADRI APPA RAO

43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H.C.) (1922) Mad. 457

———**Ss. 4 and 90 Mahomedan will—Executors—Sale of property—Probate not obtained**

An executor may dispose of immoveable property without a grant of probate under S. 90 (2) of the Prob. and Administration Act. An executor derives his title from the will and not under the probate which is only the authenticated evidence of the will itself. Where executors have been appointed they can sell such portions of the

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estate as are necessary for discharging debts without the consent of the heirs unless the will requires such consent to be obtained. 8 B. 241, 37 C. 839, 32 I. A. 244 ; (1891) 2 Ch. 101 ; 20 Ch. D. 455 Ref (*Marten and Fawcett, JJ.*) SIR MAHOMED YASUF v. HARGOVANDAS JIWAN.

24 Bom. L. R. 753 : (1922) Bom. 392.

———**S. 4—Will—Application for letters—Right of survivorship—Claim by applicant.**

Where persons applying for letters of administration allege that the deceased testator was joint with them and that they had therefore taken the estate by survivorship the application for letters must fail. In that case the deceased had no estate whatever to which letters of administration could be granted. (*Das and Adam, JJ.*) KALI KUMAR v. MT. NUFABATI KUMARI.

(1922) Pat. 240.

———**S. 12—Brahmos—If Hindus—Right to apply for letters of administration under the Act. See SUCCESSION ACT, S. 331.** 26 C. W. N. 799.

———**Ss. 14 and 15—Applicability of—Intestate—Letters of administration.**

Ss. 14 and 15 of the Prob. and Admn. Act refer to cases where letters of administration have been granted to the estate of an intestate. Where on the other hand letters of administration have been granted not upon intestacy but with copy of the will annexed, the first portion of S. 12 is applicable. Probates and letters of administration with copy of the will annexed are conclusive evidence of the factum and validity of the will, in the same way as letters of administration are conclusive of the intestacy of the deceased, 28 C. 327 ; 31 M. L. J. 277, 7 H. L. C. 124 Ref. (*Mookerjee and Cuming, JJ*) CHARU CHANDRA PRAMANICK v. NAHUSH CHANDRA KUNDUO.

36 C. L. J. 35,

———**S. 21—Letters of administration—Gift of residuum to idol—Application by puohit—Shebait.**

Where a Hindu testator directed by his will the payment of a legacy of Rs. 50 to the priest of an idol and the residue was bequeathed to the idol itself, the proper person to apply for letters of administration is the shebait and not the priest. The shebait appoints the purohit but that does not transfer the management of the debutter estate from the shebait to the purohit. 16 W. R. 99, 25 C. W. N. 201 Ref (*Mookerjee and Rankin, JJ.*) KALI KRISHNA RAY v. MAHAN LAL MUKHERJEE.

36 C. L. J. 441.

———**S. 23—Hindu widow—Reversioner—Letters of administration—Necessity for.**

Under S. 23 of the Probate and Administration Act, a Hindu widow who has an interest in the whole estate of her husband is entitled to a grant of Letters of Administration of his estate, in preference to a reversioner who has only a contingent interest which may never vest.

No grant of Letters of Administration is necessary in a case where the deceased leaves no debts or there is no difficulty in collecting the assets. (*Buckland and Cuming, JJ.*) SRIMATI LAKSHMI SUNDARI v. NITYANANDA DHUPI.

64 I. C. 61.

———**Ss. 50, 76 and 82—General grant—Revocation—Specific revocation essential. See (1921) DIG. COL. 936 RANI HEMANGINI DEBI v. SARAT SUNDARI DEBYA.** 66 I. C. 882.



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—Ss. 50 and 98—Probate—Revocation—Executor—Filing of accounts, when to be done—Account in material particulars—Effect of. *See* (1921) DIG. COL. 936 CHANDRA KUMAR CHAKRAVARTHY *v* PRASANNA KUMAR CHAKRAVARTHY. 48 Cal. 1051 : 64 I. C. 997

—S. 50—Revocation of probate—Right to apply for—Remote reversioner

Where the immediate reversioner, being a daughter, has rendered it impossible for herself by her own conduct, to maintain an application for revocation of a grant of probate, the application for revocation may be made by the daughter's sons, who as the ultimate reversioners, are proper parties. (*Mookerjee and Panton, JJ*) HARIDAS *v* BIDHUMUKHI DAS. 35 C. L. J. 66 (1922) Cal. 38 : 68 I. C. 795

—S. 52—District delegate—Grant of probate by Additional District Judge.

An Additional District Judge cannot grant probate unless he is appointed a District Delegate by the High Court or exercises powers as a District Judge. (*Kotval A. J. C.*) RAM SINGH RAJPUT *v* MUSTBAI. 68 I. C. 940.

—S. 67—Verification—Effect of absence.

The provisions of S. 67 as to verification are directory and not mandatory and hence the omission can be cured. (*Kotval, A. J. C.*) RAM SINGH RAJPUT *v* MURTIBAI. 68 I. C. 940

—S. 77—Executor not appointed—Grant, how to be made.

Where no executor is appointed under the will, only letters of administration with the will annexed can be granted. (*Kotval, A. J. C.*) RAM SINGH RAJPUT *v* MURTIBAI. 68 I. C. 940.

—S. 78—Administration bond—Breach of condition—Liability of executant.

Where there is a technical breach of the terms of an administration bond executed in favour of a court, the whole of the amount of the bond is not recoverable and only reasonable compensation can be awarded. (*Sanderson, C. J and Richardson, J.*) CHANDRA MOHAN KARKAR *v* SRIMATI ROHINI DAS. 64 I. C. 366.

—S. 78—Administration bond—Power of court to demand fresh security.

There is no provision in the Prob. and Admn. Act as to what is to be done or what the court can do in the event of the death of the surety or his discharge. The court of probate is competent to require a new bond or additional security where the interests of the estate require it and especially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown or death of one or both the sureties. 29 C. 68 : 47 C. 115 foll. (*Abdul Raoof and Martineau, JJ*) BHAGWAN DEVI *v* BANKA MAL. 66 I. C. 367.

—S. 83—Decision of probate court—Title to property—Decision not *res judicata*.

In proceedings under S. 83 of the Prob. and Admn. Act the Court decides the question of representation to the estate and not of distribution and it is only for the purpose of determining the former question that the Court decides the right

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of a party to the whole or part of the estate. Consequently the decision come to by the Court as to the right of a party to inherit does not operate as *res judicata* in a suit for administration or possession of the property belonging to the estate. 5 L. B. R. 78 : 1918 P. R. 63 foll : 48 Cal. 694 dist. (*Pratt and Duckworth, JJ.*) MG TUN. YIN *v* MA SEIN YIN. 1 Bur. L. J. 59 : 11 L. B. R. 331 : 68 I. C. 671.

—S. 89—Criminal prosecution—Death of complainant or person injured—Effect of—No abatement. *See* (1921) DIG. COL. 938. HAZARA SINGH *v* EMPEROR. (1922) Lah. 227,

—S. 89—Prosecution for hurt—Abatement, on death. *See* (1921) DIG. COL. 938 MAHOMED IBRAHIM SAHIB *v* SHAIK DAWOOD.

30 M. L. T. 349 (H. C.) : 65 I. C. 549 : 23 Cr. L. J. 117.

—S. 90—Administrator—Conveyance by leave of court—Want of—Effect of.

An administrator has the whole estate vested in him. If he is also an heir and conveys the estate without reciting the capacity in which he conveys he must be taken to have sold the greatest he could and the fact that he did not describe himself as administrator should make no difference. A sale made without the leave of the court is voidable and not void. (*Robinson C. J. and Heald, J.*) A. L. A. R. FIRM *v* MAUNG THOWE. 1 Bur. L. J. 133.

—S. 90—Executor—Power to sell estate without obtaining probate—Effect of grant of probate. *See* PROB. AND ADMN. ACT SS. 4 AND 9. 24 Bom. L. R. 753.

—S. 90 (3)—Disposal of property by administrator contrary to Act—Effect,

A disposal of property by an administrator in contravention of S. 90 (3) of the Prob and Admn. Act is only voidable and not void. (*Woodroffe and Ghose, JJ.*) JANENDRA NATH SINGH ROY *v* SHORASHI CHARAN MITRA. 49 Cal. 626 : (1922) Cal. 23.

—S. 92—Executor—Debt barred—Power to renew—Renewal by two out of three executors—Validity of.

Under the law prior to the passing of the Prob. and Admn. Act, an executor was competent to renew a barred debt of the deceased testator and the Act has not superseded the previous law. In the absence of a direction to the contrary contained in the will appointing executors, two out of three executors are competent to act alone in the matter of such renewal.

The word "several" in S. 92 of the Prob. and Admn. Act does not mean "possessing powers to act severally." (*Oldfield and Venkata Subba Rao, JJ.*) ALAMURI SITARAMASWAMI *v* VENKATA RAGHAVA CHARYULU. 42 M. L. J. 559 :

(1922) M. W. N. 278 : 30 M. L. T. 344 (H. C.) : 16 L. W. 52 : (1922) Mad. 214 : 67 I. C. 104,

—Ss. 112 and 116—Legacy—Vested interest—Assent of executor—Effect of.

As a protection to the executor the law ordains that every legatee, whether general or specific

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and whether of chattels real or personal must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect, before such assent however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered. Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title, it merely perfects the title acquired under the will and if the legacy is void the assent avails nothing. It cannot be said that till the executor has signified his assent express or implied, legatee has no interest whatever in the subject matter of legacy. The assent of the executor has relation back to the time of the testator's death and confirms an intermediate alienation by the legatee of his legacy (*Mookerjee and Cumming, JJ.*) **KHAGENDRA NATH MOOKERJEE v. KSHETRA NATH PAL.** 36 C. L. J. 21.

**PROMISSORY NOTE—Assignment—Modes of.**

A promissory note may be transferred in one of three ways, viz (1) by indorsement and delivery as a negotiable instrument under S. 48 of the Neg. Ins. Act (2) by written assignment under S. 130 T. P. Act : (3) by transfer under the general law (*i.e.*) by delivery for value, or assignment of value just as a mere chattel may be delivered 16 C. W. N. 666 : 24 M. 654 : 28 M. 544 : 31 M. 534, 9 M. L. T. 169 Rel. 3 L. W. 171, not foll. (*Duckworth, J.*) **PALAWAN v. KANU** 66 I. C. 501.

———Company — Execution of pronote—Liability of company. See COMPANIES ACT, S. 72. 24 Bom. L. R. 355.

**Consideration, failure of—Burden of proof.**

In a suit on a promissory note, if the defendant pleads want of consideration the onus lies upon him. Nevertheless, if as a result of the plaintiff's evidence in the witness-box the court is satisfied that no consideration passed, the defendant can avail himself of that and get a decree. (*Mears, C.J. and Banerjee, J.*) **KUNWAR MUHAMMAD SHAFI KHAN v. KUNWAR MUHAMMAD MOAZZAM ALI KHAN.** 4-U P. L. R. 46 (A) : 67 I. C. 684.

**Execution by a trustee and administrator of an estate—Whether binding on the estate.**

If it is settled law that, upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as an executor so as to get execution against the assets of the testator L. R. 7 Ch. 123 followed. 24 Cal. 77 distinguished.

An exception to the above rule is recognised in case there is a necessity to borrow money for the purpose of the estate.

7 C. W. N. 104 and 31 Cal. 253 Referred to (*Daniels, A. J. C.*) **P. ANANTA RAM. v. NATIONAL BANK OF UPPER INDIA LTD.,** (1922) Oudh 20.

**PROPERTY** — Right to place platforms on portions of ghat for bathing purposes—A right to property and heritable. See (1921) DIG. COL. 939 **SURAJ PRASAD v. GANESH RAM JAIN.**

L. R. 3 A. 70.

**PROVINCIAL INSOLVENCY ACT (1907) S. 15.**

**PROVIDENT FUNDS ACT (XI of 1897) S. 4 (2)**—Protection to deposits in provident fund.—Assignment of provident fund—"Children"—Legitimate children. See (1921) DIG. COL. 940. **VAZ v. MADDAX** 64 I. C. 62.

**Rule 10—Scope of**

Money standing to the credit of a retired employee is attachable. (*Richardson and Ghose, JJ.*) **RAJ KUMAR MUKHERJEE v. W. G. GODFREY,** (1922) Cal. 196.

**PROVINCIAL INSOLVENCY ACT (III of 1907) — Applicability — Proceedings under Agra Tenancy Act**

After decrees for arrears of rent had been obtained under the Agra Tenancy Act against some tenants, they were adjudicated insolvents. The decree holder then brought a suit with the permission of the Insolvency court for a declaration that certain transfers by the insolvent were invalid, as being merely sham and collusive transfers—*Held*, as the Provincial Insolvency Act did not apply to govern or affect rights under the Agra Tenancy Act, the suit did not lie 43 All. 510 (F. B.)-foll.

Per *Walsh J.*—A decree holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies, is not a creditor under the Provincial Insolvency Act in respect of his rent or decree. His decree is not a provable debt. (*Piggott and Walsh, JJ.*) **PARBATI v. RAJA SHYAM RIKH.** 44 A. 296 : L. R. 3 A. 73 (Rev.) : 20 A. L. J. 147 : (1922) A. 74 : 66 I. C. 214.

**Petition filed before Act V of 1920 came into force—Procedure—Which act to govern.**

Where the insolvency petition was filed under Act III of 1907, shortly before the new Act came into force, it has to be proceeded with under the provisions of the old Act, (*Macleod C. J. and Shah J.*) **THE LAXMI BANK, LTD. v. RAMACHANDRA NARAYAN APTE.** 46 Bom. 757 : 24 Bom. L. R. 292 (1922) Bom. 80 : 67 I. C. 238.

**S. 11 (1)—No difference between new and old Acts—Disposal of property—Effect.**

As to what has to be proved before it could be decided that a petitioner has a right to present his petition, there is no material difference between the old and the new Acts. Under S. 11 (1) of the old Act, the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor, the court is satisfied that the statement is not correct, it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the court is not justified in holding that he is able to pay his debts, but should admit his petition, so that the interests of the creditors may be benefited by the special powers given to the court while administering an insolvent's estate (*Macleod, C. J. and Shah, J.*) **THE LAXMI BANK, LTD. v. RAMCHANDRA NARAYANA APTE.** 24 Bom. L. R. 292 : (1922) B. 80 : 46 Bom. 757 : 67 I. C. 238.

**S. 15—Inquiry under—Issue as to full and true disclosure—Not pertinent.**

## PROVINCIAL INSOLVENCY ACT (1907) S. 16

The issue whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under S 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure. (*MacLeod C. J. and Shah, J.*) THE LAXMI-BANK LTD. RAMCHANDRA NARAYAN APTE.

46 Bom. 751 : 24 Bom. L. R. 292 :  
(1922) Bom. 80 : 67 I. C. 238.

—S. 16—Adjudication—Ancestral property—Vesting in Official Receiver—Death of insolvent—Effect of.

According to S. 16 of the Prov. Ins. Act on the adjudication of person as an insolvent the whole of the property of the debtor vests in the Court or the Receiver. The death of a debtor does not put an end to an insolvency proceeding initiated on an application by the debtor. There is nothing in the Act to show that after an order of adjudication has been made and the property has vested in the Receiver the death of the debtor would divest the Receiver of the property. Under the customary law a father has the right to dispose of ancestral immoveable property including the interest of his son under recognised circumstance and a vesting order made under S. 16 of the Act vests that right in the Official Receiver, who can, therefore, give a good and complete title to such ancestral estate to a purchaser. 7 Bom. 438 rel. (*Abdul Raof and Martineau, JJ.*) LACHHMAN DAS v. JAI SINGH.

4 Lah. L. J. 262. (1922) Lah. 399

—S. 16—Insolvency—Adjudication—Effect of—Vesting of property in receiver—Rights of decree holder against insolvent.

Where the judgment debtor is adjudicated an insolvent, the rights of a decree-holder against the insolvent are divested and he becomes an ordinary creditor. If the decree-holder without impleading the Receiver as party takes proceedings in execution, the interest of the insolvent will be wholly unaffected. The Privy Council upheld the concurrent findings of the courts below that notice of execution had been served on the judgment debtors. (*Lord Phillimore*) SRIPAT SINGH DUGAR v. RAI HARIRAM GOENKA.

31. M. L. T. (P. C.) 38 : 26 C. W. N. 739 :  
16 L. W. 447 : 4 U. P. L. E. (P. C.) 68 :  
(1922) P. C. 51.

—Ss. 16 and 18—Insolvency—Receiver—Vesting of property and rights of action—Suit by private creditor—Effect of.

Where a firm is adjudicated insolvent all its property vests in the Receiver and if any part of it has improperly got into the hands of another, the right to recover it is in the receiver and it is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. A suit by the creditor of an insolvent against a certain person alleged to be in possession of assets of the insolvent without impleading the Receiver in insolvency is misconceived and unsustainable. (*Sir*

## PROVINCIAL INSOLVENCY ACT (1907) S. 16

*Lawrence Jenkins*) SANYASI CHARAN MANDAL v. KRISHNADAS BANERJI.

43 M. L. J. 41 : 20 A. L. J. 409 :  
24 Bom. L. R. 700 : 49 I. A. 108 (P. C.) :  
49 Cal. 560 (1922) P. C. 237 : 30 M. L. T. 228 :  
16 L. W. 536 : (1922) M. W. N. 364 :  
26 C. W. N. 954 : 35 C. L. J. 498 :  
L. R. 3 P. C. 133 : 67 I. C. 124.

—S. 16—Insolvency—Vesting order—Suit against his property—Decree—Execution—Effect of.

Appellant sold a house to K. on 12-5-1914 for the unpaid portion of the purchase money. He instituted a suit against K on 22-3-1916 and obtained a decree on 11-7-1916 establishing his vendor's lien over the house. Meanwhile K had applied on 19-11-1915 to be adjudicated insolvent; an adjudication was made on 29-2-1916, and on 15-7-1916 his property vested in the Official Receiver. The Official Receiver sold the house to the respondent on 17-8-1916. The appellant executed his decree and purchased the house himself on 22-12-1916. The Receiver was not impleaded as a party to the suit or to the execution proceedings. In a suit by the appellant for the recovery of house from the respondent held, that the decree in the appellant's favour was a nullity as also the sale held in execution thereof and that the respondent's title was not affected thereby 25 M. 406 Rel. (*Sadasiva Aiyar and Spencer, JJ.*) MOKSHAGUNAM SUBRAMANIAM Aiyar v. RAMAKRISHNA Aiyar 42 M. L. J. 426.  
16 L. W. 43 : (1922) Mad. 335.

—S. 16—Receiver—Position of—Conduct of proceedings.

The principle of S. 16 (2) of the Prov. Ins. Act should be invariably observed in insolvency proceedings and the Official Receiver or Receiver appointed should have the carriage of them, not merely in the lower court but also on appeal. (*Oldfield and Venkatasubba Rao, JJ.*) NARASIMHAM v. HANUMANTHA RAO NAIDU.

(1922) M. W. N. 717 : (1922) Mad. 439.

—S. 16—Suit against insolvent—Permission of court—Necessity for.

Under S. 16 of the Prov. Ins. Act (1907) the court making the order of adjudication is vested with the whole property of the insolvent and no creditor to whom the insolvent is indebted in respect of any debt provable under the Insolvency Act has any remedy against the property of the insolvent person in respect of that debt nor can he commence any suit or other legal proceedings except with the leave of the court and on such terms as the Court may impose. The permission of the Court is contingent to the suit being brought and cannot be given afterwards. (*Prideaux, A. J. C.*) TRIMBAK v. SHEORAM.

5 N. L. J. 144 : 65 I. C. 941 : (1922) Nag. 108.

—S. 16 (2)—Father insolvent—Son's interest not vested.

The estate of the sons cannot be dealt with by the Receiver 49 I. C. 348 foll. (*Chevis, A. C. J.*) SHIP CHARN v. SKEIKH MAHOMED ISMAIL.

2 Lah. L. J. 401 : 68 I. C. 179 ;

—Ss. 16 (2) and 20—Suit by Official Receiver—Leave of Insolvency Court—Necessity

## PROVINCIAL INSOLVENCY ACT (1907) S. 16.

for. See (1921) DIG. COL. 944 THE OFFICIAL RECEIVER OF COIMBATORE v. D. KANGA

45 Mad 167 : 42 M. L. J. 53 : 30 M. L. T. 152 : (1922) Mad 51.

—S. 16 (2)—*Receiver—Order of adjudication—Vesting of property—Suit for declaration*

All property such as may be acquired by or devolve on the insolvent after the passing of an order of adjudication and before his discharge, forthwith vests in the court or receiver and becomes divisible among the creditors under S. 16 Sub S. (2) (a) of the Pro. Ins. Act of 1907. It is open to the receiver in whom the property so vests to ask for a declaration without suing for possession of the property inasmuch as the declaration would enable the receiver to sell or mortgage the property for the benefit of the creditors. (*Lindsay and Gokul Prasad, JJ.*) MAHOMED FATIMA v. MAHAMED MASHUQ ALI.

L. R. 3 A. 406 : 20 A. L. J. 569 : 44 All 617 : (1922) All 448 4 U. P. L. R. (A) 181 : 68 I. C. 245.

—S. 18—*Receiver—Creditor, if can be appointed.*

A court has no power to appoint a creditor of the insolvent as a kind of Receiver to realise the insolvent's property and pay the money into court. (*Walsh and Stuart, JJ.*) CHANDI PARSHAD v. JAGGU KUNBI. L. R. 3 A. 85

—S. 22—*Scope of.*

If the plaintiffs do not elect to pursue their remedy under S. 22 and there is no determination on the merits before a suit is instituted, they are within their rights in seeking their remedy by a regular suit. (*Gokul Prasad and Stuart, JJ.*) KUNDAN LAL v. KHEN CHAND.

44 All 620 : (1922) All. 407

—S. 28—*Applicability of—Arrears of rent accruing after adjudication—If provable—Suit for—Sanction.*

Rents which fall due from an insolvent after the making of the order of adjudication cannot be deemed to be a debt existing on the date of the order and to such a debt S. 28 of the Provincial Insolvency Act does not apply. And as the debt is not provable in insolvency, a suit for such arrears does not require the sanction of the Insolvency Court. (*Kanhaya Lal, J. C.*) KUER BEHARI LAL v. KALEA.

9 O. L. J. 157. (1922) Oudh 73 : 67 I. C. 549.

—S. 34 (1)—*Provincial Insolvency Act (V of 1920) S. 51—Official Receiver—Property of insolvent—Attachment before judgment in a suit—Adjudication subsequent to attachment—Petition by Official Receiver to raise attachment—adverse order—Nature of—Suit to set aside—Limitation. See 1921 DIG. COL. 949 OFFICIAL ASSIGNEE OF SOUTH MALABAR v. VEERARAGHAVAN PATTAR.*

45 Mad 70 : (1922) Mad. 189.

—S. 36—*Application for adjudication that property belongs to insolvent*

An application for an adjudication that certain property alleged to have been gifted away by him was still the property of the insolvent and in his possession does not fall within S. 36 of the Prov. Ins. Act 1907. (*Shadulal and Wilberforce, JJ.*) SOBHA RAM v. WARYAM SINGH.

4 Lah. L. J. 444.

## PROVINCIAL INSOLVENCY ACT (1920).

—S. 36—*Property situate in foreign territory—Power of British Court to annul transfer.*

A British Indian Court exercising insolvency jurisdiction has no power to annul the transfer by an insolvent of his property situate in a foreign territory. The foreign court may refuse to recognise the annulment of a transfer of immoveable property situate therein by the British Indian Court (*Kotwal, A. J. C.*) DRAUPADI BAI v. GOVIND SINGH.

18 N. L. R. 93 : (1922) Nag 221 : 65 I. C. 334.

—S. 36—*Transfer more than 2 years old—Rights of creditors—Decision of insolvency court.*

Where a transfer is several years old and therefore cannot be set aside under S. 36 of the Prov. Ins. Act, the remedy of the creditors is to sue under S. 53 of the T. P. Act and if the insolvency Court declines to pronounce on the validity of the transfer, it does not operate as res judicata. (*Piggott and Walsh, JJ.*) MUSSAMMAT GAURA v. HON NAWAB MAHOMED ABDUL MAJID.

(1922) All 443. 64 I. C. 523.

—S. 37—*"Creditor" if includes a secured creditor.*

A secured creditor is a creditor within the meaning of S. 37 of the Act. (*Hallifax A. J. C.*) SETH TARKARAN v. GOBIND PRASAD. (1922) Nag. 233 : 68 I. C. 460.

—S. 53—*Annulment of sale by insolvent—Cannot be done at the instance of a creditor but only on motion by Receiver. See (1921) DIG. COL. 951 APPIREDDI v. APPIREDDI* 45 Mad. 189 : (1922) Mad. 246 : 66 I. C. 271.

—S. 60, cl. (2)—*Decree against tenant—Insolvency—Execution of decree—Procedure—Agra Tenancy Act, II of 1901.*

There is nothing in the Prov. Ins. Act to bar a suit by a landholder against his tenant in the Revenue Court or a proceeding in execution of a decree for rent in the Revenue Court. The landholder who has obtained a decree against the tenant is not a creditor under the Insolvency Act and his proper remedy is to take out execution of the decree in the Revenue court against the property of his judgment debtor. If the Revenue court finds that the property was the subject of a transfer by the judgment debtor and therefore not available for execution, the remedy of the decree holder is to institute a fresh suit. (*Piggott and Walsh, JJ.*) PARBATI v. RAJA SHYAM RIKH.

44 A. 296 : 20 A. L. J. 147 L. R. 3 A. 73 (Rev.) : 66 I. C. 214 : (1922) All 74.

—S. 69 (c) (ii)—*Fraudulently making away with or concealing property—Not using means of ascertainment—Effect of. See (1921) DIG. COL. 952 QASIM ALI v. EMPEROR.*

64 I. C. 37.

PROV INSOLVENCY ACT (V of 1920)—*Receiver in insolvency—Decree against—Binding nature of.*

A decree obtained against the judgment-debtor is not binding against the Receiver in insolvency. There is always the possibility of its having been collusive between the parties when the judgment

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debtor would not have cared what the amount of the decree against him was. (*Walsh and Ryves, JJ.*) *SHAHAMAT ALI v RAHIM BUX.*

L R. 3 A. 436

—Ss. 4, 5 and 56—*Insolvency court—Jurisdiction—Purchaser of insolvent's property from Official Receiver—Right to apply for order for delivery of possession*

Under Ss. 4, 5 and 56 of the Provincial Insolvency Act (V of 1920) a purchaser from the Official Receiver has the right to apply to the Insolvency Court for an order for delivery of possession of the property purchased by him as against a third party who resists him in obtaining possession.

Clause (3) of S. 56 of the Act is not limited to the case of an application by the Receiver

Difference between the powers of the Court under the old Act III of 1907 and under the new Act pointed out (*Ayling and Venkatsubba Rao, JJ.*) S. R. M. S. T. R. M. RAMASWAMI CHETTIAR v T. S. RAMASWAMI AIYANGAR.

45 Mad. 434 · 42 M. L. J. 185 :  
(1922) M. W. N. 110 : 15 L. W. 273 :  
(1922) Mad. 147 : 65 I. C. 394

—Ss. 4 and 75—Power of insolvency court—Fraudulent transfer by insolvent before insolvency—Inquiry—Procedure—Appeal. See (1921) DIG. COL. 952. *CHIKRI PKASAD v AZIZ ALI.*

44 A. 71.

—S. 4, Sub S. (1)—*Decision on question of title—Powers of insolvency court—Taking of evidence.*

Though the insolvency court has power under S. 4 Sub-S. (1) of the Provincial Insolvency Act to decide a question of title, it has also full discretion to follow the course laid down in S. 4 sub-S. (3) (*i.e.*), to refuse to decide questions of title and to direct the sale of the insolvent's right, title and interest whatever that might be. It is enough of the court is satisfied on the report of the Receiver and of the answers given by the Insolvent that the debtor had some saleable interest in the property (*Chatterjee and Chotsner, JJ.*) *ITENDRA NATH BHATTACHARJEE v. FATEH SINGH NAHOR* 26 C. W. N. 921

—S. 4 (2) and (3) — *Attachment of stranger's property—Remedy of person—Question of title—Decision of Insolvency Court—Procedure*

If the Receiver in an insolvency wrongly attaches a stranger's property as the insolvent's, the stranger may appeal to the Insolvency Court against the act of the Receiver or he may sue him in a Civil Court as a trespasser. If he elects the former course, he cannot afterwards turn round and litigate the matter afresh in a Civil Court, and under S. 4 (2) of the Pro. Ins. Act, a decision on a question of title by the Insolvency Court is final and binding as between the person asserting it and the insolvent's estate.

If the Insolvency Court finds that serious and difficult questions of mortgage and other securities arise over the debtor's property which it does not deem expedient or necessary to decide itself, but prefers to leave to the contending creditors to fight out in an ordinary Civil Court, it may, if it has

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reason to believe that notwithstanding such securities the debtor has an interest, forthwith direct the sale of such interest which would not affect the right of the contending creditors; and if it decides to exercise its jurisdiction under S. 4 (3), it ought to make it clear beyond question that it is doing so and the reason for the course it is taking.

In deciding any question of title the claimant must be heard on the merits however weak his title may appear to be (*Walsh and Ryves, JJ.*) *MISRI LAL v. KANHAIYA LAL SHARMA.*

L. R. 3 A. 285 : (1922) A. 128 : 66 I. C. 863.

—S. 5—*Insolvency appeal—Powers of court—Review—Procedure.*

S. 5 of the Prov. Ins. Act, gives a District Judge when sitting as an appellate court the same powers under the C. P. Code as he would have had, if he had been sitting to hear any ordinary appeal. (*Piggott and Walsh, JJ.*) *MUNNU LAL v. KUNJ BEHARI LAL.*

44 All. 605 : (1922) All. 206 :  
4 U. P. L. R. (A) 66 · 67 I. C. 317 ·  
L. R. 3 A. 295 · 20 A. L. J. 517

—S. 9 (b)—Debt due—Meaning of—If can be proved in the proceedings. See PRO. INS. ACT. Ss. 24 (a) AND 9 68 I. C. 885.

—Ss. 24 (1) (a) and 9—*Petition by creditor—Proof of debt.*

When a petition in insolvency is put in by the creditor to adjudge his debtor an insolvent, the court has must allow him under S. 24 to prove his debt and not require him to prove it in a regular suit. (*Pratt and Duckworth, JJ.*) *A. K. R. M. C. T. CHETTY v MAUNG AUNG BWIN*

1 Bur. L. J. 239 : 68 I. C. 885.

—S. 28 (2)—*Applicability of—Suit for arrears of rent—Revenue Court—Agra Ten. Act.*

S. 28 (2) of the Prov. Ins. Act does not apply to any suit or proceeding under the Agra Tenancy Act. A creditor is entitled to maintain a suit for arrears of rent or for any other claimable under the Agra Tenancy Act and to take any proceedings open to him by way of execution of his decree notwithstanding any action that may have been taken in the Insolvency Court. 8 A. L. J. 1287 ; 19 A. D. J. 439, 19 A. L. J. 273 Ret. (*Hopkins, S. M. and Burn, J. M.*) *ALI AHMAD v BRIJ RATAN.* L. R. 3 A. 339 (Rev.)

—S. 28 (2)—*Insolvency—Adjudication of father in Joint Hindu family—Share of son in Joint family property if vests in the Official Receiver.*

Where the father of a Joint Hindu family which includes minor sons as well as himself is adjudicated an insolvent, the Receiver takes over all rights in the insolvent's property which the insolvent himself possessed including the right to alienate co-parcenary property belonging to the father and the sons in satisfaction of antecedent debts incurred by him provided they are not tainted with immorality. 7 B. 438 ; 19 M. 74 Ref. (*Piggott and Walsh, JJ.*) *BAWAN DAS v. O. M. CHIENE.* 44 A. 316 : 20 A. L. J. 155 : (1922) All. 79 · 64 I. C. 976.

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—S. 28 (6)—*Secured creditor—Charge—Rights of.*

Where a creditor has a registered mortgage over certain moveable property of the insolvent, he is a secured creditor holding a legal charge. If the Receiver realises the property, the debt constitutes a charge of the amount so realised. (*Piggott and Walsh, JJ*) *MOTI RAM v. RODWELL*.  
L. R. 3 A 638

—S. 34—*Provable debt—Meaning of—Obligation incurred*

A debt to be provable under S. 34 of Act V of 1920 must be a debt to which the insolvent has become subject by reason of an obligation incurred before the date of adjudication as an insolvent. The words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself. (*Halliday, A. J. C.*) *KESHEORAO v. GOVINDRAO*.  
68 I. C. 340.

—S. 37—*Separate suit—Maintainability.*

An order passed under S. 37 of Provincial Insolvency Act is not a summary order but a considered order passed after the alienee has had an opportunity of leading all the evidence that he might lead in a regular suit. The order of the Insolvency Court is not final, but is subject to appeal and the Legislature could not have contemplated the possibility of the alienee maintaining a separate suit to cancel the order of the Insolvency Court and that of the Court of appeal. No separate suit lies. I. L. R. 42 Mad. 322 and 39 All. 626 foll. 22 P. C. 1917 overruled. (*Le Rossignol and Abdul Qadir, JJ*) *RANA ALLAH BAKSH & Co v. KARJM BAKSH*. (1922) Lah. 214.

—S. 51 (1) *Exception. Rateable distribution—Amount credited to attaching decree-holder—Amount ordered to be rateably distributed—Payments not made—Effect of.*

The exception to S. 51 (1) of the Provincial Insolvency Act, 1920, applies not only to the amount credited in favour of the attaching decree-holder, but also to the amounts rateably distributed to the other decree-holders under S. 73, Civil Procedure Code. Where moneys have been allotted to various decree holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the judgment-debtor, but they remain the properties of the various decree-holders, even though the amounts have not been paid out to them. (*Ayling, Off. C. J. and Odgers, J.*) *THE OFFICIAL RECEIVER OF TANJORE v. M. R. VENKATARAMA IYER*.  
42 M. L. J. 361:  
(1922) M. W. N. 51: 15 L. W. 37  
(1922) Mad. 31: 68 I. C. 512

—Ss. 53 and 75—*Appeal—Voluntary transfer—Annulment.*

There is no right of second appeal from an order under S. 53 of Act V of 1920 annulling a transfer. (*Broadway, J.*) *MT. ILAHI JAN v. HARI KISHEN DAS*.  
67 I. C. 887.

—Ss. 53 and 75—*Insolvency—Gift of money by insolvent—Annulment*

Where a few months before his adjudication an insolvent made a gift of Rs. 4,400 to his mistress for purchasing a motor car for her

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and she purchased a car with that money. *Held*, that the gift of the money was a transfer within S. 53 of the Prov. Ins. Act and it was liable to be annulled even though the money had been converted into a motor car in the meanwhile. (1899) 2 B. 57 Ref. (*Broadway, J.*) *MT. ILAHI JAN v. HARI KISHEN DAS*.  
67 I. C. 887.

—S. 56—*Insolvency Court—Purchaser of property of insolvent from Official Receiver—Application for delivery of possession—Obstruction—Removal—Power of insolvency court. See PROV. INS. ACT, Ss. 4 AND 5*

42 M. L. J. 185

—S. 75 (3)—*Appeal under—Provisions of C. P. Code to apply.*

In dealing with appeals under S. 75 (3) of the Prov. Ins. Act, the provisions of the C. P. Code ought to guide the Court. (*Piggott and Walsh, JJ.*) *MUNNU LAL v. KUNJ BEHARI LAL*.

44 All. 605: (1922) All. 206:  
4 U. P. L. R. (A.) 66: 67 I. C. 317:  
L. R. 3 A 295: 20 A. L. J. 517.

—S. 78—*Application under the old Act, if can be converted into one under the present Act—Time for applying for adjudication. See (1921) Dig. Col. 952. PULPATI HANUMAYYA v. RAVURI RAMAYYA.*  
64 I. C. 270

PROV. SM. C. C. ACT (IX of 1887) S. 17—*Application under—Deposit of security—Limitation.*

The deposit or security required by the section must be furnished within the time prescribed for the application. Otherwise the application for review or setting aside the *ex parte* decree would be rejected. 13 M. 178 not foll. 29 P. R. 1894; 28 A. 470, 32 C. 339 rel. (*Saunders J. C.*) *RAM BILAS TARBENI RAM v. JAI SINGH*.  
1 Bur. L. J. 75.

—S. 17—*Ex parte decree—Application to set aside—Security bond filed with application found to be insufficient—Extension of time.*

An applicant to set aside an *ex parte* decree passed by a Small Cause Court filed a security bond along with his application. The Court refused to accept the security bond as being sufficient but extended the time for payment of the decree amount. *Held*, that the court had no jurisdiction to extend the time for depositing the decree amount, and on the deposit being made to order restoration of the case. (*Gokul Prasad, J.*) *MOOL CHAND v. NIRANJAN SINGH*.

L. R. 3 A. 327: (1922) All. 265.

—S. 17—*Ex parte small cause decree—Setting aside without security—Ultra vires.*

The setting aside of an *ex parte* decree in a Small Cause suit in the absence of deposit of the decree amount or security being furnished therefor, is *ultra vires*. The provisions of S. 17 of the Pro. Sm. C. C. Act are mandatory. 43 M. 579 F. B. Ref. (*Ayling, O. C. J. and Odgers, J.*) *PERIA VENKATAKRISHNAMMA v. B. VENKATARATNAM*.  
16 L. W. 606: 31 M. L. T. 320 (H. C.)

—S. 17 *Proviso—Ex parte decree—Application to set aside—Draft security bond alone file in time—If sufficient compliance.*

Where a small cause suit was decreed *ex parte* on 26th January 1920, and the application to set

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aside was made on the 27th without the necessary deposit or security as required by the proviso to S. 17 of the Provincial Small Cause Courts Act but on 6th February 1920, the *def.* filed a draft security bond which was tested and found acceptable on the 9th March 1920 and the actual bond was executed on the 1st April 1920.

*Held*, that the mere filing of the draft bond was not a sufficient compliance with the requirements of the proviso and the order refusing to set aside the decree was correct.

43 Mad. 579 (F. B.), 42 I. C. 751 foll. (*Ramesam, J.*) T. C. BALAKRISHNA AYYAR v. PICHAMUTHU PILLAI. 15 L. W. 186 (1922) Mad. 320.

## —S. 17—Provisions of, mandatory—Extension of time

S. 17 of the Prov. Sm. C. C. Act is mandatory and an application for setting aside an *ex parte* decree must be accompanied by the deposit of the amount due from the judgment-debtor under the decree. The court has no power to extend the time for deposit (*Ryves, J.*) SRI BHAGWAT CHAUDHURI v. BALKARAM SAITHWAR

4 U. P. L. R. (A.) 10.  
20 A. L. J. 209 : L. R. 3 A 141  
(1922) All. 29 65 I. C. 596

—S. 17 (1) Proviso—*Ex parte* decree—Application to set aside—Deposit—Delay—Power to excuse

Where an application to set aside an *ex parte* small cause decree was made within the period of 30 days accompanied by a deficient deposit and the deficiency, which was due to a *bona fide* mistake of the applicant, was made good after the 30 days. *Held* that the Court had power under S. 5 of the Limitation Act to excuse the delay in making the deposit. (*Oldfield and Venkatasubba Rao, JJ.*) SUDALAI MUTHU KUDUMBAN v. ANDI REDDIAR. 45 Mad. 628

42 M. L. J. 484 : 15 L. W. 494  
(1922) M. W. N. 266 : 30 M. L. T. 342  
(1922) Mad. 186 : 66 I. C. 104

## —Ss. 23 and 25—Return of plaint when justified—Question of title not raised in pleadings.

The power to act under S. 23 of the Provincial Small Cause Courts Act is a discretionary power which only a Court having jurisdiction over the suit can exercise and where a Court has ruled that it has no jurisdiction over the suit it has no power to act under S. 23.

Where on the pleadings no question has been raised as to title to immovable property, nor any other question of title which the Court could not finally determine, the return of the plaint by a Small Cause Court on the ground that an account of the value of the lands sold to and the value of the lands taken away from the *plff.* and the profits due to the *plff.* have to be ascertained and some questions of the ownership of the lands might arise, is unsustainable. (*Krishnasami, J.*) RAJAMMAL AYYAR v. KRISHNASAMI AYYANGAR

15 L. W. 35 : (1922) Mad. 300.

## —Ss. 23 and 34—Suit involving question of title—Suit tried by Munsif on the regular side—Appeal.

## PROV. SM. C. COURTS ACT (1887), S. 25.

A small cause suit was tried by the Munsif on the regular side without an order returning the plaint to himself under S. 23 of the Prov. Sm. C. C. Act. *Held*, that though there was an irregularity in the form of the proceedings there was none in substance affecting his jurisdiction and an appeal lay against his decision (*Newbould, J.*) ATUL CHANDRA SEAL v. KOBAD ALI.

64 I. C. 436.

—S. 25—Court taking up new case at 5 p. m.—Absence of exceptional circumstances—No notice to parties concerned—Dismissal for default—Material irregularity—Interference in revision. See PRACTICE. L. R. 3 All. 25.

—S. 25—Decision wrong in law—Finding of fact without any evidence—Ground not raised in lower court—Revision whether allowed.

No revision of the decision of a Small Cause Court can be allowed merely because it is wrong in law but it would be allowed if the lower court found a certain fact for the finding of which there did not exist an atom of evidence.

There should be no interference in revision on a ground which has never been taken up in the lower court (*Ashworth, J. C.*) CHIRANJI LAL v. KALI (1922) Oudh 130.

—S. 25—Error of law—Interference.

Under S. 25 of the Prov. Sm. C. C. Act, it is not open to interference in revision unless there is some clear error of law and injustice resulting therefrom. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) RADHOMAL KESHOW DAS v. RADHOMAL KESUMAL. 15 S. L. R. 193 : 66 I. C. 489.

—S. 25—Grounds for—Error of law.

In the absence of an error of law the High Court will not interfere in revision under S. 25 of the Prov. Sm. C. C. Act. (*Suhrawardy and Cuning, JJ.*) BAUL CHANDRA ADDYA v. SHEIKH ABDUL MATLEB. 67 I. C. 851.

—S. 25—Jurisdiction to entertain—Suit not cognisable—Interference.

Where a suit beyond the cognizance of a Small Cause Court is decreed by a Small Cause Court without objection by the *def.* as to the Court's jurisdiction to entertain the suit, the High Court can interfere in revision, set aside the lower Court's decision and direct the plaint to be returned to a Court having jurisdiction. 41 I. C. 276, foll. (*Chems, J.*) NABI BAKHSI v. MUHAMMAD ALI. 3 Lah. L. J. 380.

—S. 25—Scope of—Powers under, wider than under C. P. Code—Failure to make ground of decision clear.

The power of the High Court to interfere in revision under S. 25 Provincial Small Cause Courts Act is wider than the ordinary powers of revision under the C. P. Code. If the Judge fails to make the grounds of decision clear, that is sufficient ground for interference. (*Walsh and Ryves, JJ.*) CHANDER SEN v. MAN MOHAN LAL. L. R. 3 A. 17.

—S. 25—Suit on instalment bond—Dismissal—No reference to provisions of the Lim. Act applicable to case—Revision.

## PROV. SM. C. COURTS ACT (1887), S. 32.

Where a Small Cause Court dismissed a suit on an instalment bond without reference to the provisions of the Limitation Act applicable to the case, though *prima facie* some of the instalments are within time, the High Court could interfere in revision and set aside the decree and direct a retrial. (*Piggott and Walsh, JJ.*) *HIRA LAL v. ALLAH BAKSH.* 20 A. L. J. 89.

65 I. C. 107 (1) : L. R. 3 A. 67.

—S. 32 (c)—*Jurisdiction of Small Cause Court—Suit instituted in a court not having jurisdiction to try it—Subsequent acquisition of power—Effect.*

Where a suit for recovery of Rs. 157 was instituted in a Small Cause Court invested with jurisdiction to try suits up to Rs. 100 only, that Court cannot try the suit though it is subsequently and at the time of the trial invested with jurisdiction up to Rs. 250 (*Ryves, J.*) *CHUNNI LAL v. GOKUL.* (1922) All. 112. L. R. 3 A. 233.

20 A. L. J. 257. 66 I. C. 816

—S. 35—*Jurisdiction—Appeal—Suit instituted in court of Munsif succeeded by another not having such jurisdiction—Appeal.* See (1921) Dig. Col. 957. *ZAMIRUL HASAN KHAN v. IMDAD ALI KHAN.* 44 All. 59. 64 I. C. 573.

(1922) All. 161.

—Sch. I Art. 35 (ii)—*Suit for value of trees wrongfully cut—Jurisdiction.*

Where the plaint does not disclose an offence punishable under Ch. 17 I. P. C. a suit for the value of trees wrongfully cut by defendant is not excluded from the cognizance of a Small Cause Court. (*Lyle, A. J. C.*) *KUNWAR SINGH v. UJAGAR SINGH.* 3 U. P. L. R. (J. C.) 18.

8 O. L. J. 391. 65 I. C. 7

—Sch. II, Art. 8—*Landlord and tenant—Batal rent—Suit by landlord for damages for non-cultivation by tenant—Suit cognizable by Revenue Court.* See AGRA TEN ACT SS. 102 AND 167.

L. R. 3 A. 477. (Rev.)

—Sch. II, Art. 8—*Suit for interest due on mortgage money—Cognizable by a Small Cause Court.* See C. P. CODE S. 102. 66 I. C. 285

—Sch. II Art. 8—*Suit for recovery of rent due in respect of a shop—Jurisdiction.*

A suit for the recovery of shop rent is cognizable by a court of small causes, shop rent being covered by the expression 'house rent' in art. 8, sch. II of the Prov. Sm. C. C. Act. (*Kotval, A. J. C.*) *NATHU v. SONASA.* (1922) Nag. 15.

5 N. L. J. 241. 65 I. C. 966

—Sch. II Art. 8—*Suit for rent other than house rent—S. 102 C. P. Code, if applies.*

Sch. II Art. 8 of the Pro. Sm. C. C. Act exempts suits for rent other than house rent, out of the cognizance of a Court of Small Causes. Hence S. 102 C. P. Code does not apply to suits of this nature. (*Mullick and Atkinson, JJ.*) *SADANAND TEWARI v. DEB. NATH MANJHI.*

(1922) Pat. 154 : (1922) P. 184.

—Sch. II, Art. 13—*Haq cha harum—Suit for recovery of—Cognizability by Small Cause Court.* See (1921) Dig. Col. 957. *BECHAI v. BADRI NARAIN.* 43 All. 681.

## PR. SM. C. COURTS ACT (1887), SCH. II, ART. 35

—Sch. II, Art. 31—*Suit for accounts—Suit on the basis of an agreement—Small Cause Court—Jurisdiction of*

A suit based on an agreement between the plaintiff company and the defendant whereby "the plaintiff company was to supply raw materials and the defendant was to execute moulding and casting work to be paid for at certain stipulated rates, subject to deduction for bad workmanship and subject also to the return at the end of each month of all such materials or metals as the defendant did not use for the work he had to perform" is not a suit for account and is not exempted from the cognizance of a Small Cause Court. 21 C. W. N. 784 foll. (*Richardson, J.*) *THE RUSSA ENGINEERING WORKS, LTD v. BHADRESWAR DAS.*

64 I. C. 327

—Sch. II Art. 31—*Suit for damages for breach of covenant for title.*

A suit for damages for breach of covenant for title is not excluded from the cognizance of the Small Cause Court. (*Krishnan, J.*) *RAJAMMAL AIYAR v. KRISHNASAMI IYENGAR.* 15 L. W. 35. (1922) Mad. 300.

—Sch. II Art. 35 (ii)—*Suit for compensation—Unlawful cutting of trees.*

A suit for compensation for unlawful cutting of trees which would constitute an offence of mischief or theft punishable under Ch. XVII of the Penal Code falls within Art. 35 (ii) of schedule II of Prov. Sm. C. C. Act, and is not cognizable by a Small Cause Court. (*Syed Wazir Hasan J. C.*) *MT. SHAHIDAN v. JOGANNATH.*

4 U. P. L. R. (O. C.) 23 : 65 I. C. 344 : (1922) Oudh 161

—Sch. II Art. 31—*Suit for mesne profits—Jurisdiction of Small Cause Court.*

Art. 31 of Sch. II of the Pro. Sm. C. C. Act withdraws from the jurisdiction of a court of Small Causes a suit for mesne profits. 25 B. 85 ; 25 M. 108 foll. 23 C. 884 not foll. (*Saunders, J. C.*) *MAUNGTON E. v. MAUNG SHWE THA.*

66 I. C. 368.

—Sch. II Art. 31—*Suit for recovery of money due on acknowledgment—Jurisdiction of Small Cause Court.*

A suit for the recovery of a sum of money due on acknowledgment is not debarred from the cognizance of Small Cause Court. (*Suhrwardy and Cumming, JJ.*) *BAUL CHANDRA ADDYA v. SHEIKH ABDUL MATLEB.* 67 I. C. 851.

—Sch. II Art. 35 (ii)—*Suit for value of fruit removed from a tree—Jurisdiction.*

A suit for the value of fruit removed by deft. from a tree which plaintiff claims to be his is not triable by a Small Cause Court. (*Chevis, J.*) *NABI BAKSH v. MAHOMAD ALI.* 3 Lah. L. J. 380 :

67 I. C. 305.

—Sch. II Art. 35 (j)—*Suit for damages for wrongful execution—Omission to certify payment.*

Where a decree holder omits to certify payment of a decree outside court and executes the decree and realises the decree amount, a suit by the judgment-debtor for damages is maintainable.



**PR. SM. C. COURTS ACT (1887), SCH. II, ART. 41.**

in a Small Cause Court. (*Maung Kin, J*) MAUNG MYO v. MAUNG KHA 1 Bur L J, 207

—Sch. II Art. 41—*Suit for reimbursement—Claim under Ss. 69 and 70 of the Contract Act.*

A suit for the recovery of money under Ss. 69 and 70 of the Contract Act, does not fall within Art. 41 of Sch. II to the Prov. Small Cause Courts Act and is therefore not excluded from the cognisable of a Small Cause Court. (*Bucknill, J.*) SURADHANI DEBI v. HARI CHARAN MAHTON.

3 Pat. L T, 122 (1922) P, 337 · 64 I. C. 226.

**PUBLIC TRUST** — Land granted for — Failure of purpose — Fulfilment of object impossible — Right of donor to recover property. See TRUSTS ACT, S. 77 (c). 67 I. C. 434.

**PUNJAB ALIENATION OF LAND ACT (XIII of 1900) S. 21, (cl. (2))—Agriculturists—Decision of revenue authority — If binding on Civil Court.**

The decision of a revenue officer as to whether a person is a member of an agricultural tribe is not binding on the Civil Courts which are free to form their own opinion on the point. (*Martineau J.*) LADHA RAM v. ALI SHAH.

3 Lah. L J 439

**PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (V of 1912) S. 21—Government tenant—Succession—Widow—Gift of estate.**

A Government tenant died after acquiring occupancy right and his land was mutated in favour of his widow. The widow subsequently acquired proprietary rights and gifted the land away. In a suit by the reversioners of the tenant Held that the widow had absolute control of the property on acquisition of occupancy rights and that S. 21 of Act V of 1912 did not apply to the widow and her estate. Consequently the reversioners of the tenant had no right of succession to occupancy right. (*Shadi Lal, C J. and Wilberforce, J.*) BISAKHA SINGH v. ISHAR

4 Lah. L J 296.

**PUNJAB COURTS ACT, (VI of 1918) S. 41 (3)—Grazing rights—Custom—Second appeal.**

The question as to the existence of grazing rights is one of custom and cannot be entertained in second appeal without a certificate. (*Shadi Lal, C. J. and Abdul Qadir, J.*) SAREP SINGH v. KHEMAN. (1922) Lah. 470 · 68 I. C. 751.

—S. 41 (3)—*Scope of.*

The object of the Legislature by enacting sub-S 3 of S. 41 of the Punjab Courts Act was to make an exception in matters of second appeal regarding a question of custom or usage, of sufficient importance and to allow an appeal on evidence also. To hold that the right of questioning a decision on custom exists in appeals from decrees and does not exist in appeal from orders of remand would create an anomaly. (*Shadi Lal, C. J. Abdul Raoof and Martineau, JJ.*) MHSAMMAT UMRI v. SHAH MAHOMED.

(1922) Lah. 178.

—Ss. 41 (3) and 44 — *Second appeal—Custom—Onus of proof—Certificate if necessary—Refusal to grant certificate—Revision—Interference.*

**PUNJAB LAND REVENUE ACT (1887), S. 144.**

The question of *onus probandi* in a custom case cannot be raised in second appeal without a certificate under S. 41 (3) of the Punjab Courts Act. When an application for a certificate under S. 41 (3) of the Punjab Courts Act is refused by the District Judge on the erroneous ground that no question of custom arose, a revision to the Chief Court from the order of refusal is competent on the ground that the Dt. judge had failed to exercise the jurisdiction vested in him. 18 P. R 1918 Ref (*Scott Smith and Harrison, JJ*) NATHU v. BATAN SINGH 67 I. C. 759.

—S. 44—Material irregularity—Burden of proof—Error as to: See (1921) DIG. COL. 961 GANDA RAM v. REHANA. 64 I. C. 91.

**PUNJAB COURT OF WARDS ACT (II of 1903) Ss. 13 (1), 20, 40 and 46—Suit by Court of Wards—Death of a ward—Effect**

The death of one of the wards on whose behalf a suit has been instituted by the Court of Wards does not cause an abatement of the suit. Nor does the Court of Wards cease to have an interest in the property in dispute. (*Le Rossignol and Martineau, JJ.*) KARIM BAKSH v. COURT OF WARDS SALARWAHAM ESTATE. 4 Lah. L J. 391

**PUNJAB EXCISE ACT (I of 1914) S. 61 (1) (a) and 61 (2) (a)—Complaint by whom to be made.**

Under the new Excise Act a complaint can be brought by a Police Officer for an offence under this Act, the Local Government having empowered all Inspectors and Sub Inspectors of Police with the powers of an excise officer. 13 P. R 1910 Cr. overruled, (*Abdul Qadir, J.*) NIHAL SINGH v. THE CROWN (1922) Lah. 220.

—S. 78—Confiscation of articles—Offence justifying—Illegal order. See (1921) DIG. COL. 965, SUNDAR DAS v. EMPEROR.

67 I. C. 200 · 23 Cr. L J. 376.

**PUNJAB GENERAL CLAUSES ACT, S. 22—Notification under repealed Act—If ipso facto cancelled by repealing Act.**

A notification under S. 7 of the Punjab Pre-emption Act of 1905, if it is not inconsistent with S. 6 of the Pre-emption Act 1913, remains in force till it is cancelled according to law. (*Le Rossignol and Harrison, JJ*) JOLAL DIN v. NATHU RAM 68 I. C. 729.

**PUNJAB GOVERNMENT TENANTS ACT (III of 1893) S. 8—Agreement by Government tenant to share whatever right may be acquired by him—Legality of — Public policy — Specific performance of agreement. See CONTRACT ACT, S. 23. 64 I. C. 18.****PUNJAB LAND REVENUE ACT (XVII of 1887) S. 111—Widow's right to apply for partition.**

A widow has a *locus standi* under S. 111 of the Punjab Land Revenue Act to apply for a partition of the joint estate of her husband, (*Le Rossignol and Abdul Qadir, JJ*) SHADI v. MT JEONI. 3 Lah. 236 : (1922) Lah. 362 : 68 I. C. 553

—Ss. 144, 158 (2)—Title to crop—Delivery by revenue officer—Suit in Civil Court—Jurisdiction.

**PUNJAB LAND REVENUE ACT (1887), S. 158**

Defendants applied to the Revenue Officer for a division or appraisal of the produce of a holding in which they were co-sharers with the plaintiffs. An appraisal of the produce was duly made, by the referee appointed by the Revenue officer but before division of the produce plaintiff removed it and stored it in a house. The referee thereupon made over a whole Khatti of barley to the defendants in lieu of their share of the produce. In a suit by plaintiffs for the price of the barley alleging that it belonged to them exclusively.

*Held*, that the question whether the barley was joint property or belonged exclusively to the plaintiffs, was a question of title which cannot be determined by a Revenue Officer. Consequently the Civil Court has jurisdiction to entertain the suit which did not come within S. 158 (2) (XIX) of the Punjab Land Revenue Act. (*Shadi Lal and Harrison, JJ.*) **RAMJI LAL v. MANGAL SINGH**.

2 Lah. 302, 65 I. C. 256, 28 P. L. R. 1922 : (1922) Lah. 157.

—S 158 (2) (XVII)—*Declaratory suit that land impartible—Collector's order to partition—Agreement in Wajib-ul-arz.*

An agreement among some co-sharers of shamlat land that it should remain joint and indivisible was entered in the Wajib-ul-arz. When the Collector ordered partition, a suit was instituted in a Civil Court for a declaration that the land could not be partitioned:

*Held*, under S. 158 (2) (XVII) of the Land Rev Act it was not cognisable by a Civil Court. (*Abdul Raof and Martineau, JJ.*) **SINGH RAM v. DATA RAM**.

3 Lah. 4 : 4 U. P. L. R. (Lah) 72  
67 I. C. 240. (1922) Lah. 88.

**PUNJAB LAND REVENUE RULES, R. 27—Zaildar—Designation—Conditional resignation—Succession of person designated.**

When a Zaildar is too old to perform personally the duties of his office the usual and proper course is for a substitute to be appointed. There is nothing in the Land Revenue Rules to preclude an unconditional resignation of his office by a Zaildar though a resignation conditional on the succession of a particular person designated by the resigning Zaildar is opposed to the spirit of the rules regulating succession to the Zaildar. The initiation and prosecution of needless proceedings in connection with such posts as this is to be deprecated. (*Fagan, F. C.*) **MAHAMMAD ILAHI v. FAZAL ILAHI**.

4 Lah. L. J. 415.

**PUNJAB LAWS ACT (VI of 1872)—Insolvency proceedings—Suit—Decree—Appeal.** See (1921) DIG. COL. 966 **RADHA KISHEN v. MADAN GOPAL**, 67 I. C. 794

**PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION ACT, I of 1900) Sch. I—Heir—Meaning of—Suit by remote reversioner for possession.**

The word "heir" in the Schedule to the Punjab Limitation Act includes only the next heir after the death of the alienor and not a remote reversioner. A suit for possession by a remote reversioner of the last male holder, whose right to possession did not arise till the death of the intervening reversioner is not governed by the Act. (*Scott Smith, J.*) **RULDU SINGH v. SAWAL SINGH**. (1922) Lah. 380 : 64 I. C. 67

**PUNJAB MUNICIPAL ACT, (1911) S. 3.**

—Art 1—*Applicability of—Right to sue accruing under old act—Limitation.*

Where the time prescribed for setting aside an alienation had already expired when the Punjab Limitation Act came into operation, that Act does not operate so as to extend the time. This principle however is not applicable to a case in which the right to sue had accrued under the old Act but the period of limitation had not expired when the Punjab Limitation Act of 1900 was passed. (*Le Rossignol and Wilberforce, JJ.*) **HAKUMAT RAI v. WADHAWA SINGH** 4 Lah. L. J. 243

—Art. 2—*Alienation by proprietor—Suit for possession—Limitation.*

Where property is alienated without consideration and necessity by a man proprietor, a suit by the heir to have it set aside and for possession is within time if filed within 12 years of the attestation by the Revenue officer. (*Chevis, J.*) **KUNDAN v. MAM RAI**. 4 Lah. L. J. 178 : (1922) Lah. 57.

—Art. 2—*Applicability of—Death of alienor—Death of—Object of the enactment—Test of applicability of the section*

An action to recover possession of ancestral land alienated by a male proprietor subject to the customary law of the Punjab is governed by the Punjab Act I of 1900 if the death of the alienor which gives rise to the cause of action for a suit for possession, takes place after the enforcement of the Act. The whole scheme of the Act makes it clear that the object of the legislature was to remove an uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a limited period of 12 years. The title of the alienee is to be immune from attack if the alienation in his favour was not contested within the 12 years of the date specified in the third column of art 2. Art 2 should be read with art 1 which prescribes the period of limitation for suits for a declaratory decree and the word "heir" in the former article connotes the same person or persons as the expression "son or reversioner" in the latter article. The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and as long as a proprietor is living he has no heir. It is only after the death of the proprietor that the "son or reversioner" becomes an heir. (*Shadi Lal, C. J. and Harrison, J.*) **RULDU SINGH v. SAWAL SINGH** 3 Lah. 188 : 67 I. C. 388.

**PUNJAB LOANS LIMITATION ACT (I of 1904) Arts. 16 and 22—Instalment bond—Penalty—Default—Limitation.**

In the Punjab a suit for the recovery of money due on a bond containing a penalty for a default in payment of instalments is governed by art 16 of the Punjab Loans Limitation Act. Art. 22 is more general and applies to suits on all bonds whether payable by instalments or otherwise. (*Shadi Lal, C. J. and Abdul Qadir J.*) **SIBA SINGH v. SUNDAR SINGH**. 3 Lah. L. J. 522.

**PUNJAB MUNICIPAL ACT (III of 1911) Ss. 3 (10) and 188—Bye laws—Delhi Municipality—Enforceability of** See (1921) DIG. COL. 965 **JOTI PRASAD v. EMPEROR**. 64 I. C. 129.

## PUNJAB MUNICIPAL ACT (1911) S. 3

—Ss 3 (13) 172 and 193—*Street, meaning of—Structure projecting over a street—Permission of the Municipality if necessary.*

A lane which is accessible to the public whether permanently or temporarily, is a street.

S. 193 refers only to buildings to be erected on private property 62 P. R. 1907 referred to

It is clear from S. 172 that a person is not entitled to build a balcony without the permission of the Committee. The Committee has full power to withhold permission for the building of a structure that will project over a street and a Civil Court has no jurisdiction to interfere in such a matter. (*Martineau J.*) GANGARAM v. THE MUNICIPAL COMMITTEE, (1922) Lah. 41. 68 I. C. 675

—S. 56 (1) (b) — *Charity well—Dedication—Power of Municipal Committee to close the well.*

A well was sunk as a charitable act by a private person and dedicated by him to the public. The well lay in a recess at the end of a lane which was a *culdesac*. Held that the well together with the recess was a public one and therefore vested in the Municipality and that the Municipality might deal with it as it pleased, provided that no private rights were invaded. (*Le Rossignol, J.*) KISHEN SINGH v. THE MUNICIPAL COMMITTEE OF AMRITSAR. 4 Lah. L. J. 62 : (1922) Lah. 167 : 67 I. C. 899 (2).

—S. 61 (B) (b)—*Religious teacher—Offering made to—Tax.*

The profession of a theologian or religious teacher is one of the learned professions or callings and hence any income derived from offerings from disciples will be taxable under S. 61 (B) (b) (*Shadi Lal, C.J. and Abdul Qadir J.*) MOTI SINGH v. PRESIDENT. COMMITTEE OF ANANDPUR. 68 I. C. 996

—S. 172—Erection of balcony projecting into street—Permission—Powers of court. See PUNJAB MUNICIPAL ACT, Ss. 3 (13), 172 AND 193. (1922) Lah. 41

—S. 193—Scope of—Refers only to buildings on private property See PUNJAB MUNICIPAL ACT, Ss. 3 (13), 172 AND 193. (1922) Lah. 41

—S. 240—Sanction to prosecute—Rule 26 (2)—Powers of Magistrate to grant sanction

A person appointed by the Deputy Commissioner to prepare and revise voters' lists issued a notice to one of the candidates and other persons at the instance of a rival candidate to show cause why action should not be taken under S. 476 Cr. P. Code or sanction should not be given under S. 195, Cr. P. Code. Held that under the Municipal Act no court could take cognisance of any offence under rules made under S. 240, except on complaint made with the sanction in writing of the Deputy Commissioner and that the proceedings were without jurisdiction. (*Abdul Qadir, J.*) SHIV DAYAL v. TAKAN DAS. (1922) Lah. 183 : 37 P. L. R. 1922.

## PUNJAB PRE-EMPTION ACT, (I of 1913) S. 3 (5)

(a)—*Sale of minor's property—Leave of court—S. 29 of the Guardian and Wards Act—Right to pre-emption.*

## PUNJAB PRE-EMPTION ACT (1913) S. 12

In a suit for pre-emption, if appeared that terms of the sale were settled between the parties privately but to complete a sale on behalf of a minor permission had to be obtained under S. 29 of the Guardians and Wards Act. It was therefore obtained by the guardian and the sale was completed by the guardian privately in favour of the vendee.

Held, that the sale was a private sale and a claim for pre-emption was not prohibited by S. 3 clause 5 (a) 46 P. R. 1909, dist. 52 I. C. 337. (*Abdul Raoof, J.*) HAR KISHEN SINGH v. KALA RAM. 2 Lah. L. J. 261 : 67 I. C. 924

—S. 4—*Adalphi tenure—If a sale*

The creation of an *adalphi* tenure in which no consideration passed does not amount to a sale and hence does not give rise to a right of pre-emption (*Scott-Smith, J.*) ALLAH RAKHIYA KHAN v. AHMAD. 68 I. C. 1008.

—S. 6 — *Pre-emption — Village — Sale of house apart from site.*

Held, that the house in suit was a standing building in a village, and that it was village immoveable property and liable to pre-emption even apart from the site; but the pre-emptor would hold just on the same terms as the vendor did. 10 P. R. 1909 at P. 21 foll. (*Chevers, C.J.*) WAGHA v. MAHOMED ALI. 2 Lah. L. J. 345 : 68 I. C. 193.

—S. 8 (2)—*Notification of Local Government—Effect of.*

Pending a suit for pre-emption, the Punjab Government declared by notification that there would be no right of pre-emption with regard to agricultural land and village immoveable property in a certain area which comprised the suit lands.

Held, the rules had no retrospective effect. The usual method of dealing with pre-emption suits is to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose. (*Abdul Raoof and Campbell, JJ.*) MOHINDAR SINGH v. ARUR SINGH. 3 Lah. 267 (1922) Lah. 344. 67 I. C. 625.

—Ss. 12, 17 and 25—*Scope of—Pre-emption—Rival claims—Priority—Rule of decision—Relationship—Proof of—Tradition—Oral testimony.*

S. 12 of the Punjab Pre-emption Act does not contemplate merely inheritance by one person, or even by a group of people, who at the critical moment would be together equally entitled to inherit the property sold, if the vendor were dead, but it assumes that there will be different priorities as between the different claimants and that such priorities shall be determined in due order of succession.

To be in a position to enforce by suit a claim to pre-empt under the Act the claimant must under S. 17 of the Act have given a notice within a limited time of his intention to enforce his right of pre-emption. A claimant to be successful need not have been at the date of the sale or at any time the heir presumptive of the vendor. The heir presumptive may not have the means to purchase or for any reason may not be desirous to purchase

**PUNJAB PREEMPTION ACT (1913), S. 14.**

and may have omitted to give within the time limited a notice of his intention to pre-empt

Where among the community to which the rival pre-emptors belong, there are no accessible records of births and deaths or family memorials the proof of relationship depends on oral tradition which requires close scrutiny. (*Loid Buckmaster*) SABZ ALI KHAN v. KHAIR MAHOMED KHAN. 3 Lah. 48 : 30 M. L. T. 237.

20 A. L. J. 427 : 49 I. A. 74 : 43 M. L. J. 49 :

1 P. L. R. (P. C.) 1922 : 35 C. L. J. 514

4 U. P. L. R. (P. C.) 39 : (1922) P. C. 139 :  
67 I. C. 264 (P. C.)

—S. 14—*Municipality—Sale in—Right of non-agriculturist to pre-empt*

Though under the notification issued by the Govt. under the Alienation of Land Act, a non-agriculturist may buy land from a member of an agricultural tribe without restriction in a Municipality he cannot pre-empt a sale of such land. (*Leslie Jones, J.*) LACHMAN SINGH SUNDAR DAS. 67 I. C. 816 : 4 U. P. L. R. (Lah.) 98.

—S. 15 (c)—*Scope of—" Pattis" or other sub-division—Meaning of.*

Where at the Settlement of 1864 two *tarafs* or *pattis* were created but they were nominal divisions created for purely fiscal purpose and in fact there was no real sub-division of the village except that some proprietors had been allotted to one *lambardar* and some to another merely for the convenience of collecting land revenue, they are not *pattis* or *tarafs* within the meaning of S. 15 (c) of the Punjab Pre-emption Act, (*Chevis, J.*) UTTAM CHAND v. MEHTALE SINGH, 67 I. C. 48.

—S. 16—*Pre-emption—Suit for—Vicinage—Transfer of property by pre-emptor to his wife—Sale void against creditors—Effect of* See (1921) DIG. COL. 967 ABDUL RAZAK v. FAZAL LAHI. 4 Lah. L. J. 289.

—S. 22 (1)—*Preliminary deposit—Fixing of time—Omission—Deposit when to be made*

It is the duty of the court to fix a time under S. 22 of the Punjab Pre-emption Act within which the preliminary deposit should be made and where the court omits to fix the time, a pre-emptor should not be penalized for omitting to deposit the amount in time, (*Wilberforce, J.*) BALMOKAND v. MT. LACHMAN BAI. 3 Lah. L. J. 545.

—S. 29—*Suit for pre-emption—Limitation—Starting point.*

The underlying principle governing the limitation in pre-emption suits is that it runs from the date of notice. If physical possession is given under the sale the whole world is given notice of the alienation. If a registered deed is executed, constructive notice is given and the same constructive notice is given by mutation.

Where under the terms of an agreement, ownership was to pass only on fulfilment of certain conditions but possession was given to

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facilitate the fulfilment of the conditions, and after they were complied with mutation of names was effected, held in a suit for pre-emption, time began to run from the date of mutation under S. 28 of the Punjab Pre-emption Act (*Abdul Raoof and Harrison, JJ.*) TOLA RAM v. LORINDA RAM. 3 Lah. 261 : (1922) Lah. 210.

—S. 30—*Joint undivided holding—Physical possession—Limitation*

A share in an undivided *mahal* is not susceptible of physical possession within the meaning of S. 30 (citing *Ellis Law of Pre-emption 4th Edn p 40*) (*Broadway, J.*) MD. ATA ULLAH KHAN v. GOPALA MAL. 68 I. C. 906.

—S. 30—*Physical possession—What is—Possession of tenants*

"Physical possession" in S. 30 of the Punjab Pre-emption Act means personal and immediate possession. When the land is in the possession of tenants at-will, it is not capable of physical possession for the purposes of the section. (*Scott-Smith, J.*) HAIDER ALI SHAH v. BHIKHE SHAH. 68 I. C. 811.

—S. 30—*Sale of undivided share—Physical possession—Limitation, when begins.*

If the assignee from a co-sharer of joint undivided property gets possession of any portion of the property, time begins to run under S. 30 (2) of the Pre-emption Act from the time of such assumption of possession. (*Le Rossignol, J.*) SARDAR ALI v. FAZIL. 68 I. C. 895.

**PUNJAB REDEMPTION OF MORTGAGES ACT, (II of 1913) S. 12—*Mortgagor in possession after redemption—Suit for declaration that more money due—Maintainability—Objections not to be raised in second appeal.***

Even after redemption and putting the mortgagor in possession, a suit by a mortgagee for a bare declaration that some more money is due under the mortgage is maintainable under S. 12 of the Redemption of Mortgages Act. Such an objection, cannot be raised for the first time in second appeal (*Scott Smith and Campbell, JJ.*) NARIJAN SINGH v. DIWAN CHARAN DAS. 3 Lah. 239 : (1922) Lah. 363 : 68 I. C. 557.

—S. 15—*Deposit by mortgagor—Delivery of possession—Attachment of deposit.*

The provisions of S. 15 of Punjab Act II of 1913 are primarily for the protection of the mortgagor or other person depositing the money. Where therefore the depositor is given possession of the land, the money becomes the property of the mortgagee and could be attached as such. (*Broadway and Martineau JJ.*) MOHANA MAL v. TULSI RAM. 3 Lah. 141 : (1922) Lah. 290 : 67 I. C. 718.

**PUNJAB TENANCY ACT, (XVI of 1887) S. 59—*Succession of occupancy tenancy—Customary law—Gift by widow to her illegitimate son—Right to contest alienation—Onus: See* (1921) DIG. COL. 969, MUSSAMMAT TOTI v. MALUKA. 66 I. C. 919.**

—S. 77 (1)—*Landlord and tenant—Suit for recovery of price of trees cut down by tenant—Jurisdiction*

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A suit by a person describing himself as a landlord against the defendant described as an occupancy-tenant, for price of trees cut down by him on the ground that the tenant had exceeded his rights was held to be one cognisable by a Revenue Court and not by a Civil Court (*Harrison, J.*) *ABDULLA v BISHAN DAS*.

64 I. C. 152

—S. 77, cl. (3) sub. s. (d)—*Suit by tenant to establish a right of occupancy—Jurisdiction of Revenue Court*

Under S. 77 cl. (3) (d) of the Punjab Tenancy Act suits by a tenant to establish a claim to a right of occupancy are to be heard and determined by a Revenue Court. A plaintiff's claim to be declared as owner is undoubtedly cognisable by the Civil Court. Similarly, his claim that the land in suit, really formed part of his hereditary holding is within the cognisance of the Civil Court. (*Broadway and Abdul Raoof, JJ.*) *BISHEN SINGH v. JEFFAR*

4 Lah. L. J. 240.

—S. 77 (3) PROVISIO—*Civil and Revenue courts—Jurisdiction—Occupancy tenant—Suit by lessee for possession.*

A suit by a tenant to establish a claim to a right of occupancy or by a landlord to prove that a tenant has not such a right, is exclusively triable by a Revenue authority under S. 77 (3) (a) of the Punjab Ten. Act. The Civil Court has no jurisdiction to decide that the tenants had a subsisting right of occupancy, having regard to the proviso to S. 77. (*Scott Smith and Harrison, JJ.*) *CHUSA v. ASA*.

3 Lah. 44:

4 Lah. L. J. 196 : 4 U. P. L. R. (Lah.) 44 : (1922) Lah. 33 : 65 I. C. 520

—S. 77 (3)—Prov. 1—*Scope of*

When after having entertained the suit the Court reaches a point in the trial at which it holds that the plaintiff is a tenant and is suing as such, the proviso takes effect and makes it incumbent on the Court to return the plaint for presentation to the Collector. (*Abdul Raoof and Harrison, JJ.*) *MURID HUSSAIN v. FASAL ILLAHI*.

(1922) Lah. 173

PURDANASHIN — *Criminal trial—Examination on commission—Procedure if proper*

The issue of a commission for the examination of a Purdanashin eye-witness in a serious criminal trial is a procedure which is much to be deprecated and should never be adopted except for the most cogent reasons, (*Coutts and Ross, JJ.*) *LACHMI LAL v. EMPEROR*.

(1922) Pat. 159

3 Pat. L. T. 398 : (1922) P. 40 : 65 I. C. 1002 : 23 Cr. L. J. 218

—Deed—Execution by—Gift—Onus of proof of knowledge. See (1921) DIG. COL. 969 *KAMAWATI v. DIGBIJAI SINGH*.

42 M. L. J. 87 : 15 L. W. 1 : 30 M. L. T. 47 : L. R. 3 (P. C.) 65 : 26 C. W. N. 490 :

24 Bom. L. R. 626 : 64 I. C. 559. (P. C.) : (1922) M. W. N. 336. (1922) P. C. 14 : 4 U. P. L. R. (P. C.) 32.

—*Disposition—Court's duty.*

A court dealing with the disposition of her property by a *pardah* woman, ought to be satisfied that the transaction was explained to her

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and that she knew what she was doing. 3 Cal. 334 and 8 All. 267 Referred to. (*Abdul Raoof and Abdul Qadir, JJ.*) *HARICHAND OF DELHI v. JUGUL KISHORA OF DELHI*. (1922) Lah. 349

68 I. C. 722.

—*Guardian of property of minor.*

A *pardanashin* lady is not disqualified from being appointed guardian of minor's property, but the Court will exercise discretion whether she will be the proper guardian looking to the nature of the business. (*Kotwal, A. J. C.*) *MT. RAJRAJ v. MT. BHAGWANDAS* (1922) Nag. 232.

—Undue influence—Deed of gift—Dominating position—Unconscionable bargain—Onus heavy on donee. See CONTRACT ACT, SS. 16 AND 19. 65 I. C. 380.

RAILWAY—Carriage of goods—Delivery of goods—What constitutes—Extent of liability of railway. See RAILWAYS ACT, SS. 72, 47, ETC. 20 A. L. J. 31

—*Contract to carry goods—Goods carried at owner's risk under Risk Note Form H—Loss of goods—Wilful neglect—Inference from conduct—Onus of proof.*

Goods were delivered to a Railway Company to be conveyed to a certain place under the usual risk note Form H—according to which in consideration of a specially reduced tariff, under which the consignor agreed to hold the Railway Company free from all responsibility for any loss, destruction, or deterioration of or damage to all or any of the consignment from any cause whatever except loss due to wilful neglect or theft, wilful neglect not including fire, robbery or any unforeseen accident

In a suit by plaintiff for shortage of a part of the goods, held on the facts the loss was due to theft owing to wilful negligence of the Company also. Plaintiff having proved a *prima facie* case the onus was on the Railway Company to offer some reasonable explanation to escape liability. (*Macleod, C. J. and Shah, J.*) *THE CENTRAL INDIA SPINNING AND WEAVING COMPANY v. G. I. P. RAILWAY*

24 Bom. L. R. 272 :

(1922) Bom. 46 : 67 I. C. 162.

—*Risknote—Form B—Deviation from route—Liability for loss.*

Where a railway company carries goods covered by a risk note in Form B otherwise than by the agreed route to suit its own convenience, without notice to the consignor and without giving him an opportunity to consider whether he should sign a risknote in Form B, the Company is liable for damages for loss of the goods and could not rely on the protection afforded by the risknote. (*Macleod, C. J. and Coyajee, J.*) *VALI MAHOMED HAMAD v. G. I. P. RAILWAY*.

46 Bom. 330 : 24 Bom. L. R. 316 : (1922) Bom. 74 : 67 I. C. 366.

—*Risk notes H or B—Liability of railways.*

In cases where goods are consigned under risk notes B or H, it is incumbent on the plaintiffs to prove in order to succeed wilful neglect on the part of the railway or theft, (*Adami, J.*) *THE BENGAL NORTH WESTERN RAILWAY COMPANY v. ABDAL KARIM*. (1922) P. 419.

## RAILWAY RECEIPTS.

**RAILWAY RECEIPTS**—Negotiability of—Assignment of, when passes title to the goods *See* CONTRACT ACT, Ss. 102, 108. 1 Bur. L. J. 90

**RAILWAYS ACT (IX of 1890), Ss. 42, 47 and 109**—Reservation of compartment for Europeans and Anglo-Indians—Legality of—"Another passenger" Meaning of—Object of the rule: making power.

It is lawful for a Railway Company to reserve a compartment by its train for the use of Europeans and Anglo-Indians only.

The accused entered and persisted in remaining in a third class compartment to which a card had been attached purporting, over the initials of the senior ticket examiner, to reserve it for Europeans and Anglo Indians, *Heli*, per the *Officiating Chief Justice and Oldfield, J.* (*Krishnan, J. dissenting*), that the accused had committed an offence punishable under S 109 of the Indian Railways Act.

Per *The Officiating Chief Justice and Oldfield-J.*—The term 'passenger' in the expression 'another passenger' in S 109 (1) is not restricted to a person who actually enters a Railway carriage for the purpose of travelling but also includes possible passengers who may join at any later station.

The object and the result of making rules under S. 47 (1) of the Act with the sanction of the Governor General in Council are only to make their breach an offence punishable by the Courts

The Traffic Working Orders are not general rules published under S. 47 of the Act. They are not available and in no way resemble a power of attorney from which the station-master's authority is derived, they form merely a domestic code which every organisation must formulate for the guidance of its employees.

The reservation of accommodation for Anglo-Indians or any class of passengers is not an undue or unreasonable preference in favour of a particular description of traffic within the meaning of S 42 (2) of the Act

Per *The Officiating Chief Justice*—There is nothing in any of the rules of the Traffic Working Orders to indicate that a compartment can only be legally reserved by a label or notice signed or initialled by the Station-master. The direction in R. 172 (a) to the effect that the Station-master should label the carriage or compartment does not imply that he must do so with his own hands or sign the label.

Per *Krishnan, J.*—The third class compartment in the case was not reserved for Europeans and Anglo-Indians, as the label that was in the carriage door was not the usually printed label signed or initialled by the Station-master under S. 172 (a) of the Traffic Working Orders. The station-master has to observe the formalities required by the rules before properly he can reserve a compartment as his authority to do so is given to him by the Railway administration subject to the rules.

The expression "Traffic" in S. 42 (2) is not restricted to conveyance of animals and goods and the fixing of charges therefor. (*Ayling, Offg C J., Oldfield and Krishnan, JJ.*) *KOMARAN AND GOVINDASWAMY In re.* 45 Mad 215 :

42 M. L. J. 21 : (1922) M. W. N. 34 : 30 M. L. T. 134 : 15 L. W. 207 : (1922) Mad. 35 : 66 I. C. 520 : 23 Cr. L. J. 296.

## RAILWAYS ACT (1890), S. 63.

—S. 47—Object of making rules under—Traffic orders if general rules. *See* RAILWAYS ACT, Ss. 42, 41 AND 109. 45 Mad. 215.

—S. 47—Rules under—Rule controlling or limiting statutory liability of railway under S. 72 of the Act. *ultra vires.* *See* RAILWAYS ACT, Ss. 72, 47, ETC, 20 A. L. J. 31.

—Ss. 56 and 80—Carriage of goods by rail—Delivery to consignee—Damage to goods—Demand for clean receipt—Refusal—Sale of goods.

A consignee has no right to demand that the goods shall be opened and inspected on the railway premises before he can be called upon to take delivery, 11 A. L. J. 772 Ref. There is no provision of law which obliges a railway company to make or allow to be made in its delivery register any note alleging that goods are in a damaged condition. A consignee cannot refuse to take delivery because the Ry. Co. refuses to make an entry in their books that the goods are damaged and the consignee could not insist upon an entry. If he had any complaint, he was entitled to make his representation to the company in any other way.

Where in such a case the consignee refuses to clear the goods and the Ry company sells them under S. 56 of the Act, it is guilty of conversion 11 A. L. J. 775; 39 C. 311. Ref.

Where goods are despatched through several railway systems and the consignee sues one of the railways for damage to goods he could only recover damages from that Railway by proving that the damage was caused on its system. 34 A. 422 Ref. (*Lindsay and Kanhaiya Lal, JJ.*) *SRI GANGAI COTTON MILLS CO. LTD. v. EAST INDIAN RAILWAY CO.* 20 A. L. J. 761 :

(1922) All. 514 : 4 U. P. L. R. (A) 222 : 68 I. C. 961.

—S. 57—Loss of railway receipt for goods consigned to railway—Offer to execute indemnity bond delay on the part of the railway company—Claim for demurrage. *See* (1921) Dig. COL 975 *EAST INDIAN RAILWAY CO. v. BHAGWAN DAS.* 1 Pat. 15 : (1922) P. 390.

—Ss. 63, 93, 108 and 109—Scope of—Pulling the chain—Overcrowding—Reasonable and sufficient cause.

Accused pulled a chain used as an alarm signal in a railway carriage on the ground that the compartment had become over-crowded on account of 70 passengers having entered into it, whereas the compartment was marked for 27 passengers only He also complained to the Railway authorities but received no attention *Held* that he had reasonable and sufficient cause for pulling the chain within the meaning of S. 108 of the Railways Act.

To prevent any danger to the health and life of passengers. S. 63 of the Railways Act provides that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment on pain of penalty. A corresponding obligation has been cast under S. 109 of the Act upon passengers to obviate entering a compartment which already contains the maximum number

## RAILWAYS ACT (1890), S. 72.

of passengers exhibited therein. These provisions of the Act therefore confer a right upon the occupants of a compartment to resist the entry of passengers when the compartment had already contained the maximum number allowed under the rules. (*Jwala Prasad, J.*) ISHWAR DASS VARSHNI v. EMPEROR. 1 Pat 260.

(1922) P. 8 : (1922) Pat. 63 : 3 Pat. L. T. 195 : 66 I. C. 321 : 23 Cr. L. J. 257.

— — — S. 72—Carriage of goods—Railway's risk—Shortage in weight—Open delivery—Refusal to give—Suit for damages.

There is no provision in the Railways Act or any rule or regulation made under it, making it incumbent upon a railway company to effect an open delivery and the consignee could not insist on the railway authorities to open the parcel and compare its contents with the items given in the beejak in his possession. The consignee is not justified in refusing to take delivery of the parcel for that reason and he cannot prefer a claim for the price of the goods as on a refusal to deliver, 11 A. L. J. 772 foll. (*Abdul Raouf, J.*) SECRETARY OF STATE FOR INDIA v. SHAM LAL DEOKI NANDAN. 4 U. P. L. R. (Lah.) 65 : 67 I. C. 312.

— — — Ss. 72, 47 and 54—Delivery of goods to railway—Grant of receipt by railway if essential to complete delivery—Rules to that effect ultra vires—Liability of railway—Contract Act, S. 149.

Plaintiff handed over goods to a Railway Company for despatch to another place, which was accordingly done. He however failed to take a receipt for the goods despatched which never reached their destination and in a suit for damages, the company pleaded that under a rule framed under S. 47 (1) (i) "delivery" will be deemed to be complete only as a receipt in the proper form being granted by the company's authorised servants, and that as the rule had not been complied with in the case, they were not liable.

Held, overruling this plea, goods had been 'delivered' to the Railway authority within the meaning of S. 72 and the company could not escape liability for their negligence.

Per *Piggott, J.* :—It is not open to a Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorised servant of the administration to be carried by the Railway, nevertheless the court shall not deem them to have been so delivered unless and until the Railway servant in question has performed a particular act, such as granting a receipt.

Per *Walsh, J.* :—No rule which any company can make can cut down, control or limit its liability which is a creature of statute under S. 72 and if a rule is relied upon by the company which is inconsistent with that liability, it has clearly gone beyond the authority created for making rules.

S. 72 of the Railways Act, defines the responsibility of a Railway Company entrusted with goods as that of a bailee for reward as defined in Ss. 151, 152 and 161 of the Contract Act. The definition of bailment involves the definition of "delivery" as contained in S. 149 of the Contract Act and the two Ss. 148 and 149 of that Act are equally incorporated with the Railways

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Act and define and control the liability of the Railway Company.

23 All. 367 dist. (*Piggott, Walsh and Gokul Prasad, JJ.*) FIRM SOHANPAL MUNNA LAL v. THE EAST INDIAN RAILWAY CO. 44 A. 218 : 20 A. L. J. 31 : L. R. 3 A. 33 : (1922) A. 9 : 65 I. C. 109.

— — — S. 72—Despatch of goods by railway—Risk Note Form A—Delay—Liability.

Where certain goods are despatched by railway but there is no proof that they were despatched under a risk note in Form A the Railway Company is liable in damages for the delay in the delivery of the goods at the proper time. The liability of the Ry. Co. is under S. 161 of the Contract Act. (*Banerjee, J.*) EAST INDIAN RAILWAY v. FIRM OF INDERMAN KULSHI RAM. 20 A. L. J. 114 : L. R. 3 A. 101 : (1922) A. 63 : 65 I. C. 771.

— — — S. 72—Liability of railway for goods consigned on risk notes—Onus. See (1921) DIG. COL. 975 JAMNADHAR BALDEVDASS FIRM v. BURMA RAILWAYS & CO., LTD.

. 64 I. C. 395.

— — — S. 72—Non delivery of goods—Loss—Suit for damages—Negligence—Burden of proof.

In a suit by a consignor for damages for non-delivery of goods the railway company must prove actual loss of goods to come within the exception clause. The burden of proving due diligence lies primarily on the railway and it is only then that the consignor will have to prove the existence of exceptional circumstances excepted in the risk note, (*Dhobley, A. J. C.*) DANDBHAI v. G. I. P. RY. CO.

5 N. L. J. 233.

— — — S. 72—Railway—Carriers of goods—Consignment Risk-note form H—Loss of part of consignment—Liability of railway company—Negligence or wilful default terms. See (1921) DIG. COL. 975 B B AND C. I RAILWAY v. DAYARAM BECHARIDAS. 46 Bom. 11 : 64 I. C. 4 : (1922) Bom. 189.

— — — S. 72—Risk note—Form B—Responsibility of railway—Rights of consignor.

S. 72 (2) of the Railways Act limits the responsibility of the railway company to the extent specified in a risk note filled up and signed by the consignor. In the case of a consignment lost in transit and covered by a risk note in form B the onus of proving neglect or theft by the railway administration or its servants lies on the consignor 39 All. 418, 43 Bom 769 ref. (*Dalal, A. J. C.*) HAZAI LAL v. SECRETARY OF STATE FOR INDIA.

(1922) Oudh 170 : 65 I. C. 342..

— — — S. 72—Risknote—Consignment—Deterioration of goods—Cause of action.

Certain quantity of wheat flour was despatched by railway under the terms of a risk note which held the Railway company concerned liable only in case of loss of one or more packages forming part of the consignment. Owing to a mistake on the part of the Railway the bags were sent to a wrong station ; during the course of the transit the goods deteriorated. Held, that the consignor had no cause of action against the

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Railway. (*Stuart and Gokul Prasad, JJ.*) RAM KISHUN RAM. v. NORTH WESTERN RAILWAY.  
20 A. L. J. 973

—S. 72—*Risknote Form B—Theft in a running train—Onus of proof.*

Where there is a risknote in Form B. in the case of a theft in a running train, the company is protected by the risknote. It is open to the consignee in such a case to prove that theft did not occur in the running train or that the theft was brought about by the company's servants. But if nothing more can be proved except that there was a theft in a running train, then the company by the Risknote Form B will be protected. (*Macleod, C. J. and Shah, J.*) B B AND C I. RAILWAY v. SARKAR CHAND KALIDAS SHAH.

24 Bom. L. R. 787 : (1922) Bom. 256 : 68 I. C. 534.

—S. 72 (2) (b)—*Risk note form H—Goods consigned under—Loss of—Suit for damages for—Onus on plff.*

In a suit for compensation for the loss of goods booked for carriage by railway under a risk note (Form H), the onus lies on the plff. who alleges that the case fell within the exceptions mentioned in the risk note to prove the facts necessary to charge the company with liability. (*Kumaraswami Sastri, J.*) ALBUQUERQUE AND SONS v. THE SOUTH INDIAN RAILWAY COMPANY.  
43 M. L. J. 90 : (1922) M. W. N. 328. 16 L. W. 667 : (1922) Mad. 231 : 31 M. L. T. 470 (H. C.) : 68 I. C. 269.

—S. 72 and Sch. II (m) — *Shawls — Meaning of—Cheap cloth.*

The word "Shawls" in the Railways Act is used in a special and restricted sense as meaning a costly woollen fabric and does not cover articles of cheap manufacture at home or abroad, 39 C. 1029 foll. ; 42 A. 76 not foll. (*Macleod, C. J. and Shah, J.*) THE EAST INDIAN RAILWAY COMPANY v. DAYABHAI VANMALIDAS.

24 Bom. L. R. 416 : (1922) Bom. 416 : 67 I. C. 852.

—S. 72 (2)—*Carriage of goods by railway—Risk note Form B—Theft of goods in transit—Robbery—Liability for loss.*

"Robbery" in risknote form B means the same thing as theft and not in the sense as defined by the Indian Penal Code. Where goods consigned under risk note form B were stolen during transit the railway is not responsible for the loss under the terms of Risk-note Form B. (*Ryves, J.*) G. I. P. RAILWAY Co v. FIRM OF BHOLA NATH DEBI DAS.  
L. R. 3. A. 464.

—S. 75—*Consignment of shawls by railway article comprised in Sch. II—Declaration of value. See (1921) DIG. COL. 976 THE GREAT INDIAN PENINSULA RAILWAY Co. v. CHELLARAM GIANCHAND, 30 M. L. T. 229 (H. C.) : 65 I. C. 99*

—S. 76 — *Consignment — Shortage Burden of proof—Risk Note Form A.*

A person consigned goods under a Risk Note Form A which stated that the consignment was in bad condition and was liable to damage, leakage and wastage as the cases in which the goods were contained were old, torn and wet. Further the consignee agreed to hold the railway free from

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responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising therefrom. In an action by plff. (consignor) for damages for short delivery held that the onus lay on the consignor to prove that under S. 76 of the Railways Act the shortage was due to pilferage by the railway servants and the risk note A properly protected the railway. (*Ryves, J.*) FIRM OF PARBHOLAL RAM RATAN v. THE BENGAL NORTH WESTERN RAILWAY CO.,  
4 U. P. L. R. (A.) 2 : 65 I. C. 583.

—Ss. 76, 77—*Risk Note—Wilful neglect or theft of servants—Jurisdiction of the note—Non-delivery—Notice—General Traffic Manager—Power to settle claims—When notice to G. T. M. is sufficient.*

The Railway company cannot plead in defence the risk note as freeing it from all responsibilities, when the loss of the property in question is due to the wilful neglect of the Railway administration or theft or neglect of its servants.

In a suit for possession or compensation on account of non delivery of the goods signed to the company which the defendant is bound to deliver to the plff. S. 77 has no application and the company is not entitled to any notice in case of non-delivery. When the assignment of power to settle claims is proved, notice to the General Traffic Manager is sufficient. (*Jwala Prasad, J.*) EAST INDIAN RAILWAY COMPANY v. KALI CHARAN RAM PRASAD 3 Pat. L. T. 215 : (1922) Pat. 145 : 69 I. C. 103 : (1922) P. 106.

—S. 77—*Loss of consignment—Notice.*

When there is a loss of consignment, notice of loss to the Railway Company under S. 77 is necessary. (*Le Rossignol, J.*) THE EAST INDIA COMPANY v. RAHIM BUKSH. (1922) Lah. 72.

—Ss. 77 and 140—*Loss of goods—Notice of claim—To whom to be given—Necessity for notice.*

Where a person sent his goods for carriage by a railway and they were lost in transit, notice of a suit for damages must be given to the Agent of the company. Correspondence with the traffic manager or notice sent to him does not, in law, amount to notice to the Agent. 28 A. 552 foll. A direction in the railway receipt given for the goods despatched that all claims should be sent to the Traffic Manager does not dispense with the necessity of giving the notice contemplated by S. 77 of the Railway Act. 33 A. 544 foll. (*Gokul Prasad, J.*) RAM SAHAJ CHHIDDA LAL v. EAST INDIAN RAILWAY Co. 44 All. 645 : 20 A. L. J. 664 : L. R. 3, A 311 : (1922) A. 280 (2) 66 I. C. 578.

—S. 77 — *Notice for compensation for determination of goods — Notice to the railway company—Breach of Contract or Tort See (1921) DIG. COL. 976 SHANKAR BALKRISHNA TORNE v. SOUTH INDIAN RAILWAY. 46 Bom. 176 : (1922) Bom. 157 : 64 I. C. 390.*

—Ss. 77 and 140 — *Suit for damages against railway company— Notice of claim within*



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six months—Notice to agent—Notice to subordinate officials if sufficient. *See* (1921) DIG COL. 977, MAHADEVA AIVAR v. THE S. I. RY. CO.

45 Mad. 135 : 42 M. L. J. 202.

30 M. L. T. 112 (H. C.) : (1922) Mad. 362.  
69 I. C. 59.

—S. 108—*Sufficient cause—Test of—Overcrowding, if one.*

No hard and fast rule can be laid down as to what must constitute reasonable and sufficient cause within the meaning of S. 108 Railways Act and it must depend upon the circumstances of each case whether there was such a cause as to justify a passenger in pulling the communication chain.

Where a passenger's complaints as to the overcrowding of a compartment are not listened to by the authorities, and finds the compartment packed to suffocation, he is justified in pulling the chain. (*Jwala Prasad, J.*) ISWAR DAS VARSHNI v. EMPEROR.

1 Pat. 260 : (1922) Pat. 63.

3 Pat. L. T. 195 : (1922) P. 8 : 66 I. C. 321.  
23 Cr. L. J. 257.

—S. 109—Obligation on passengers—Compartment containing maximum number—Entry into. *See* RAILWAYS ACT, Ss. 63, 93, 108 AND 109 (1922) Pat. 63.

—S. 109—"Passenger"—Meaning of—If includes possible passengers. *See* RAILWAYS ACT Ss. 42, 47 AND 109, 45 Mad. 215

—S. 120—*Travelling without ticket—If justifies removal.*

Travelling without a ticket is not one of the circumstances mentioned in S. 120 of the Railways Act as justifying removal from a Railway by a Railway servant. (*Campbell, J.*) RADHA KISHEN v. EMPEROR.

68 I. C. 846.

23 Cr. L. J. 622.

—S. 120 (b)—Selling fish in retail—Making place offensive—Offence. *See* (1921) DIG COL. 978 DEOKI SHA v. EMPEROR. 48 Cal. 1042

—S. 121—*Abuse—If amounts to obstruction.*

Abuse or insult to a railway authority does not necessarily constitute obstruction or impediment to a Railway servant in the discharge of his duty and a conviction under S. 121 is not sustainable (*Campbell, J.*) RADHA KISHEN v. EMPEROR.

68 I. C. 846 : 23 Cr. L. J. 622.

—S. 140—Notice—To whom to be sent. *See* RAILWAYS ACT, Ss. 77 AND 140.

L. B. 3 A, 311

—Ss. 140 and 141—Scope of—Suit against Railway—Limitation—Proper defendant—Amendment. *See* (1921) DIG COL. 978 SINGHI RAM BIHARI LAL v. THE AGENT, EAST INDIA RAILWAY CO. 64 I. C. 125.

RANGOON RENT ACT (II of 1920) S. 10—*Ejectment—Sufficient cause—Erection of a substantial building.*

The Rent Act was a piece of emergency legislation passed with the object of temporarily restricting the increase of rents in the city of Rangoon.

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It was not the object of the Act to interfere with the legal use of private property lost; it was aimed to protect tenants from ejectment where they are unable or unwilling to pay an enhanced rent. It is no doubt necessary that the landlord should show that he is acting bona fide that it is his real intention to pull down and eject and that he has means to carry out his intention for no landlord could be permitted to eject his tenant on such a plea if he had no real intention of carrying out his purpose. Where a person purchased premises with the object of pulling down a one storied building which was then standing and erecting on the site a large and commodious building that would afford residence to many people, he is entitled to eject the tenants for carrying out his object. (*Robinson, C. J. and Macgregor, J.*) THE PUNJAB MOTOR CO v. SHAIK JUMAN.

1 Bur. L. J. 87.

—S. 10—Order for ejectment—Premises required by landlord for his own occupation. *See* COL. 978 O, RAISEE & Co v. JOSEPH.

64 I. C. 171.

—S. 10 (1) proviso—*Bona fide requirement—"Own occupation" meaning of*

The expression "own occupation", in the proviso is not restricted to "personal occupation", but includes occupation by the employees of the land lord. Where a landlord requires certain premises for lodging his employees for whom he is bound to provide accommodation, he requires the premises "bona fide" for his own occupation within the meaning of the proviso to S. 10 (1). Want of bona fides may be shown by proving either that the premises are as a fact required by him for some purpose other than the one alleged, or that the alleged purpose is so absurd under the circumstances that it cannot possibly be bona fide. A bona fide requirement means that the alleged need is genuine and not a mere fiction; it is not necessary to show that it is reasonable. (*Robinson, C. J. and Macgregor, J.*) S. JOSEPH BROTHERS v. O. RAISEE AND COMPANY. (1922) L. B. 1.

—S. 13—*Over payment of rent—Standardisation for 6 months—Right to deduction*

The right to deduct overpayment of rent given by S. 13 of the Rangoon Rent Act must be exercised within 6 months after the date of the last over payment and in default the right is barred. (*Duckworth, J.*) JAISHANKAR v. JIVANKRAM SANTHAL

1 Bur. L. J. 169.

—S. 18—*Rent Controller—Powers of—Ex parte decision—Setting aside revision—Powers of High Court.*

The Rent Controller under Burma Act II of 1920 is a civil Court subordinate to the High Court and the High Court can entertain an application for revision from his decision. A Rent Controller has inherent power to set aside an ex parte order in accordance with the provisions of the C. P. Code. A person aggrieved by a decision of the Rent Controller may apply in revision to the High Court or he may impugn the order when making a representation to the Small Cause Judge. If the objection is one to an order fixing a

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standard rent. 1 Bur. L J 138 Rel. (*Duckworth, J.*) MOHAMED EBRAHIM MOOLLA v. S. R. JANDASS. 1 Bur. L J 200

**RATIFICATION—Void transaction—Subsequent conduct.**

Where a transaction is ab initio void there cannot be a ratification. (*Scott-Smith and Dundas, JJ.*) ALLAH DITTA v. GIAN SINGH.

4 Lah. L. J. 454.

**RECEIVER—Appointment of—Effect of—Effect on title and possession.**

A receiver is entitled to be represented in a suit the result of which may be to affect the property *in custodia legis*, but here no attempt has been made to interfere with the right of the receiver to the property entrusted to his care. Though the appointment of a receiver may in many cases operate to change possession it has no effect whatever on the title of the party to the property which is placed in the possession of the receiver. (*Adami and Bucknill, JJ.*) MADHEWA SURENDRA SAHI v. AWADH MISSEER. 3 Pat. L. T. 316. 65 I. C. 349.

**—Appointment of—Execution against property—Leave of Court—Necessity for—Omission to obtain leave.**

The rule that possession of a receiver may not be disturbed without leave, does not apply so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession. Even where a receiver is in possession, a sale of property in his hands at the instance of a stranger to the suit without leave of court is not void but only voidable. It can only be set aside by appropriate proceedings and if the persons interested do not impeach the sale, it is not open to others to do so. (*Chatterjee and Pearson, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEB v. BHUBANESWAR MITRA. 27 C. W. N. 38.

**—Appointment of—Mortgage—Decree—Objection by decree-holder—Effect. See C. P. Code, S. 51 AND O. 40, R. 1**

(1922) Pat. 66

**—Leave to sue—Want of objection if fatal to the suit.**

Failure to obtain the sanction of the appointing Court for suing a Receiver can be effectively cured by obtaining the same during the course of the litigation—Where the Receiver originally appointed had ceased to exist and had been substituted by the heirs of one of the parties who were on record the objection that the suit against the receiver was instituted without leave would no longer be available. (*Sadasiva Iyer and Spencer, JJ.*) JAGANA SANYASIAH v. M. P. ATCHAMA NAIDU. 15 L. W. 289: 42 M. L. J. 339.

**—Mortgage Suit—Final decree—Subsequent appointment of receiver of the properties of the mortgagors—Receiver proper party to execution proceedings—Refusal to add—Revision—C. P. Code, S. 115.**

Where after the final decree on a simple mortgage is passed in a mortgage suit and before the sale, a receiver is appointed of the properties of

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the mortgagor in a partition suit between them and Receiver applies to be made a party to the execution proceedings, he ought to be made a party. The mere fact that there is a mortgage on the property in the hands of the Receiver would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of a receiver, without the sanction of the court which appointed him.

Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed. 26 C. 127 doubted.

The Receiver in such a case is not a new party under O. 1 R. 10 C. P. Code and that rule does not stand in the way of the Receiver being made a party.

The refusal to make the Receiver party to the execution proceedings is a material irregularity in the exercise of the jurisdiction of the lower court justifying the interference of the High Court under S. 115 C. P. Code (*Devadoss, J.*) FRASER AND ROSS v. KRISHNASWAMI IYER. 43 M. L. J. 211: 16 L. W. 322: (1922) M. W. N. 745.

**—Right to sue after a conditional order of discharge—Effect of decree passed—Duty to disclose fact to court.**

Where a conditional order discharging a receiver had been passed, but the order had not been carried out nor possession taken and subsequently the Receiver was even continued in office by an order of court a decree obtained by the Receiver in a suit for rent subsequent to the above order was quite valid and binding.

Even on the footing that the Receiver had been discharged before the rent decree, it would only result in a devolution of interest and the decree would enure for the benefit of the persons on whom the interest had devolved.

Under the circumstances, there was neither in fact nor in law, such a discharge as made it incumbent on the Receiver to disclose it to the court. (*Woodroffe, and Ghose, JJ.*) BEPIN BEHARI BOSE v. BONNERJEE. 26 C. W. N. 361.

**—Right to sue for rent accruing due prior to appointment.**

A receiver, who has been appointed to manage certain properties, is the only person who can sue in respect of rent whether it accrued due prior to his appointment or not (*Das and Adami, JJ.*) BALKI LAL v. SURENDRA NATH RAY. 1 Pat. 255: (1922) P. 480.

**RECORD OF RIGHTS—Entry in—Presumption—Limitation.**

An entry in the record-of-rights merely raises a presumption of correctness, and is not a starting point for the computation of the period of limitation. (*N. R. Chatterjee and Suhrwardy, JJ.*) SOROJ KUMAR ACHARI CHOWDHURI v. UMED ALI HOWLدار. 35 C. L. J. 19: (1922) Cal 251.

**—Entry—Construction.**

In a suit for rent where the Khatian contained an entry as to rent as follows, "Every year the

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land which actually grows crop is measured. The tenant pays to the malik and Dhan and Moong. Laggi 9 feet 9 inches". Held the entry, meant that the rent was payable at the rate of Rs. 3-5 6 Bigha of land grown with Dhan and 4 annas per bigha of the land grown with moong the actual quantity of land grown with Dhan and Moong being ascertained by measurement every year. (*Jwala Prasad, J.*) GOBIND RAUT v. THAKUR PRASAD CHOUDHURI. (1922) P. 481.

—Presumption of accuracy—Rebuttal—What evidence admissible—Acquisition of occupancy rights.

Evidence of facts documentary and oral prior to that of the publication of the Record of Right is admissible to rebut the presumption of accuracy attaching to the Record of Rights.

Provincial Settlement Records are of high value in determining the status of tenants and an entry therein is sufficient to rebut the presumption of correctness attaching to Records of Rights.

*Rafu-bankidars* are occupancy raiyats and not tenure holders.

Under raiyats may by custom acquire certain privileges possessed by occupancy tenants, but that does not confer upon them the status of occupancy tenants. (*Das and Adams, JJ.*) RAGHU-NATH MISRA v. RAM BEHERA. 1 Pat 167 : (1922) P. 548.

—Publication—Certificate of—Effect.

The production of the certificate of publication of the Record of Rights by the defendants raises a presumption that there was publication according to the procedure laid down in the Regulation, throwing the onus on the plaintiffs to establish that there was no regular publication of the Record of Rights. (*Das and Adams, JJ.*) DWARKA PRASAD v. JAI BARHAM. (1922) P. 322 : 67 I. C. 686.

REFORMATORY SCHOOLS ACT (VIII of 1897) s 31—Minor girl—Conviction for murder. See (1921) Dig. Col. 981 MT. PARBAT v. EMPEROR, 65 I. C. 609 : 23 Cr L J. 145.

REGISTRATION—Effect of—If amounts to notice. See T. P. ACT, S. 3. 68 I. C. 732.

—Mortgage—Property within the Registration district not the mortgagor's—Effect—Mortgagor if can take advantage of.

Where a mortgage deed was registered at a place where part only of the properties were situate, even if the properties do not belong to the mortgagor, he cannot in a suit on the mortgage take advantage of his own fraud by pleading that the mortgage deed was not registered at the proper place. (*Rafique and Piggott, JJ.*) SAYIED MUHAMMAD v. PARSHOTAM SARAN. L. R. 3 A. 293 : (1922) A. 231 : U. P. L. R. (A) 91 : 66 I. C. 681.

—Title—Whether intention of parties can be looked to.

Registration of a deed of sale does not necessarily pass the title, if the parties intend that no title shall pass till the consideration money has been paid in full. For this purpose the court may look to previous as well as subsequent conduct of the parties.

## REGISTRATION ACT (1908), s. 17.

P. R. 85 of 1911 : 3 I. C. 177 approved. (*Scott Smith and Abdul Raoof, JJ.*) RAM SINGH v. GANGA RAM. 3 Lah. 389 : (1922) Lah. 356.

REGISTRATION ACT (1908), Ss. 17 and 49—Agreement to sell—Unregistered sale, deed relating to property worth less than Rs. 100—Admissibility in evidence. See T. P. ACT, S. 54.

18 N. L. R. 8

—Ss. 17 and 49—Partition deed—No registration—Admissibility.

A *kararnama* which was in reality a partition deed requires registration if it affects property of over Rs. 100. In the absence of registration, the deed is not admissible in evidence (*Prideaux, A. J. C.*) ABDUL RAHIM v. SHEIKH KAWADOO. 68 I. C. 712.

—Ss. 17 and 49—Registration—Office of registry having no jurisdiction—Effect of.

Where a deed is registered at a place where no part of the property concerned was situate the registration is without jurisdiction and the deed inadmissible in evidence. 41 Cal. 972, 49 I. C. 343 ; 26 C. W. N. 369 ref. (*Broadway and Abdul Qadir, JJ.*) HAR BHAGWAN v. HUKAM SINGH. 4 Lah. L. J. 245 : 3 Lah. 242 : (1922) Lah. 243 : 68 I. C. 769.

—Ss. 17 (1) a) and 49—Unregistered deed of gift—Effect of—Title to property.

Where the source of title for a property is an unregistered deed of gift and the property itself is worth more than Rs. 100 in value, the gift is inadmissible in evidence. If the gift had been the outcome of a compromise of a disputed claim then it might be admissible. (*Broadway and Moti Sagar, JJ.*) CHANAN SINGH v. SUCHA. 4 L. L. J. 7 (1922) Lah. 112.

—S. 17 (1) (b)—Agreement to lease—Bainapatra—Registration if necessary. See (1921) Dig. Col. 983 HARI NATH BANDOPADHYA v. PROMOTHA NATH DEY CHOWDHURY. 64 I. C. 747.

—Ss. 17 (1) (b) and 49—Agreement to surrender property—Subsequent letter affirming agreement unregistered—Effect of.

Where the manager of a Hindu joint family estate entered into an agreement with his co-sharers that on proof of losses in the management of the estate they should pay their share of such losses and if they be not paid when demanded, their shares in the estate would pass to the former :

Held, that the agreement by itself was sufficient to transfer the shares upon the event happening as contemplated, and that a subsequent letter to the manager admitting the loss and surrender was not an operative conveyance which required registration. (*Lord Buckmaster.*) PANDURANG KRISHNAJI v. MARKANDEYA TUKARAM. 26 C. W. N. 201 : 18 N. L. R. 1 : 20 A. L. J. 305 : 5 N. L. J. 6. 15 L. W. 486 : 42 M. L. J. 436 : 30 M. L. T. 249 : 24 Bom. L. R. 557 : 49 I. A. 16 : 65 I. C. 954 : 35 C. L. J. 409 : (1922) P. C. 20.

—Ss. 17 (1) (b) and 49—Consent decree—Matters extraneous to litigation—Necessity for registration.

## REGISTRATION ACT (1908), S. 17.

If a consent decree incorporates within itself matters not within the scope of the suit, it is not valid as part of a judicial proceeding, but requires registration. (*Rankin, J.*) SHASHI BHUSAN SHAW v. HARI NARAIN SHAW. 48 Cal. 1059 : 66 I. C. 705.

———Ss. 17 (1) (b) and 49—Conveyance of property—Agreement for redemption—Registration, necessity for.

Where there is an outright sale of property executed and registered a subsequent agreement providing for redemption upon payment of the price is in essence a mortgage and it cannot be enforced unless registered (*Mauing Kim, J.*) CHANG KYWAIR v. MA DO, 1 Bur. L. J. 223.

———Ss. 17 (1) (b) and 49—Deposit of title deeds—Agreement in writing—Necessity for registration in case agreement contains terms of contract See T. P. ACT, S. 59. 24 Bom. L. R. 502

———Ss. 17 (1) (b) and 49—Document Creating interest—Agreement by mortgagor to pay cost of improvement at redemption—Unregistered—Admissibility—Collateral purpose.

Where there is an agreement by the mortgagor to pay at the time of redemption all sums expended by the mortgagee on the repair or improvement of the mortgaged property, the document neither declares nor creates any right to add those sums to the price of redemption. That right is created and declared by S. 63 of the T. P. Act. The assent of which the section speaks may be oral or even tacit. In any case, even if the document was compulsorily registrable it could be used for the collateral purpose of proving the mortgagor's assent. (*Hallifax, A. J. C.*) RAMBILAS v. LUXMI NARAYAN. 68 I. C. 382

———S. 17 (1) (b) — Equitable mortgage—Letter accompanying deposit of title—Deeds—Necessity for registration. See T. P. ACT, S. 59, 3 Lah. L. J. 373.

———S. 17 (1) (c)—Lease—Agreement for lease—Record of oral lease—Agricultural land—Registration—Necessity for.

A solenamah which was for all intents and purposes a mere record of certain agreement which the parties had come to out of court for the settlement of their differences existing at that time and whereby the plaintiffs agreed to accept the defendant as tenant with certain rights and a certain rate of rent and to give effect to which a formal document in the shape of a kabuliyat would in future be executed by the defendants, is not a lease or agreement to lease and is not compulsorily registrable, 39 C 663 Ref. The document was in effect merely a record of an oral agreement between the parties which was reduced to the form of writing only by way of a memorandum. (*Suhrawardy and Cuming JJ.*) ALAM MULLA v. SURENDARA KUMAR KARFORMA, 69 I. C. 57.

———S. 17 (1) (c)—Lease—Separate parcels—Registration.

There is nothing to prevent a landholder from letting his land in two separate parcels, constituting separate holdings by unregistered leases

## REGISTRATION ACT (1908), S. 17.

to the same tenant though the aggregate rent exceeds Rs. 100 (*Hopkins, S. M. and Fremantle J. M.*) MOTI v. COLLECTOR, COURT OF WARDS, BULAND SHAHR. 4 U. P. L. R. (B.R.) 102.

———S. 17 (1) (c) (2)—Agreement to execute sale—Oral sale—Registration of agreement if necessary.

A document which does not itself effect a sale but merely gives a right to the vendee to obtain sale free of all incumbrances on the property does not require registration, by virtue of S. 17 (1)(c) (2) (v) of the Registration Act (*Abdul Raoof and Campbell, JJ.*) PARSHOTAM SINGH v. RALLIA SINGH. 4 U. P. L. R. (L) 36 : (1922) Lah. 269 : 65 I. C. 524.

———Ss. 17 (1) (d) and 49—Agreement—Lease—Registration—Necessity for.

An unregistered Hukunnama with a stamp of one anna affixed thereon, which purports to create a lease without fixed terms and is of a nature of a perpetual lease with the fixity of rent of Rs. 2-8-0 besides cesses, is a document which comes within cl. (d) of S. 17 of the Registration Act and is compulsorily registrable. (*Jwala Prasad, J.*) BHIM BAHADUR SINGH v. EMPEROR. (1922) Pat 10 : (1922) P. 265.

———Ss. 17 (1) (d) and 49—Agreement to lease—Unregistered—Delivery of possession to lessee—Effect of—Doctrine of part performance—Estoppel against statute

An agreement to lease intended to operate as a present demise is a lease within the meaning of cl. (d) of S. 17 of the Registration Act, 1908, and as such is inadmissible in evidence in a suit for specific performance of its terms, under S. 49 of the Act, if it is not registered even though the tenant is in possession under the said agreement.

Cases of part performance under S. 4 of the statute of frauds have no application to those arising under S. 49 of the Registration Act, 1908, as the positions under the two Acts are quite different.

The Plaintiff who was in possession of certain premises under a previous tenancy expiring in December 1916, on the expiry of the said tenancy entered into negotiations for a further tenancy with the landlords, the Mondol Defendants, the terms of which were reduced into writing. This document, dated 15th January 1917, which was unregistered, purported to be in form a memorandum of agreement but was intended to operate as a present demise of the said premises to the plaintiff for five years from 1st January 1917 and was held to be a lease within the meaning of cl. (d) of S. 17 of the Registration Act, 1908. In May 1919 the Mondol Defendants sold the said premises to the Lahiri Defendants who had full notice of the unregistered instrument of 15th January 1917 and of its terms. On the 29th May 1919, the Plaintiff was given notice by the Lahiri Defendants to quit by the 30th June 1919, on the allegation that he was a monthly tenant. The Plaintiff brought a suit for the specific performance of the said agreement in terms of the unregistered document.

Held, that the document dated 15th January 1917, was not admissible in evidence in a suit for specific performance, under S. 49 of the Registration Act, as it was not registered.

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As there was no other evidence before the Court of the terms of the said agreement, there could not be a decree for specific performance.

There cannot be an estoppel against the prohibition of a statute and English cases under the statute of frauds have no application to this country, 47 Cal. 435 and 47 Cal. 280 rel

21 Ch. D. 9; 2 C. L. J. 343 L. R. 8 A. C. 467; 11 C. L. J. 548, 25 C. W. N. 920 24 C. W. N. 463, 39 Cal. 663, 47 Cal. 280 (P. C.) referred to. (*Rankin, J.*) SANJIB CHANDRA SANYAL v. SANTOSH KUMAR LAHIRI. 26 C. W. N. 329; (1922) Cal. 436; 49 Cal. 507.

—Ss 17 (1) (d) and 49—Lease for so long as the tenant pays rent—Registration—Oral agreement reduced to writing—Oral evidence See (1921) DIG- COL 984 FIRM OF KARIM BAKHSI TAJUDDIN v. NATHA SINGH. 68 I. C. 904.

—S. 17 (1) (d)—Strict construction—Lease—Period not fixed—Monthly rent—Registration—Necessity.

S. 17 of the Registration Act, being a disabling section, must be strictly construed and that unless a document is clearly brought within the purview of that section its non-registration is no bar to its admissibility in evidence.

A lease of pliff's hut was entered in his book, and the entry was that pliff. had let the hut to the deft. who was to pay 8 annas per mensem by way of rent and in the event of a default in payment of the rent, the tenant was liable to be ejected. Held, that the lease was not one for a period exceeding one year within S. 17 (1) (d) of the Registration Act and did not require to be compulsorily registered. (*Shadi Lal, C. J., and Harrison, J.*) ATTRA v. MANGAL SINGH 2 Lah. 300; 4 Lah. L. J. 1: 65 I. C. 254; 27 P. L. R. 1922. (1922) Lah. 43.

—Ss 17 (2) and 49—Partition—Share list—Necessity for registration—Oral agreement for execution of a formal document.

It is open to party to a partition to prove that a "share list" of properties is not the final partition but that it was orally agreed between them that a formal partition deed should be executed later on. If such agreement is proved the share list would be admissible without registration, (*Krishnan and Venkatasubba Rao, JJ.*) GUNDAPANENI GOPPAYA v. GUNDAPANENI KRISHNAYYA. 16 L. W. 784.

—Ss. 17 (2) and (v) and 42—Partition—Severance in Status—Provision for execution of separate deed in the future as regards properties to be allotted to the members—Registration—Necessity for.

A yadast or memorandum entered into between the members of a joint Hindu family recited the cesser of jointness which amounted to a declaration that from that time forth the parties became entitled to possession and enjoyment of their properties in separate shares; and it further provided for the execution of a further deed effectuating the partition, in these terms: "A partition deed in terms hereof shall be executed and registered in the office of the Sub-registrar as early

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as possible; until then this shall itself be in force." Held that the yadast was not a document by itself creating, assigning, limiting or extinguishing any right or interest in immoveable property; it merely created a right to obtain another document which would, when executed, create a right in the person claiming the relief. Consequently the document was admissible in evidence without registration. (*Mr. Ameer Ali*) RAJANGAM AYYAR v. RAJANGAM AIYAR.

31 M. L. T. 136 (P. C.); 16 L. W. 615; (1922) P. C. 266; 4 U. P. L. R. (P. C.) 85; 69 I. C. 123.

—S. 17, (2) (b)—Agreement to share in property forming subject of litigation in lieu of supplying money.

Where a person agrees to advance money for a litigation in consideration of his getting a share of the property forming the subject matter of the suit the agreement does not effect a transfer of property and does not require registration. The right would come into existence, if it all, only on the success of the litigation 150 P. R. 1889 not toll 16 P. R. 1895; 18 B. 396, 7 B. 310 foll. (*Scott-Smith and Martineau, JJ.*) INDAR SINGH v. MUNSHI. 4 Lah. L. J. 301.

—S. 17 (2) (vi)—Compromise—Agreement relating to land filed in court but not registered—Effect of.

In suit for enhancement of rent by a landholder the tenant agreed to a small enhancement and the landholder agreed to grant certain privileges. The terms of the agreement were embodied in a decree of court. Held, that the agreement was admissible in evidence though not registered (*Pearson, J. M.*) NAUNITA KUAR v. GIRDHARI LAL. L. R. 3 A. 527 (Rev.)

—S. 17 (2) (vi)—Compromise decree—Registration—Necessity for.

A compromise embodied in a decree of court does not require registration only when it relates to the subject matter of the suit. (*Burn, S. M. Pearson, J. M.*) BHUPUL THAKUR v. DWARKA DASII. L. R. 3 A. 497 (Rev.)

—S. 17 (2) (6)—Compromise—Disputed claim—Registration.

Where the terms of a compromise do not relate to the subject matter of the dispute in suit, the compromise is not admissible in evidence unless stamped and registered. (*Fremantle, J. M.*) SHRI RADHA KRISHNAJI MAHARAJ v. DUNIYA PRASAD. L. R. 3 A. 139 (Rev.)

—S. 17 (2) (6)—Consent to alienation by limited owner—Registration—Not necessary. See CUSTOM, ALIENATION. 4 L. L. J. 52.

—S. 17 (2) (vi)—Award—Lists of properties allotted at partition—Registration.

Lists of properties allotted to the members of a joint Hindu family at a partition effected by the arbitrators annexed to the award does not require registration. The mere signature of the parties (i.e., the members of the family on these lists does not remove these documents from the category of an award. 10 P. R. 1917; 22 A. 224 Rel. (*Broadway and Abdul Quadir, JJ.*) RALIA RAM v. DUNI CHAND. 66 I. C. 118.

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—S. 17 (3)—Authority to adopt—Will—Construction of document—Disposition of property. See (1921) DIG. COL. 986 JAGANNATHA BHEEMA DEO v. KUNJA BEHARI DEO.

24 Bom L. R. 600 : 30 M. L. T. 124 (P. C.)  
26 C. W. N. 374 : 64 I. C. 458  
(1922) P. C. 162

—S. 17 (4)—Lease for life—Registration—Necessity for.

A lease for life is a lease for term exceeding one year but even if it be considered a lease for an indefinite period, it is at any rate a lease from year to year requiring registration (*Hopkins, S. M. and Fremantle, J. M.*) JASODA NANDAN v. MT. RAM KUAR

4 U. P. L. R. (B. R.) 48.  
L. R. 3 (A) 537 (Rev.)

—S. 17, Cl. (4)—Lease—Indefinite period—Determinable at any time on certain conditions—Necessity for registration.

Where under the terms of a lease the lessee could have continued for an indefinite period but there was no certainty that the lease would last beyond one year *Held*, that the lease was not one for a term exceeding one year, and was not therefore compulsorily registrable (*Mears, C. J. and Banerji, J.*) KASHI NATH v. ABDUR RAHMANKHAN.

L. R. 3 A. 196 20 A. L. J. 211.  
65 I. C. 836 : (1922) A. 54.

—Ss. 21 and 22—Description of property—Sufficiency of—Registration.

Where a compromise agreement between the parties recited that "all the immoveable properties pertaining to the family of the executants and mentioned in Sch. A described herein below shall be divided into four equal shares" and the division was to take place six months after the execution of the document, *Held* that the description as family property was sufficient for the identification of the property for purposes of registration. 10 M. L. J. 104 ; 13 M. L. J. 303 Ref. (*Phillips and Devadoss, JJ.*) NALLANCHAKKRAVARTHULA APPALACHARYULU v. RAMACHANDRA CHARYULU.

16 L. W. 287  
68 I. C. 901

—S. 23—Registration within what time to be effected. See AGRA TENANCY ACT, S. 97.

L. R. 3 A. 293 (Rev.)

—S. 28—Knowledge of mortgagee necessary for invalidity.

Where the mortgagor represented to the mortgagee that he (the mortgagor) was the owner and the proprietor of the said land and it is not proved that the mortgagee knew at the time of taking the mortgage that the land in question did not belong to mortgagor, *Held*, the mortgagor cannot take advantage of his own fraud by pleading that the mortgage deed was not registered at the proper place (*Rafique and Piggot, JJ.*) SYED MAHOMED v. LALA PURSHOTAM SARAN

(1922) All. 231

—Ss. 32, 33 and 75—Presentation for registration—Duly authenticated—Power of attorney—Acceptance for registration—Presumption—Refusal of Registrar to register—Appeal—Order for registration—Effect of—Subsequent presentation if necessary.

## REGISTRATION ACT (1908), S. 33.

A sub-registrar to whom a mortgage was presented for registration by a person holding a power of attorney from the mortgagor refused to register the document on the ground that the mortgagor did not attend to admit execution under S. 45 of the Registration Act. On appeal the Registrar ordered registration of the document. The sub-registrar accordingly registered it. Subsequently an objection was raised that the original presentation was invalid and that the document was not duly presented even at the time it was registered. *Held*, that the endorsement of the Sub-registrar that the document was validly presented raised a presumption that the power of attorney was duly executed and that the document having been originally validly presented a fresh presentation was unnecessary before it was registered in pursuance of the order of the Registrar (*Lord Buckmaster*) CHHOTAY LAL v. COLLECTOR OF MORADABAD.

(1922) P. C. 279 : 31 M. L. T. 284 (P. C.) :  
49 I. A. 375 : 44 All. 514 : 69 I. C. 44.

—Ss. 32, 34 and 35—Registration of document—Admission of execution by some of the executants—Validity of registration.

Ss. 32 to 35 of the Registration Act have been very carefully designed to prevent forgeries and the procurement of deeds by fraud or undue influence. It is necessary to insist on strict compliance with them. Where only one of the executants of a deed appeared before the Registrar and admitted execution and the others did not, the deed has no legal operation as a deed executed and registered by other executants. A document duly presented for registration can be registered only in respect of the executants who appear personally or by a representative and admit execution. If the document is registered upon the appearance and admission of one of the executants only, there is no effective registration as regards the other executants who neither appear nor admit execution. (*Mookerjee and Chotzner, JJ.*) J. D. EZEKIEL v. ANNADA CHARAN SEN.

36 C. L. J. 109.

—S. 32—"Representative, Meaning of.

The term "representative" in S. 32 refers to the legal personal representatives or by virtue of S. 2 the guardian or committee of the persons described and does not include a clerk or agent. (*Viscount Cave*) MA SHWE MYA v. MAUNG HO HNAUNG.

(1922) P. C. 359 : 49 I. A. 395 :  
31 M. L. T. 304 (P. C.)

—S. 32—Scope of

Provisions of S. 32 are imperative, and unless a document presented for registration in presented by one of the persons described in the section mere presentation does not give to the registrar the indispensable foundation of his authority to register it and the registration if made is invalid. 42 I. A. 22 followed. (*Viscount Cave*) MA SHWE MYA v. MAUNG HO HNAUNG.

(1922) P. C. 359 : 31 M. L. T. 304 (P. C.) :  
49 I. A. 395.

—S. 33—Purdanashin lady—Attendance before Registrar.

A purdanashin lady executing a power of attorney is not bound to personally attend at the

## REGISTRATION ACT (1908), S. 34.

Registrar's office. The Subregistrar may attest the execution of the power of attorney after he has been satisfied as to its voluntary execution. The fact of attestation raises a presumption that he was so satisfied (*Coutts and Das JJ.*) **RAM LAL SINGH v. MT. BIBI SHAHRUNISSA**  
3 Pat. L. T. 442; (1922) P. 569; 67 I. C. 315.

—S. 34—Registration—Authority to present document—Deed of gift in favour of minor married girl presented by latter's father.

Two deeds of gift executed by K in favour of his niece A, who was a minor and married to his adopted son where presented for registration by A's father and registered:

*Held*, that upon A's marriage her father ceased to be her natural guardian and never having been appointed, her legal guardian was not her assignee or her representative within the meaning of S. 3 of the Registration Act, 1877. Nor was he within the meaning of S. 34 of the Act, the representative, assign or agent duly authorised on behalf of K. The registration of the deeds was therefore illegal, and void, with the consequence that the deeds themselves were void and unenforceable. (*Lord Atkinson*) **AMBA v. SHRINIVASA KAMATHI**  
26 C. W. N. 369  
(1922) P. C. 135; 68 I. C. 754 (P. C.)

—S. 49—Absence of—Estoppel if can arise.

Where law gives validity to a document only if it is registered, the document is inadmissible in evidence in the absence of registration—Nor can such a document be allowed to raise an estoppel, since doing so would alter the law of the land as to registration.

There can be no question of estoppel when the truth is known to both parties. (*Hopkins, S. M. and Fremantle, J. M.*) **BASDEO RAI v. GHARIB CHAMAR**  
L. B. 3 A. 229 (Rev.);  
4 U. P. L. R. (B. R.) 49

—S. 49—Evidence—Deed of partition—Want of registration

Where the case was based really on the *Kararnama*, which was virtually a deed of partition affecting the property valued over Rs. 100, *Held* without registration it was inadmissible in evidence, because the evidence in the case did not go to prove that it was acted on, and it was produced to prove no collateral purposes.

(39 M. L. J. 382; 30 M. L. J. 62; 15 M. 336) **Pradeaux A. J. C.** **ABDUL RAHMAN v. SK. KAWADOO**  
(1922) Nag. 236; 68 I. C. 712

—Ss. 49 and 17 (1) (b)—Mortgage by deposit of title deeds—Writing accompanying the deposit not registered—Inadmissible in evidence Mortgage ineffective, *See T. P. Act S. 59*.

24 Bom. L. R. 502.

—S. 49—Partition deed—Property affected more than Rs. 100 in value—No registration if admissible in evidence. *See REGISTRATION ACT S. 34 AND 49*.  
68 I. C. 712.

—S. 49—Sale—Deed inadmissible for want of registration—Claim for possession. *See (1921) Dig. Col. 989 Mt. PARMESHWARI DEVI v. AUTAR*  
67 I. C. 144.

## REGISTRATION ACT (1908), S. 82

—S. 40—Sale deed registered—Subsequent agreement for redemption—Unregistered—Unenforceable as a mortgage. *See REGN. ACT, Ss 17 (1) (B) AND 49*.  
1 Bur. L. J. 223.

—S. 49—Unregistered agreement to lease—Inadmissible in evidence in a suit for specific performance. *See REGN. ACT, Ss. 17 (1) (d) AND 59*.  
26 C. W. N. 329

—S. 49—Unregistered partition deed—Nature of possession.

Notwithstanding the existence of an unregistered deed of partition oral evidence as to the factum of partition and the nature of the possession of the parties can be adduced, (*Dhobky, A. J. C.*) **LAXMAN BHAT v. BANABAI**  
64 I. C. 906

—S. 70 (2), cl. (6)—Unregistered compromise—Admissibility of—Estoppel.

Where a suit for ejectment is compromised on the terms that the tenant was to remain in possession, so long as he paid the rent but the compromise was not registered nor its terms embodied in the decree or in the judgment the compromise is inadmissible in evidence for want of registration and does not bar a suit for ejectment of the tenant. (*Burn, J. M.*) **RAM HARAKH v. JHAKRI**  
L. B. 3 A. 58 (Rev).

—Ss. 73, 82 and 83—District Registrar—Refusal to sanction prosecution—Power of High Court to interfere.

Where a District Registrar in reversal of the order of a sub-Registrar, refuses to sanction the prosecution of the executant of a sale-deed under S. 73 of the Registration Act, there is no jurisdiction in the High Court to interfere as the District Registrar had acted not as a Civil Court. The remedy of the aggrieved party was by a petition to the Board of Revenue. (*Adam, J.*) **HARI BUX RAM v. CHEDDI PANDE**  
67 I. C. 511;  
23 Cr. L. J. 415.

—Ss. 75 (2) (3) and 77—Decree directing registration—Limitation for application to register.

Where a Civil Court passes a decree in a suit under S. 77 of the Registration Act, directing the registration of a document, the document must be presented for registration within 30 days of the date of decree, (*Das and Adam, JJ.*) **MIRZA MAHOMED ISMAIL BEG v. SRICHARAN DAS**  
1 Pat. 146; (1922) P. 408.

—S. 82—Offence under—Elements of—Fraudulent or dishonest intention—Sanction to prosecute.

Fraudulent and dishonest intentions are not necessary ingredients of an offence under S. 82 of the Regn. Act. 40 M. 880; 11 C. 565 foll. An identifying witness must be in a position to depose without the possibility of error to the identity of the person he is identifying. Merely stating that he knows that a person is so and so, because he has been so told by some other person and with no actual knowledge of the facts would make the identifying witness liable to the penalties of S. 82 of the Registration Act (*Pradeaux, A. J. C.*) **NILKANATH RAO v. EMPEROR**  
(1922) Nag. 86; 66 I. C. 527.  
23 Cr. L. J. 303.

## REGISTRATION ACT (1908), S. 82.

—Ss. 82 (c) and (d)—*Conviction—Comparison of thumb impressions—Legality of.*

Where the conviction of false impersonation was based solely on the comparison of the thumb impression on the questioned document with that of the thumb impression of the accused taken in Court: *Held*, that the very fact of taking of a thumb impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated is in itself sufficient for setting aside the conviction (*Das and Bucknill, JJ.*) *BAZARI HAJAM v. EM PEROR.* (1922) Pat 46; 4 U P L. R. Pat. 1: 3 Pat. L. T. 526; 1 Pat. 242; (1922) P. 73: 68 I. C. 958; 23 Cr. L. J. 638.

REGULATION (XVII of 1806,) Ss. 7, 8—*Notice—Defect in—Effect*

Where the mortgagee sent a notice to the mortgagor warning him that if the money was not paid within one year and the land redeemed in the manner provided by S. 7 of the Regulation, *held*, the notice was defective as it provided neither for tender nor deposit in Court—The defect is not cured merely by adding in the manner provided by S. 7. (*Chavis, J.*) *ZORA v. CHANDU.*

68 I. C. 883

RELIGIOUS ENDOWMENT — *Debts — Necessity—Borrowing by trustee—Decree against temple funds.*

Where the trustee of a Hindu temple borrows money on a simple bond for temple necessity contracting to repay the debt out of temple funds the creditor is entitled to a decree against the funds of the temple in respect of the debt. 32 M. L. J. 250 dist 31 Mad 47; 43 Mad. 795; 15 L. W. 72 foll. (*Ayling and Krishnan, JJ.*) *SUNDRASAN CHETTY v. VISVANATHA PANDARASANNADHI AVERGAL.* 45 Mad 703; 43 M. L. J. 147:

16 L. W. 83; 31 M. L. T. 66 (H. C.): (1922) M. W. N. 444; (1922) Mad. 402.

—*Dedication—Charitable gift—Perpetuity—Application of income.*

Perpetuity is not essential to a charitable gift. A donation may be charitable just as well as an endowment. But if the donation can wholly be applied as income it is unnecessary to consider whether it is charitable and thus within the exception to the rule against perpetuities (*Marten, J.*) *THE ADVOCATE GENERAL OF BOMBAY v. YUSUFALI Ebrahim.*

24 Bom. L. R. 1060

—*Dedication — Formalities of— Inference from conduct.*

The execution of a document is not essential to constitute a valid dedication. Dedication of property to an idol can be inferred from user and from the long application of the proceeds of the property and from family conduct. 8 W. R. 42; 18 B. 247, 36 C. 1003 Ref. (*Mookerjee and Chotzner, JJ.*) *RAMBRAHMA CHATTERJEE v. KEDAR NATH BANERJEE.* 36 C. L. J. 478.

—*Dedication— Inference from facts—Application of income—Long period.*

The mere fact that the proceeds of any land were being applied in varying quantities and at recurring intervals to the maintenance of a temple

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is insufficient to show that the lands have been dedicated to it. The onus lies on the party who sets up the case to show that the property has been inalienably dedicated to a temple or idol. 2 Cal. 341; 8 W. R. 42; 18 W. R. 399 foll. (*Batten, J. C.*) *MIKUND SINGH v. MAHANT PRMDAS.*

(1922) Nag. 122; 67 I. C. 258.

—*Dedication—Proof—Conduct— Private and public trusts*

A man can create a private trust by building a temple and an idol and endowing it with funds or income for strictly private purposes not merely retaining the management and control in the hands of himself and his family, but restricting the enjoyment to himself and his family and he may out of the warmth of his heart allow other persons, outside the original beneficiaries, to enjoy from time to time the advantages thereby created. But in such a case especially with a temple and idol publicly constituted and publicly accessible in which the appearance may be what one may describe as ambiguous, one would expect and ought to insist upon clear evidence of permission given or license given and permission withheld, because it is equally true that a private individual may construct out of his private purse a private temple and idol retaining the control and management in his own hands and in that of his family or some other selected individuals and yet so conduct himself as to provide conclusive evidence of dedication by implication by conduct.

Once he has shown his intention to dedicate, the matter passes out of his hands and the beneficiaries to whom the use is dedicated, have a right in such use. Where there is no express deed of dedication or document creating the trust the courts have to depend almost entirely upon the history of the place and the user by people generally from time to time, to decide whether it is private or was intended to be a public trust, (*Walsh and Ryves, JJ.*) *RAM DAS v. MUSSAMMAT BASANTI.* 20 A. L. J. 789; (1922) All. 519.

—*Dedication—What constitutes—Founder who is— Erecting temple on land granted by another—Devolution of the trusteeship—Sbeast—Pujari—Position of—*

When the worship of an idol has been founded the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. 17 C. 3, 32 C. 129; 35 A. 283; 11 C. L. J. 2; 40 C. 251; 29 A. 663; 22 C. L. J. 404; 36 A. 161 Rel. In the application of this rule if may not always be easy to determine who are the founders. One person may provide the site of the temple another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol. Where the owner of the site relinquishes his right in the land, he may not be a founder unless he indicates at the time, expressly or impliedly, that he will associate himself with others in carrying out the objects of the foundation. *Prima facie* all the persons who establish the



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worship are entitled to take part in the management. If a number of persons provide the original endowment, they together constitute the founder. But persons who subsequent to the foundation, furnish additional contributions do not thereby become joint founder; their bene action is regarded as nothing beyond an accretion to an existing foundation. 24 M. 219; 7 M. 499; 17 C. 3 Ref.

The shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise equally in the case of private and public endowments. No distinction between the two classes of cases has been drawn in this respect in the judicial decisions.

18 A. 227; 11 C. L. J. 2; 40 C. 251; 5 C. 228; 40 M. 612 Rel.

Consequently whether a foundation is public or private the three fold principle is applicable namely. (i) the devolution of the trust on the death or default of each trustee, depends upon the terms on which it was created, of the usage of the particular institution where no express trust deed exists; (ii) the worship of the idol is vested in the founder and his heirs, in default of evidence to show that he has disposed of it otherwise; (iii) and where a shebait appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the founder and his representatives even though the endowment has assumed a public character.

The *indicia* of a public temple discussed. 18 B. 721; 11 A. 18; 18 M. L. T. 543; 4 L. W. 228; 4 L. W. 444; 27 M. L. T. 11. Rel.

The pujari or archaka is not the shebait of the temple; he is appointed by the shebait as the purohit to conduct the worship; but that does not transfer the rights and obligations of the shebait to the purohit and he is not entitled to be continued as a matter of right in his office as pujari.

16 W. R. 99; 25 C. W. N. 201; 15 M. 183; 42 M. 618; 35 M. 631 Rel. (*Mookerjee and Chotzner, JJ.*) ANANDA CHANDRA CHAKRABARTI v. BROJA LAL SINGHA. 36 C. L. J. 356.

—Dedication—Writing not necessary—User of income.

Dedication need not necessarily be by deed. Long user of income from a certain source for charitable purposes will be evidence of dedication. (*Spencer and Kumaraswami Sastri, JJ.*) TADI ELLI TAMMIREDDI v. GANGIREDDY

45 Mad. 261; 42 M. L. J. 570; 30 M. L. T. 323 (H. C.); 16 L. W. 55; (1922) Mad. 236

—Dedication—Absolute or partial—Performance of services—Evidence of conduct.

Where a donor gifted lands, to a deity in a Hindu temple for the conduct of daily *naivedyam* and *deeparadana* by a specified archaka and concluded by saying that the said archaka and his sons and grandsons should enjoy the same for ever and render the services to the deity; Held that the donee was the deity itself and the archaka was not entitled to the surplus income from the remaining after the performance of the services.

It would be dangerous to hold that if the trustees of religious trusts have for many years been

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applying the income to their own personal use the court must construe the trust deed in the light of such conduct. (*Abdur Rahim and Moore, JJ.*) MUTTEYI SRINIVASACHARYULU v. DINAVAH PRATYANGA RAO 30 M. L. T. 101 (H. C.); 64 I. C. 816,

—Dedication—Evidence of—User—Rights of inheritance.

Where it is found by the courts below that certain property had been set apart for a shrine and had been in the possession of a trustee of the shrine, the inference is that the property belongs to the religious institution and is therefore not recoverable by the heirs of the founder. (*Shadi Lal and Dundas, JJ.*) MT. DAROPDI v. LAL CHAND. 4 Lah. L. J. 67; (1922) Lah. 320.

—Dharmasala—Public or private property Evidence of treatment.

Where a Dharmasala had always been treated by the members of a Hindu family as private property and one of them dies separate his widow is entitled to possession of her husband's share of the property and the other male members are not entitled to eject her therefrom. A finding that a Dharmasala has always been treated as private property by the members of the family is a finding of fact binding on the Court in second appeal (*Wilberforce and Abdul Kadir, JJ.*) SADHU DAS v. MUSHTAQ SHAH SINGH 3 Lah. L. J. 514.

—Founder—Right of to appoint trustees and provide for management and administration—Usage of the institution—Participation in offerings.

Where the worship of an idol has been founded the shebaitship of the idol is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. 17 C. 3; 32 C. 129; 35 A. 283; 20 C. W. N. 314 Rel. The founder is competent to provide for the government and administration of the trust and can give directions for its management not inconsistent with its character as a religious or charitable trust. The test in each case is whether the direction of the founder is inconsistent with the nature of the endowment as a religious or charitable trust. The proof of the intention of the founder becomes almost conclusive, when the usage is immemorial. The intention may be presumed from a number of instances extending over a limited period, if they are made out by clear and unambiguous evidence.

Where the founder of an endowment prescribed the line of succession the shebaitship in the descendants of his sons and also directed that the descendants of his daughters would be entitled to participate in the *bhog* offerings dedicated to the idols established by him. Held that it was competent to him to do so. (*Mookerjee and Chotzner, JJ.*) RAMBAHMA CHATTERJEE v. KEDAR NATH. 36 C. L. J. 478.

—Founder—Right of, to provide for management—Trusteeship.

Ordinarily the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees; but if he exercises that power and

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appoints a trustee the trustee cannot be removed except in the manner provided in S 92, C. P. Code (*Lindsay and Kanhaiya Lal, JJ*) PUTTU LAL v. DAYA NAND. 20 A. L. J. 712. L. R. 3 A 455 : (1922) A. 499 : 68 I. C. 786

— *Founder—Who is—Right to shebaitship—Rights of pujari or priest.*

Where the worship of an idol has been established by the ancestors of a lady she is not the original founder, nor can she be regarded as a founder because of her subsequent benefaction which is nothing beyond an accretion or addition to the existing foundation 7 M 499 ; 24 M 219 Ref. When the worship of an idol is founded, the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution 17 C. 3 ; 32 C. 129 ; 35 A. 283 Rel. The shebait appoints the purohit to conduct worship but that does not transfer the management of debutter estate from the shebait to the purohit. 16 W. R. 99, 25 C. W. N. 201 Ref. (*Mookerjee and Rankin, JJ.*) KALI KRISHNA RAY v. MAKHAN LAL. 36 C. L. J. 441.

— *Hindu temple—Kattalai—Independent trust—Powers of supervision of temple—Committee. See REL. ENDOW. ACT SS. 3 AND 4.*

16 L. W. 340.

— *Hindu temple—Priest or pujari—Rights of—Shebait.*

Where the appointment of a purohit has been at the will of the founder, the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed, and will not entitle them as of right to be continued in office as priest. (1878) Bom P. J. 195 ; 15 M. 183 Rel. (*Mookerjee and Rankin, JJ.*) KALI KRISHNA ROY v. MAKHAN LAL. 36 C. L. J. 441

— *Mahant—Chela—Position of—Right to contest alienation by Mahant.*

It is not uncommon in the case of celibate ascetics to take a minor as disciple in order that he might succeed to the office of mahant after the death of the then Mahant. Where property is purchased from the income of an *ashram* it is trust property. A chela or disciple can protect the property of the endowment either by virtue of his interest as a possible future successor of the estate or by virtue of his being a person interested in the endowment. If he acts in the former capacity he is entitled to a declaration under S 42 of the Sp. Rel. Act because a sale of the property would affect his contingent right. If he acts as a member of the public interested in the endowment he can adopt the procedure prescribed by O. 1. R. 8, C. P. Code.

Being a disciple he has at all events, a contingent right to succeed to the office of mahant on the death of the present holder of the office and he can take steps to protect the endowed property against any acts of waste committed by the present holder of the office or against any threatened sale in execution of a decree not legally enforceable against the endowment. (*Kanhaya Lal, J.*

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C.) BISHUNATH BHARTHI v. CHAUDHRI HAR SARUP. (1922) Oudh 142 : 66 I. C. 415.

— *Alienation by Mahant—Necessity—Test of—Recitals.*

In the case of an alienation by a Mahant, if the transaction took place at such a distance of time as to make proof of actual necessity impossible, recitals in a document will be clear evidence of a representation made by the Mahant that there was necessity—But the alienee must still establish that the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation of which the recital is evidence. (*Das and Bucknill, JJ.*) MAHANT RAMRUP v. LAL CHAND MARWARI. 1 Pat. 475 : 3 Pat. L. T. 352 : (1922) P. 243 : 67 I. C. 401.

— *Mahant—Alienation of property—Necessity—Onus of proof.*

In the case of a mortgage granted over the security of endowed property by the Mahant thereof, it lies upon the mortgagee or those claiming through him to prove that the debt was a necessary expense of the institution itself. (*Kanhaya Lal, J.*) BISHUNATH BHARTHI v. CHAUDHRI HAR SARUP. (1922) Oudh 142 : 66 I. C. 415.

— *Mahant—Position of—Alienation of endowed property—Adverse possession. See (1921) DIG. COL. 993. RAM PADARATH SINGH v. MAHANT BASDEO DAS. 3 Pat. L. T. 264 : (1922) P. 178*

— *Power of mahant to alienate—Necessity.*

Where the title to property is vested in Mahants an alienation by a Mahant, in the absence of legal necessity, will enure only for his life-time. It will be open to each of them to challenge an alienation which is invalid, limitation running from the date of the death of the preceding Mahant. (*Das and Bucknill, JJ.*) MAHANT RAMRUP v. LAL CHAND MARWARI. 1 Pat. 475 : 3 Pat. L. T. 352 : (1922) P. 243 : 67 I. C. 401.

— *Mahant—Removal—Unfitness—Suit for declaration by removal of Mahant—Onus. See (1921) DIG. COL. 994 NIAMAT ALI v. YAD ALI SHAH. 3 Pat. L. T. 114 : (1922) P. 346.*

— *Manager—Defacto manager—Right of—Ejectment.*

Where a person has been recognised as the *defacto* manager of the property of an idol, he is entitled to sue to eject a trespasser and take other steps for protecting the idol's property (*Newbould and Ghose, JJ.*) HARI MOHAN MODAK v. RAMESWAR DAS. 64 I. C. 737.

— *Manager—Powers of—Permanent Lease—Necessity—Presumption—Lapse of time.*

There is no absolute prohibition against the grant of a permanent lease by the Manager of a religious endowment. Such a lease can be granted for strict necessity and though the burden is on the alienee or lessee to prove such necessity, yet the long lapse of time between the alienation and the challenge of its validity raises a presumption that the original grant was made in the exercise

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of the extended powers of the manager, *i.e.*, for necessity 19 M. 485 Ref. (*Lord Buckmaster*). *BAWA MAGNIRAM SITARAM v. SHETH KASTARBAI MANIBAI*  
46 Bom. 481 : 26 C. W. N. 473 :  
30 M. L. T. 268 : 49 I. A. 54 : 20 A. L. J. 371 :  
24 Bom. L. R. 584 : (1922) M. W. N. 319  
35 C. L. J. 421 : (1922) P. C. 163 :  
66 I. C. 162 (P. C.)

———*Management of—Founder's widow—Powers of—Testamentary disposition—Plea of justitiam in defence.*

The manager appointed by the founder of a Hindu endowment failed to take up the office, and the founder's widow took up the management. She died leaving a will by means of which he appointed a third party to succeed her as a manager. In a suit by the founder's heirs for a declaration that the testamentary appointment was invalid.

*Held*, on her husband's death, she had a right as representing her husband's estate to make another appointment to take effect immediately; but she had no power to make herself manager for her life first and then a testamentary disposition provide for the management after her death.

*Per Walsh, J.* : A plea of *justitiam* cannot be set up in this class of cases. (*Walsh and Pigott, JJ.*) *GOSWAMI PURAN LALJI v. RAS BEHARI LAL.*  
20 A. L. J. 527 : L. R. 3 A. 334 :  
44 A. 590 : 4 U. P. L. R. (A). 119 :  
(1922) A. 285 : 67 I. C. 328.

———*Manager—Alienation in excess of authority—Possession of alienee if adverse.*

Where the manager of a religious endowment grants a permanent lease in excess of his authority, the possession of the lessee is not adverse to the endowment during the life of the head. 44 M. 821 Ref. (*Mookerjee and Cuming, JJ.*) *GAJENDRA NATH DEY v. MOULVI ASHRAF HOSAIN*  
27 C. W. N. 159 : 36 C. L. J. 48.

———*Manager—Suit by in his capacity as manager for recovery of money due to temple—Temple owing money to the manager—Effect of.*

Plff. sued as manager of a Hindu temple alleging himself to be hereditary trustee thereof, for the recovery of certain moneys due to the temple. In the course of the plaint the plaintiff stated that he had spent moneys out of his pocket for the temple and that he was entitled to be reimbursed in respect of those moneys. The trial court took an undertaking from the plff. that he was recovering the money only on behalf of the temple and passed a decree in his favour as manager. The appellate court without going in to the merits of the case dismissed the suit holding that the plaintiff claimed adversely to the temple as he was in effect trying to appropriate the moneys himself. *Held* that the decree of the trial court was correct as the plaintiff was suing in terms as the manager of the temple. (*Shah, A.C.J. and Crump, J.*) *VINAYAK SHIV RAO v. ATMARAM RAYAJI.*  
24 Bom. L. R. 1308.

———*Head of a mutt—Position of.*

The head of a mutt is not a trustee, except as to any specific property proved to have vested in him for a specific and definite object. (*Das and*

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*Bucknill, JJ.*) *MAHANT RAMRUP v. LAL CHAND MARWARI.*  
1 Pat. 475 : 3 Pat. L. T. 352 :  
(1922) P. 243 : 67 I. C. 401.

———*Mutt—Head of—Mahant—Marriage—Forfeiture of office.*

In the case of *Sitarmarthi Asthal* the mahant does not forfeit his office by marrying. The fact that there has been no instance of a marriage on the part of a mahant is strong evidence of a custom against marriage. (*Das and Bucknill, JJ.*) *MAHANT RAGHUNATH DAS v. SHEOKUMAR MISSIR.*  
67 I. C. 464.

———*Mutt—Mahant—Personal property and mutt property—Distinction between—Offerings by worshippers.* See (1921) DIG. COL. 995 *KUMUD BAN MOHUNT v. TRIPURNA CHARAN CHAUDHURI*  
35 C. L. J. 188.

———*Mutt—Succession—Nomination—Designation of heir by the Guru—Initiation ceremony.*

Where the guru of a Math designates clearly a particular person as his heir, such person is entitled to succeed to the guruship, even though no formal ceremony of initiation has taken place in the guru's life-time. (*Macleod, C.J. and Shah, J.*) *KRISHNAGIRI TRIKAMGIRI v. SHRIDHAR KAVLEKAR.*  
24 Bom. L. R. 140 : (1922) Bom. 202 :  
67 I. C. 129.

———*Mutt—Succession—Removal of the mahant.*

A mahant is the head of any Hindu Dera or religious institution and succession to the office may be hereditary in which case the successor would be a mahant. The only law as to mahants their offices, functions and duties is to be found in custom and practice, which is to be proved by testimony. 11 M. L. A. 405, 428, app. A self-constituted sangat cannot exercise supervision or control over the mutt or mahant. A custom entitling the worshippers to control the appointment or succession of mahants or to remove them without invoking the aid of law must be proved. (*Broadway and Abdul Qadir, JJ.*) *FATEH SINGH v. BUR SINGH.*  
65 I. C. 842.

———*Mutt—Succession—Sanyasis—Chela—Repudiation—Effect of.*

According to the religious law and custom, a chela or disciple entirely repudiated by his guru for misconduct becomes an utter outcaste, the tie of discipleship is entirely broken and the repudiated chela retains no right whatever of succession, either as a *chela* to the guru who has repudiated him or as a *gurubhai* to any lawful chela whom the aforesaid guru may thereafter initiate. (*Hafiq and Pigott, JJ.*) *MAHANT JAGANMATH GIR v. TIRGUNANAND.*  
L. R. 3 A. 466.

———*Pattams—South Canara—Agreement by pattamdar to convert properties attached to office into family properties—Validity of agreement.* See (1921) DIG. COL. 996 *NAGARAJA v. DEVARAJA*  
45 Mad. 62 : (1922) Mad. 224 : 67 I. C. 84.

———*Shebait—Establishment of thakur for worship—Removal by succeeding shebait—Validity of.*

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Where the worship of a Thakur was founded by M and properties were also dedicated to its worship but no condition as to the location of the Thakur was imposed by M it is not open to any subsequent shebait to impose restrictions which would fetter these who subsequently as heirs of the founder become shebaits. It is competent to one of the heirs of the founder to remove the Thakur from the Thakurbari during his turn of worship, 17 C. 3. Rel. (*Greaves, J.*) *PROMATHA NATH MULLICK v. PRADYUMNA KUMAR MULLICK*, 26 C. W. N. 909.

—Shebait—Removal of—Grounds for—Acquisition of trust estate by trustee—Secret purchase. See (1921) DIG. COL. 997, *RAJA PEARI MOHAN MUKERJI v. MONOHAR MUKERJI*, 48 Cal 1019 : 30 M. L. T. 24 (1922) P. C. 235 (P. C.)

—Temple—Dharmakarta—Position and powers of—Conversion of trust property—Falsification of accounts—Removal.

The dharmakarta of a Hindu temple is in law a trustee. His position is not that of a shebait or a religious institution or of the mahant of a mutt. These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of a beneficial character 27 M. 435 Ref. But a dharmakarta is literally no more than the manager of a charity, and his rights, apart it may be in certain circumstances from the question of personal support, are never in a higher legal category than that of a mere trustee.

Where the discoverable origins of property show it to be trust property the onus of establishing that it has legitimately come into the trustee's own rights is heavily upon the trustee who must show by the clearest and the most unimpeachable evidence the legitimacy of his personal acquisition.

Where the trustee of a Hindu temple set up an unfounded assertion of private ownership in himself of the properties of the temple and resisted the recovery of those properties for the trust which he administered and supported that assertion by the concoction of false accounts filed as evidence in the case, he is guilty of seriously reprehensible conduct and is unfit to be retained in office of trustee. (*Lord Shaw*.) *T. P. SRINIVASACHARI v. C. N. EVALATPA MUDALIAR*, 45 Mad 565 : 43 M. L. J. 536 : 16 L. W. 247 : 24 Bom. L. R. 1214 : (1922) P. C. 325 : L. R. 3 P. C. 213 : 36 C. L. J. 524 : 49 I. A. 237 : 31 M. L. T. 1 (P. C.)

—Trustees—Acts of majority—When binding on trust—Omission to consult some trustees—Effect of.

In the case of religious endowments with many trustees or urals, the general rule is that all of them are entitled to be consulted before any act is done in the management of the trust property. The act of the majority of the trustees in granting a lease of the trust property will be binding on the trust only when all the trustees are consulted and their wishes ascertained after mutual discussion. The mere fact that one of

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the trustees obtains a benefit from his trust does not abrogate the rule. (*Oldfield and Ramesam, JJ.*) *MATAMULLA MANIKOTI PATTAM CHANDU v. KUTTIL RAJIRA*, 42 M. L. J. 280 : 15 L. W. 264 : (1922) M. W. N. 172 : (1922) Mad. 2 : 66 I. C. 396.

—Trustee—Archaka as trustee—Committee of supervision.

Generally speaking it is desirable that the offices of archaka and trustee should be separate for it is only then that the work of the archaka could be properly supervised. (*Abdur Rahim and Moore, JJ.*) *MUTTEYI SRINIVASACHARYULU v. DINAVAH PRATYANGA RAO*, 30 M. L. T. 101 (H.C.) : 64 I. C. 816.

—Trustee—Archaka—Hereditary archaka—Position of.

Hereditary archakas are only servants of the temple subject to the disciplinary jurisdiction of the trustee. They have a right of suit if they are improperly prevented from performing the duties of their office or dismissed without good and proper reasons. The possession of the temple and its properties by an archaka is only that of servant and the trustee can take possession of them. Hindu Law treats hereditary archakaship as immoveable property. 35 M. 631 : 36 B. 94 : 45 B. 234 Ref. (*Deva Doss, J.*) *SRI VANAMAMALAI JEER SWAMIGAL v. PERIA VENKATARAMANA CHARIAR*, (1922) M. W. N. 442 : (1922) Mad. 183 : 16 L. W. 931 : 68 I. C. 183.

—Trustee—Breach of trust—Association of strangers in management.

It is not competent to the trustee of a religious endowment to introduce a stranger into the trusteeship as joint trustee without committing a breach of trust, (*Spencer and Krishnan, JJ.*) *KOTASSERI E. V. SANKARAN NAMBI v. KANHOLI D. AUTHERJENAM*, 16 L. W. 26 : (1922) M. W. N. 428 : 43 M. L. J. 572 : (1922) Mad. 259.

—Trustee—Mahant—Powers of leasing out trust properties—Karta of joint family.

Leases granted by a Mahant in the ordinary course of management of the estate are binding on his successors. There is no difference in this respect between the karta of a joint family and a mahant. 40 M. 709, dist. 6 M. I. A. 393, Ref. (*Jwala Prasad, A. C. J. and Das, J.*) *MAHANTH JAI KRISHNA PURI v. BHUKHAL GOPE*, 6 P. L. J. 638 : (1922) Pat. 113 : (1922) P. 165 : 65 I. C. 290

—(XX of 1863) Ss. 3 and 4—Kattalai—Jurisdiction of Temple Committee over.

Though a temple may be subject to the control and superintendence of a Temple Committee, that fact does not give the Committee any right of supervision over the Kattalai which is an independent trust. (*Phillips and Ramesam, J.*) *KANDASAMI IYER v. SIVACHIDAMBARAM CHETTIAR*, 16 L. W. 340 : 31 M. L. T. 217 (H. C.) : (1922) M. W. N. 704.

—S. 14—Property granted for religious service—Duty to account for proceeds.

**RELIGIOUS OFFICE.**

Where lands are granted for a service to be performed viz. the upkeep of a mosque and its buildings and the performance of religious services therein the grantee or his descendants need not strictly account for the disposal of the income of the lands so long as the services are performed properly. (*Spencer and Ramesam, JJ.*) MAHOMED HUSSAIN SAHIB BAHADUR v. MAHOMED ABDUL RAHIM BEG SAHIB 42 M. L. J. 272 : (1922) M. W. N. 74 : 15 L. W. 241 : (1922) Mad 8. 67 I. C. 492

**RELIGIOUS OFFICE—Emoluments—Division of—Validity of.**

A temporary division of lands forming the emoluments of a religious office among the joint trustees is not per se objectionable especially if it tends to convenient management. 27 M. 199 (oll). (*Spencer and Ramesam, JJ.*) MAHOMED HUSSAIN SAHIB v. MAHOMED ABDUL RAHIM BEG SAHIB 42 M. L. J. 272 : (1922) M. W. N. 74 : 15 L. W. 241 : (1922) Mad 8. 67 I. C. 492.

**RENT SALE—Validity of—Fraud of purchaser—Annulment of incumbrances.**

It is an abuse of statutory provisions for sale of tenures in execution of decrees for rent to bring about designedly a sale under such circumstances so that the right of under tenure holders might be destroyed, an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. In such a case the transaction is a private sale. Though the purchaser joined in the fraud after the default had been made he cannot by reason of his entering into the agreement before the sale which was the machinery by which the fraud to be carried out and with knowledge thereof, be permitted to enjoy to the detriment of others the benefit which result to a purchaser at a sale for arrears of rent or revenue, 10 M. I. A. 540 : 12 C. L. J. 336 : 18 W. R. 240 Ref. (*Chatterjee and Pantan, JJ.*) TEJENDRA CHANDRA DHAR v. DURGADAS DUTT. 67 I. C. 398

**RES JUDICATA**

See C. P. CODE, S. 11

**RESTITUTION OF CONJUGAL RIGHTS—Suit for—Cause of action—Basis of. See LIM. ACT, S. 23 AND ART. 120**

65 I. C. 452,

**Suit for—Defence—Widow—Chadar andazi marriage—Plea of absence of marriage ceremony.**

A decree for restitution of conjugal rights is a matter entirely within the discretion of the Court. Where a widow, who has been betrayed into a chadar andazi ceremony with her brother-in-law, repudiates the relationship immediately and goes off to her own family, the husband's claim for restitution of conjugal rights should not be decreed. If under these circumstances the fact of marriage is denied, it also means that the marriage, if it has been performed, is invalid. (*Wilberforce and Abdul Qadir, JJ.*) MUST. RAM JAWAHAR GOKAL CHAND. 3 Lah. L. J. 559 : 64 I. C. 150

**REVENUE RECORDS—Entries in—Presumption of correctness. See SP. RELIEF ACT, S. 42.**

4 Lah. L. J. 207.

**RIGHT OF SUIT.****REVENUE RECOVERY ACT (1890) BENG. ACT) S. 5—Sale of estate not in arrears—Jurisdiction of Collector—Title of real owner, whether affected.**

A Collector acts without jurisdiction in selling estates which are not in arrears under the Revenue Sale Law, as his power is restricted to a sale of estates in arrears only. The real owner's title is not affected by the sale by the Collector of an estate not in arrears. (*Coutts and Adam, JJ.*) SHAIK MOHAMMAD WAHEED v. MT. SUNDER BASI KUAR. (1922) P. 445.

**REVENUE SALE—Default in payment of revenue—Sale for arrears—What is sold—Rights of purchaser**

On the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of the government assessment. A person in adverse possession who occupies the land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession. (*Mockerjee and Chatterner, JJ.*) JOBEDA KHATUN v. TULSI CHARAN DAS. 36 C. L. J. 472.

**REVISION.**

See C. P. CODE, S. 115 AND PROVINCIAL SMALL CAUSE COURTS ACT, S. 25.

**REVIEW.**

See C. P. CODE O. 47.

**RIGHT OF SUIT—Contract—Stranger to—Not entitled to enforce.**

It is not open to a stranger to a reference and award to enforce a provision in his or her favour in the award. (*Broadway, J.*) DIWAN CHAND v. BISHEN DAS. 2 Lah. L. J. 255 : 67 I. C. 919.

—Land Acquisition case—Party dissatisfied with award or with apportionment of compensation—Remedy by suit in Civil Court barred. See LAND ACQUISITION ACT, Ss 9, 11 ETC. 26 C. W. N. 506

**Suit to recover money paid under decree—Maintainability of.**

It is not competent to a person to institute a suit for the recovery of money paid to the debt under a prior decree of Court on the allegation that the suit in which that decree was passed was a false one and was supported by false evidence. In the absence of proof of fraud and collusion in the obtaining of the prior decree, its finality cannot be questioned 57 A. 535 : 32 A. 145 ref. (*Rafique and Lindsay, JJ.*) SHEO PRASAD v. SRI PAL. 20 A. L. J. 254 : L. R. 3 A. 249 : (1922) A. 187 : 66 I. C. 81.

**Suit on decree—Declaratory decree of Judgment.**

Where the relief claimed in the suit has already been granted by the decree in a prior suit and could be obtained in execution, it is not open to

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the plaintiff to institute a fresh suit for the same relief. A merely declaratory decree declaring the rights of the parties merely is incapable of execution. In such a case a separate suit will lie (*Mookerjee and Chotzner, JJ.*) **SYAMA CHARAN DAS v. SATYA PRASAD CHAUDHURI.**

36 C. L. J. 101

**RIWAJ-I-AM**—Entries in—Value of. See **ALIENATION.** 3 Lah. 40

—Entries in—Presumption of correctness—Rebuttal—Onus of proof. See **CUSTOM—SUCCESSION.** 3 Lah 181

See also

3 Lah. 237.

**ROYALTY**—Nature of interest—Not an interest in immovable property—Mortgage on royalty does not require registration or attestation. See **T. P. ACT, Ss. 3 AND 58**

65 I. C. 673.

**SECOND APPEAL**—See **C. P. CODE S. 100.**

**SECRETARY OF STATE**—Magistrate not servant or agent—Liability of former for erroneous order of latter—Suit for damages not maintainable. See **CAUSE OF ACTION.** 20 A. L. J. 420

**SETTLEMENT ENTRIES—Correctness—Proof.**

A settlement entry of land as sir cannot be proved to be incorrect by the mere production of the entry of the year before the settlement. (*Hopkins, S. M. and Fremantle, J. M.*) **HIRA SINGH v. SITA RAM.**

L. R. 3 A. 533 (Rev)

**SHIPPING**—Prize—Capture—Territorial waters—Rights of neutral states.

Capture consists in compelling the vessel captured to conform to the captor's will. When this is done deditio is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take particular forms. Striking the colours is an accepted sign of surrender, but to do so without also ceasing resistance, active or passive is to invite and justify further severe measures by the victorious combatant.

Where an alleged prize is taken from neutral waters without justification, the remedy is the restoration of that which was seized or its appraised value to the neutral state as honourable amends for a belligerent act. (*Lord Sumner*) **THE STEAMSHIP "PELLWORM" IN THE MATTER OF.** 31 M. L. T. 117 (P. G.)

**SINDH MUNICIPAL Act (III of 1904) S. 96—**"Any building" meaning of

The words "any building" in S. 96 are wide enough to cover a building in a private Mahal (*Fawcett, J. C. and Kemp, A. J. C.*) **EMPEROR v. JANU FAKIR.** 15 S. L. R. 171 : (1922) S. 22 :

66 I. C. 999 : 23 Cr. L. J. 343.

**SPECIAL DAMAGE.**

**SIR LAND**—Alienation by co-sharer—Validity. See **LAND TENURES—SIR.** L. R. 3 A. 225 (Rev)

**SONTHAL PARGANAS REGULATION (III of 1872) Ss. 5 and 6—Applicability and scope of—Settlement—Completion of—Power of ordinary Civil Courts—Interest—Maximum allowable.**

The effect of the amendment of the Sonthal Parganas by S. 5 of the Amending Act of 1918 was to exclude for the future the jurisdiction of the Civil Courts to try cases relating to any land in the Sonthal Parganas only during such period as that land should be under settlement the period being reckoned from the time when the land is notified as under settlement to the time where the settlement is notified as completed.

The restrictions as to interest contained in S. 6 of the Regulation of 1872 are binding upon the ordinary Civil Courts locally situated outside the Sonthal Parganas but exercising jurisdiction over property within that area. The section applies even when no settlement operations are going on. All Courts wherever they may be locally situate having jurisdiction in the Sonthal Parganas must, when exercising jurisdiction in cases arising within the Sonthal Parganas follow the rules relating to usury set out in the section. 41 C. 116 foll. The intention of the Legislature in enacting S. 6 of the Act was that the amount decreed should not be such as to increase the total liability for interest on the bond beyond the amount of the principal debt. Therefore the interest recoverable in a suit on a mortgage should be limited to the amount of the principal of the original debt of loan after crediting the interest already paid. (*Muller C.J. and Bucknill J.*) **HARI PRABAD SINGHA v. SOURENDRA MOHAN SINHA**

66 I. C. 945 : (1922) P. 450 : 3 Pat. L. T. 709.

—Ss. 11 and 25 A—Applicability of—Publication of record of rights—Certificate of—Suit in Civil Court—Jurisdiction of Settlement Court.

S. 11 of the Regn. bars every suit regarding any matter decided by any Settlement Court, except such suits as are brought to contest the finding or record of the Settlement Officers where only the right of Zemindars or other proprietors as between themselves are concerned provided they are brought within 3 years from the date of the publication of the Record of Rights. When the question in controversy between the parties does not involve the determination of the rights of the Zemindars or other proprietors between themselves, the decree under S. 11 cannot be avoided by a suit under S. 25 A but where the question in controversy does not involve the determination of such rights the decree under S. 11 can be avoided by a suit. S. 11 operates in every case to give every decision and order of the Settlement Courts the force of a decree and S. 25 A enables a party affected by such decisions and orders to sue for setting aside such decisions and orders provided the rights decided fall within the class of rights mentioned in S. 25 A. The publication of the Record of rights in accordance with law is immaterial. (*Das and Adami, JJ.*) **DWARKA PRASAD v. JAI VARHAM.** (1922) P. 322 : 67 I. C. 686

**SPECIAL DAMAGE**—Not necessary in suit for declaration of public right—Sanction of court. See **C. P. CODE, O. 1 R. 8.** 26 C. W. N. 587.

## SPECIAL MARRIAGE ACT, S. 10.

**SPECIAL MARRIAGE ACT (III of 1872) Ss 10, 16 and 17—Bramo—Declaration under the Act—Effect of—Does not cease to be a Hindu. See SUCCESSION ACT, S. 331. 26 C. W. N. 799.**

**SPECIFIC PERFORMANCE—Agreement to lease Contract subject to "usual" terms and to entering into a written lease—Incomplete agreement—No specific performance. See SP. REL. ACT, S. 21 (c). 21 Bom. L. R. 466**

—Agreement to sell—Option to purchase—Sale to third person before exercise of option. Effect of. See SP. REL. ACT, S. 27. 42 M. L. J. 432.

—Alienation pending suit—Title—Effect of decree in suit. See LIS PENDENS. 49 Cal. 495.

—Contract of lease—Contract in excess of trustee's powers.

A court of equity will not grant specific performance when a trustee has entered into a contract for a lease which is in excess of his powers or has entered into a contract for renewal which is ultra vires (*Mookerjee and Cuming JJ*) GAJENDRA NATH DEY v. MOULVI ASARAF HOSSAIN 36 C. L. J. 48 : 27 C. W. N. 159

—Contract for sale of land—Time made the essence of the contract by notice—Notice unreasonable—Specific performance—Right to See CONTRACT ACT, S. 55. 24 Bom. L. R. 203.

—Decree for—Capable of execution by defendant as well as plaintiff. See C. P. CODE, S. 2 (3) 24 Bom. L. R. 496

—Delay—When a ground for refusing relief to plff. See SP. REL. ACT, S. 22. 67 I. C. 70

—Joint Hindu family—Contract for sale by manager—Minor members—Existence of—Specific performance. See HINDU LAW—JOINT FAMILY MANAGER. 18 N. L. R. 67

—Suit for—Maintainability of—Conveyance executed but not registered—Suit for fresh conveyance.

When once a conveyance is duly executed and delivered to the purchaser but it is not registered owing to the latter's neglect or omission a suit for specific performance does not lie and a fresh conveyance cannot be compelled. (*Ayling, O.C.J. and Odgers, J*) SUBBARAYA PILLAI v. DEVASAHAYAM PILLAI. (1922) M. W. N. 70.

—S. 9—Decree under—Execution—order if appealable

An order passed in execution of a decree under S. 9 Specific Relief Act is not appealable (*Scott Smith J*) WAIS v. FATLH DIN. 63 I. C. 760

—S. 9 Dispossession—Order under S. 144. Cr. P. Code—Effect of.

The effect of an order under S. 144, Cr. P. C., is not to disturb either title or possession though it may prevent the exercise of rights which a person in possession would otherwise be entitled to exercise during the continuance of the said order. The person so prevented by an order under S. 144,

## SPECIFIC RELIEF ACT, S. 9.

Cr. P. C. is dispossessed he can sue under S. 9 of the Sp. Rel. Act. (*Teeunon, J.*) NASIRAN BIBI v. SALIM AKANDA. 64 I. C. 572.

—S. 9—Joint possession—Decree for not to be given

In a suit under S. 9 of the Sp. Rel. Act. it is not open to the court to decree joint possession 29 M. L. J. 760 1011 19 C. W. N. 1117 Ref. (*Doddoss, J.*) SRI VANAMAMALAI JEER SWAMIGAL v. PERIA VENKATARAMANA CHARIAR

(1922) M. W. N. 422 : 16 L. W. 931 : (1922) Mad 183 : 68 I. C. 183.

—S. 9—Order under nature of—Suit for—Injunction.

The object of S. 9 of the Sp. Rel. Act is to discontinue people from taking the law into their own hands however good their title may be. 8 B. 371 Ref. It provides a summary any speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another leaving them to fight out the question of their respective titles if they are so advised 13 A. 527 Ref. A person against whom an order is made under S. 9 of the Sp. Rel. Act can sue for a declaration of title and for an injunction restraining the opposite party from interfering with his possession 4 Cal. 580 d's, (*Coyajee, J.*) MARI DODDATAMMA MARKUNDI v. SAFTAY RAM KAISHANA PAI. 24 Bom. L. R. 768 : (1922) Bom 216 : 68 I. C. 490.

—S. 9—Possession—Suit on Invalid title—Mortgage of occupancy holding.

A person who has taken a usufructuary mortgage over an occupancy holding, on contravention of the provisions of the law, will not receive the assistance of the courts in a suit for recovery of possession based on title, such title being *ex hypothesi* invalid. The mortgagee could however sue to be put back in possession under S. 9 of the Sp. Rel. Act without pleading her title at all. (*Piggott and Walsh, JJ.*) SNEO MOOR KOERI v. MT KANSILLA. L. R. 3 A. 519 (Rev) : 20 A. L. J. 972.

—S. 9—Possession of servant, if protected.

S. 9 of the Sp. Rel. Act is intended to provide a summary remedy for cases of dispossession within 6 months where the court will direct the restoration of possession irrespective of the title of the parties. The possession of a servant is that of his master and a court has no jurisdiction to decree possession in a suit by a servant against his master. The position of archaka in a Hindu temple is that of a servant of the trustees 35 M. 631 Ref. (*Devadoss, J.*) SRI VANAMAMALAI JEER SWAMIGAL v. PERIA VENKATARAMANA CHARIAR.

(1922) M. W. N. 422 : (1922) Mad. 183 : 16 L. W. 931 : 68 I. C. 183.

—S. 9—Suit for possession—Occupancy right.

In a suit on possessory title the court decrees the suit only when it finds the plff. in peaceful possession before dispossession, the plff's previous possession being in law sufficient proof of title. In a suit under S. 9 of the Sp. Rel. Act, the court is empowered to go only into the question of dispossession within 6 months before

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and not into the deft's title. 20 C. 834; 26 M 514 foll. (*Pratt, J.*) *MA SAW v MAUNG SHWE GAN.* 1 Bur. L J. 165.

—S. 9—Suit for possession against trespasser—Plff. entitled to succeed without proving his own title. See (1921) DIG COL. 1013 *AMAR CHAND v. RAM RAKHA.* 67 I. C. 941.

—S. 9—Suit by co-owner. — *Trespasser in possession—Other co-owners not parties, effect of*

S 9 of the Sp Rel. Act is wide enough to include the case of a co-owner of property seeking to be restored to the possession jointly with a trespasser of property from which the latter has ousted his co-owners along with him even though those other co-owners do not claim possession of their shares. Nor are such co-owners necessary parties to the suit. 19 C. L. J. 117 d'ss. 19 C. W. N. 1007 foll. (*Hallfar, A. J. C.*) *RAMCHANDRA FATE v. SHRIDAR,* 5 N. L. J. 151. 65 I. C. 351; 18 N. L. R. 71 (1922) Nag. 115.

—S. 15 — *Incomplete contract — Specific performance.*

Where there is no completed contract between the parties, a court cannot decree specific performance. When plff sued to enforce specific performance of a contract for sale of certain land by the first and second defendant and it was found that the second defendant had never agreed to sell, the contract cannot be specifically enforced. (*Chatterjee and Pantun, JJ.*) *RAM SARAN ROY v. SHOSHI BHUSAN GHOSE* 65 I. C. 594.

—S. 21—Scope of—C. P. Code, Sch. II, para. 22.

S. 21 of the Specific Relief Act is limited by paragraph 22 of Schedule II of C. P. Code and does not apply to any agreement to refer to arbitration or to any award governed by Sch II, C. P. C. (*Mookerjee and Fletcher, JJ.*) *ABDULLAH v SAFIULLAH.* 64 I. C. 204.

—S. 21 (c)—*Agreement to lease specific performance—Incomplete contract.*

A contract of letting by defts. to plff. was in these terms. "We (defts) agree to rent to H. (plff) our building under construction at Plot No. 3 Ballard Estate for a period of 5 years and 5 year's option at a monthly rent of Rs 1,500 from the completion of the same subject to the conditions and entering into a regular lease. A deposit of 3 months' rent is paid on signing of this contract." In a suit by plff. for specific performance held that the writing did not evidence a concluded agreement as it was impossible for the parties to draw up a formal lease on its basis. The words "subject to the conditions and entering into a regular lease" made "the entering into a lease" a condition precedent to the parties coming to a complete agreement. The document could not possibly be specifically enforced. It was merely the result of preliminary negotiations which defined a portion of the terms to appear in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter. So that the final agreement between the parties depended on a Regular lease which

## SPECIFIC RELIEF ACT, (1877) S. 26.

was to be executed. (*Macleod, C. J. and Coyajee J.*) *SIMON REUBEN v. HAJI SIAKH MAHOMED.* 24 Bom L R. 466 (1922) Bom. 404 67 I. C. 433.

—S. 22 — *Specific performance—Delay — Effect of—Abandonment of contract—Intention.*

In cases of specific performance delay may, in certain cases, be evidence of abandonment or acquiescence, but on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of defendants does not disentitle the plff. to sue for specific performance, 33 C 683 foll. (*Abdul Raoof and Campbell, JJ.*) *JUGAL SINGH v. GULAM MAHOMED.* 67 I. C. 700; 3 Lah. 376; (1922) Lah. 461 4 U P L R. Lah. 100.

—S. 22 — *Specific performance—Delay—Two years—Contract for the sale of land.*

A delay of two years in suing for specific performance of a contract for the sale of land even though plaintiff had given notice of suit immediately after the expiry of the period of 15 days fixed for completion of the sale, disentitles the plaintiff to specific performance. To give him this relief would enable a purchaser to speculate on the rise and fall of the market and to bring his suit when he thought the value of land had reached its highest point. (*Kemp, A. J. C.*) *NAROO SHANKAR v. RAJUMAL,* 15 S. L. R. 21.

—S. 22—*Specific performance—Tender—Necessity for—Agreement to reconvey.*

In a suit for specific performance of an agreement to reconvey it would be proper for the plff. to tender the money or bring it into Court with his plaint. But having regard to the facts that the negotiations went on for several months, that the suit was filed before the 3 years had expired, and also the fact that the defts. had been in possession of a portion of the villages when they undertook to reconvey to the plff. the court refused to apply the strict law as to tenders and directed defts. to reconvey on payment of the consideration money. (*Macleod, C. J. and Coyajee, J.*) *TRIBHOVANDAS VARIVANDAS v. BALMUKUND DAS.* 24 Bom L R. 434 67 I. C. 865.

—S. 25 (b) — *Marketable title — Vendor and purchaser—Contract of sale—Proof of title.*

"Marketable title" in the case of a contract for the sale of immoveable property means a title free from reasonable doubt. Whether the doubt under the facts and circumstances of a particular case is reasonable or not must necessarily depend on the nature of the objections and the facts of the case. (*Shah, A. C. J. and Pratt J.*) *HAJI OOSMAN HAJI ISMAIL v. HAROON SALLEH MAHOMED.* 24 Bom. L. R. 978; 68 I. C. 862.

—S. 26—III (b)—*Variation as a defence—Evidence to prove variation.*

Where specific performance is asked for, the law provides that plaintiff must do equity and extends the provisions of the evidence Act by giving the defendant opportunity to prove the variation set up. (*Macleod, C. J. and Coyajee J.*) *UDAR BAI v. DWARKADAS PARIHA.* (1922) Bom. 336 (1)



## SPECIFIC RELIEF ACT, (1877) S. 27.

—S. 27—Agreement to sale—Specific performance—Option to purchase—Sale to third person before acceptance of offer—Effect of.

An agreement for the sale of certain lands by the 2nd deft. in favour of the plff. was as follows. —“In respect of the land which you and others had sold to my mother on 2-10-1902 you executed a cultivation muchillika to me on 10-10-1913 specifying the lands with particulars. The amount mentioned in the said sale is Rs. 600 and the amount of loans taken from time to time is over Rs. 200 on payment being made of the total amount of Rs. 800 within the 30th Vaisaki of any year. I shall execute a sale deed to you in respect of the said lands. I shall not execute a sale deed to any other person.” Before any offer of payment was made by the plff. the first deft. purchased from the 2nd deft. the suit lands and the plff. sued to enforce specific performance. *Held*, that as against the first deft. there was no agreement the specific performance of which could be enforced by the plff. The agreement was merely an offer by the 2nd deft. to sell to the plffs. on certain terms, if they chose to avail themselves of the offer which could be withdrawn and did not connote an agreement to buy.

Where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer, and when the offer is at an end e. g. by the promisor selling the subject matter of the offer to a third party, the sale being known to the promisor before there is nothing to accept. (*Ayling and Ramesam, JJ*) *EAGALA NAGAPPA NAIDU v. MUNISWAMI IYER.* 42 M. L. J. 432 : 15 L. W. 409

30 M. L. T. 175 : (1922) M. W. N. 201 : (1922) Mad. 16 : 65 I. C. 720.

—S. 27—Notice of agreement for sale—Oral agreement followed by delivery of possession. See (1921) DIG COL 1014, *VINAYAKRAO MORESHWAR NATU v. GYANOBA HARIBA NAVAL* 64 I. C. 246.

—S. 27 (b)—Contract of sale—Transfer in favour of third person—Bona fide transfer without notice—Plea of—Onus.

From the time a contract for the sale of land is entered into the vendor, as to the land, becomes a trustee for the vendee : and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every one coming in by subsequent representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds or from whom he purchased. The onus of proving a bona fide purchase for value without notice or the prior contract for sale is on the person setting up. Proof of payment of full consideration for the sale in ignorance of the original contract of sale raises a presumption of good faith. (*Abdul Raouf and Harrison, JJ.*) *KANSHI RAM v. ISHWAR DAS.* 67 I. C. 888.

—S. 31—Rectification of mistake—Mortgage—Plea of mistake raised in defence.

Where it is proved that what was intended by the mortgagor and the mortgagee alike to be included in the security has been so misdescribed by reason of a manifest clerical error that nothing

## SPECIFIC RELIEF ACT, (1877) S. 42.

would pass by the deed and the intention of the parties would be defeated, the court can give effect to the indisputably real agreement between the parties without driving them to a suit for rectification. 34 C. L. J. 256 Rel. (*Mookerjee and Cuming, JJ*) *NANDA LAL AGRANI v. JOGENDRA CHANDRA DATTAR* 36 C. L. J. 421.

—S. 42—Adoption—Declaratory suit by reversioner—Further relief.

Where plaintiff is a reversioner and if the adoption is declared to have not taken place the second defendant, adoptive father's widow, would be entitled to immediate possession and not the plaintiff he could not have well asked for possession it is unnecessary to ask for further relief, for example, injunction, plaintiff's object being attained by a declaration that the adoption had never taken place. (*Kotwal and Pradeaux, A J. C.*) *DEORAO v. MT. ANNAPURNABAI.* (1922) Nag. 185.

—S. 42—Adoption—Suit by presumptive heir for declaration of its invalidity.

It is competent to the presumptive heirs of a Hindu to maintain a suit for declaration of the invalidity of an adoption made by the widow of the last male owner. 28 Bom. 294, 29 Mad. 390 ; 45 Cal. 510 Ref. (*Broadway and Abdul Qadir, JJ.*) *RULYA RAM v. BADAMO.* 4 Lah. L. J. 37 : (1922) Lah. 68.

—S. 42—Award—Suit for declaration—Award not filed in court—Arbitration Act, S. 14.

Where an award of arbitrators has not been filed in court it is competent to the plaintiff to institute a suit for a declaration that the award if, not binding on him S. 14 of the Arbitration Act, is no bar to the maintainability of the suit. (*Le Rossingal and Campbell, JJ.*) *FIRM OF HIRA NAND MURLI DHAR v. FIRM OF FLEMING SHAW & CO.* 4 Lah. L. J. 12 : (1922) Lah. 26 : 66 I. C. 187.

—S. 42—Consequential relief—Court fee.

Where plaintiff not only sued for a declaration but asked for a temporary injunction restraining defendant from executing the ex parte decree against plaintiff, *held* that the real relief is perpetual injunction and court fee must be paid on it. (*Madgaonker, A J. C.*) *SHRIRAM v. FIRM OF DATARAM MUNSHIRAM.* (1922) Sind 20.

—S. 42—Consequential relief—Nature of—Plaintiffs in physical possession—Nature of possession.

Where some of the members of a joint Hindu family sued for a declaration that an alienation of the joint family properties made by the other members were not binding on them and it was found that the alienees were not in possession. *Held* that the plaintiffs being in physical possession with other members of the family of the properties, were not bound to sue for possession and that S. 42 of the Sp. Ref. Act was no bar to the suit. 36 A 126 Ref. (*Bannerjee and Gokul Prasad, JJ.*) *KANHAI LAL v. JAI LAL.* L. R. 8 A 632 : 20 A. L. J. 930.

## SPECIFIC RELIEF ACT (1877), S. 42.

—S. 42—Declaration—Discretion of court—Person not parties to suit in which declaration is sought—Declaration in favour of.

Plaintiffs (representatives of the pattadars and the mirasidars of a village) sued for a declaration that the sale of the plaint land (alleged to be blacksmith's unenfranchised inam) to the third defendant by defendants 1 and 2 inamdars (until shortly before suit, when they were removed from service by the plaintiffs) was void and to recover possession of the land from the third defendant. The decree for possession was refused because defendants were found to own the kudivaram of the land. *Held*, that the grant of a declaration under S. 42 of the Specific Relief Act being discretionary the Court ought not, in view of the fact that plaintiffs had not appointed others in the place of defendants 1 and 2 and might in fact never appoint anybody else to use its discretion to make the declaration. (*Oldfield and Odgers, J.J.*) *ELLAPA NAIDU v. BOOLOGACHARY*  
42 M. L. J. 359 (1922) M. W. N. 180 :  
16 L. W. 531 : (1922) Mad. 97

—S. 42—Declaration decree—Effect of—Stepping stone for further litigation and of no practical effect—Discretion of Court. See C. P. CODE, S. 92 (b). 20 A. L. J. 557.

—S. 42—Declaratory suit—Legal character—Election—Suit to set aside—Maintainability. See (1922) DIG. COL. 1018 THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KATRUNG v. CHARU CHANDRA MUKERJEE. 68 I. C. 229.

—S. 42—Declaratory suit—Right to recover money. See (1921) DIG. COL. 1018 SHAIKH RAFIQ UD-DIN v. HAJI SHAIKH ASGAR ALI 1 Pat. 1 : (1922) P. 392 : 3 Pat. L. T. 793

—S. 42—Declaratory relief—Covenant for pre-emption or reconveyance—Void as offending the rule against perpetuities.

It is open to a plff. to sue for a declaration that he is the absolute owner of lands under a sale deed unaffected by the covenants for pre-emption or reconveyance contained in the sale-deed, on the ground that such covenants offend the rule against perpetuities and are therefore void. (*Macleod, C. J. and Kanga, J.*) *DINKARRAO GANPATRAO v. NARAYAN.* 24 Bom. L. R. 449 : (1922) Bom. 84

—S. 42—Suit for declaration of title—Maintainability—No cloud on title. See WILL—EXECUTOR. 42 M. L. J. 567.

—S. 42—Suit for declaration of title to use property—Order under S. 144 Cr. P. C.—If ponfers cause of action. See CR. P. CODE, S. 144. 42 M. L. J. 179.

—S. 42—Declaratory suit—Possessory title.

Where neither party is able to prove its title to property in dispute it is open to the plff. in possession for some time short of the statutory period to obtain a declaration of his right to the property. (*Maung Kin, Of J. C. J.*) *THA LIN v. P. K. P. L. PALANEAPPA FIRM.* 64 I. C. 400.

## SPECIFIC RELIEF ACT (1877), S. 42.

—S. 42—Declaratory suit—Suit by Hindu reversioner during life-time of limited owner.

A court will not grant a bare declaratory relief that the plaintiff is the nearest male reversioner during the life-time of the widow or other heirress (*Lindsay and Ryves, J.J.*) *MUNNU LAL v. RAJA RAM.* 20 A. L. J. 282. I. R. 3 A. 247 : (1922) All. 100. 66 I. C. 899

—S. 42—Suit for declaration, without asking for possession—Revenue records—Entries in—Presumption of correctness—Tenants if entitled to declaration against landlord.

When a suit was filed for a declaration of title as regards a number of properties, and the plaint itself showed a right to present possession with respect to some, held in the absence of claiming possession also, a suit for a mere declaration was not maintainable.

Entries in revenue records as tenants for a long time raise a presumption of correctness which has to be rebutted, but tenants are not entitled to a declaration under S. 42 against their landlords. (*Leslie Jones, J.*) *MT. JAI KAUER v. LABHU* 4 Lah. L. J. 207 : (1922) Lah. 163.

—S. 42—Entry in revenue records—Effect of—Possession.

Where the Revenue court makes an entry in the Revenue records changing the property into the name of the minor who had just attained majority, whereas the property stood all along in the name of the guardian, this amounts in law to dispossession. A suit by the guardian for declaration of title alone will be barred under S. 42. (*Rafique and Piggott, J.J.*) *KUMBR UDIT NARAYAN SINGH v. DIWAR RANDHIR SINGH.* I. R. 3 A. 642.

—S. 42—Santal Parganas—Not applicable—Power of a Court to grant declaratory relief—No consequential relief prayed for.

As the Specific Relief Act does not apply to the Santal Parganas there is nothing in the law apart from that Act which would entitle the court to grant a declaratory decree. Before 1877 the power of the courts in such cases were governed by the provisions of the Civil Procedure Code of 1859 subject to a condition precedent that there were circumstances which might justify the grant of consequential relief.

2 P. L. J. 379 ; 19 W. R. 171 and 23 W. R. 314 followed. (*Dawson Miller, C. J. and Bucknill, J.*) *ISWARI PRASAD SINGH v. MT. SAHORA KUMARI* (1922) P. 42.

—S. 42—Proviso—Declaratory suit—Larger portion of land in suit in joint possession of plff. and deft. See (1921) DIG. COL. 1021. *MUSSAMMAT SHANKER v. JODHA,* 68 I. C. 576.

—S. 42—Proviso Suit by vendee for declaration—Prayer for possession.

Where a purchaser from an absent cosharer brings a suit for declaration of his title, he need not sue also for possession (*Shadi Lal and Martineau, J.J.*) *GOKUL DAS v. RANGILA* 4 Lah. L. J. 462.

## SPECIFIC RELIEF ACT (1877), S. 45.

—S. 45 (d) (e). *Specific and adequate remedy—Meaning of—Remedy when complete.*

"Specific and adequate remedy" in S. 45 (d) refers not to a general right of suit which must, unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act.

If the High Court were to express judicial opinion in the course of injunction proceedings that certain land acquisition proceedings were illegal and *ultra vires*, it must be assumed that the Local Government as the Land Acquisition authorities will stay their hands in view of the decision. (*Greaves, J.*) *In re MANICK CHAND MAHATAB v. THE CORPORATION OF CALCUTTA AND THE IMPROVEMENT TRUST.* 48 Cal. 916 : 66 I. C. 600.

—S. 54—*Trade mark—Injunction—Points of similarity and dissimilarity—Test.*

The defendant began to sell a certain patent medicine encased in such a way that the ordinary customer might easily think it was another similar one of the plaintiff. In an action for injunction restraining the defendant from so doing, held the test to apply in such a case would be the points of similarity and not the points of dissimilarity. The fact that the plaintiff's medicine was not an efficacious one, was no reason for refusing him the legal protection he claimed (*Mears, C. J. and Banerjee, J.*) *CHETERPAL SHARMA v. JAGANNATH DAS.* 44 A. 608 : L. B. 3 A. 344 : 20 A. L. J. 537 : 4 U. P. L. R. (A) 135 : (1922) A. 178 : 67 I. C. 353.

—S. 56 (e)—*Suit for injunction—Order under S. 9 of the Sp. Rel. Act.*

Where an order under S. 9 of the Sp. Rel. Act is passed against a person in possession he can institute a suit to establish his title to the property and for an injunction restraining the opposite party from interfering with his possession. 4 Cal. 380 dist. (*Coyajee, J.*) *MARI DODDATAMMA MARKEMDI v. SANTAYA RAM KRISHNA PAI.* 24 Bom. L. R. 768 : (1922) Bom. 216 : 68 I. C. 490.

—S. 57—*Contract of—Personal service—Breach—Injunction—Negative covenant.*

Where there is a contract of personal service coupled with a stipulation that the servant is not to seek service elsewhere during the period of the contract the court can grant an injunction restraining the servant from seeking employment elsewhere in breach of the contract, though it is unable to enforce specific performance of the affirmative covenant. (*Robinson, C. J. and Heald, J.*) *THE INDO-BURMA OIL FIELDS, LTD. v. BURMA OIL COMPANY LTD.* 11 L. B. R. 26 : 64 I. C. 794.

STAGE CARRIAGES ACT (XVI of 1891) S. 7—*Offence under—Trial—Second class Magistrate.*

Held, following 7 P. R. 1879 that a second class Magistrate has no jurisdiction to try an offence under S. 7 of the Stage Carriages Act. (*Chevis, J.*) *GOMND RAM v. EMPEROR.* 65 I. C. 439. 23 Cr. L. J. 87.

STAMP ACT (II of 1899)—*Construction of—Object of the enactment.*

## STAMP ACT (1899), S. 35

The Stamp Act being a fiscal statute whose primary object is to secure revenue to the state its object is attained by excluding the unstamped document from evidence and not acting on it. The parties need not be penalised beyond this extent. (*Kennedy, J. C. and Kar, A. J. C.*) *NARAIN DAS v. JASSOMAL.* 15 S. L. R. 135 : 65 I. C. 37.

—S. 2 (1)—*Execution of document—Unsigned instrument.*

Unsigned Burmese instruments made since the Indian Stamp Act came into force, that is since the 1st. July 1899 cannot be treated as "executed for the purposes of the Stamp law" 7 Bur. L. T. 48 foll. (*Saunders, J. C.*) *MAUNG PO DIN v. MAUNG PO NYEIN* 66 I. C. 360.

—S. 2 (5) vi—*Attestation—What amounts to—Writer of document—If an attesting witness.*

The attestation referred to in S. 2 (5) vi of the Stamp Act means attestation on the face of the instrument, 48 Cal. 61 does not hold that the person who signs as writer of an instrument must be regarded as an attesting witness, but that a person who is present and witnesses execution of a bond and whose name appears in the document though he is therein described merely as a writer of the deed is a competent witness to prove execution. (*Woodroffe, Greaves and Ghose, JJ.*) *BIDHA RANJAN MOJUMDAR v. MANGAN SARKAR.* 49 Cal. 729 : 26 C. W. N. 585 : 35 C. L. J. 459. (1922) Cal. 452 : 67 I. C. 780.

—S. 2 (15)—*Evidence—Instrument of partition—Award.*

As "instrument of partition" includes in its definition award by an arbitrator directing a partition; if it is not sufficiently stamped as an instrument of partition it is inadmissible in evidence. (*Stuart, J.*) *SYED MOHAMMAD HAMEED v. SYED MANZUR HASAN* (1922) All. 283.

—S. 12—*Cancellation of stamp—What is.*

The question whether a particular adhesive stamp has or has not been effectually cancelled so that it cannot be used again is a question that depends on the facts of each case. Drawing lines across the whole stamp extending beyond the edges was a sufficient cancellation within the meaning of S. 12, (*Kincaid, J. C. Raymond, A. J. C.*) *PESSUMAL v. GAGANMAL.* 15 S. L. R. 34 : 66 I. C. 5.

—S. 35—*Bond—Document stamped with one anna—If unstamped or insufficiently stamped.*

Where a document was in reality a bond, but was apparently intended to be a promissory note and as such bore only a one-anna stamp, in levying the penalty it should be treated only as insufficiently stamped and not unstamped. Merely because the stamp happens to be of the wrong kind, the document should not be treated as wholly unstamped. (*Pratt, J.*) *THE COLLECTOR OF RANGOON v. ABDUL RAHMAN SIRCAR.* (1922) L. B. 27 : 67 I. C. 640.

—S. 35—*Document unstamped—Inadmissible in evidence—Decree or original consideration.*

**STAMP ACT (1899), S. 35.**

The question whether a loan was given and taken, can in certain cases, such as those of collateral security, be distinguished from the question of the terms of the loan and of its re-payment and where it can be so distinguished, even if the document embodying the terms of the loan is inadmissible for want of stamp, the lender may fall back and sue upon the loan itself and prove it by other evidence. The basis of such an action is not the document, but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed should return the money to the payer 23 C 351; 24 B 360, 34 A 158; 16 I. C. 33 Ref. (*Kennedy J. C. and Madgaon Kar, A. J. C.*) *NARAINDAS v. JASSOMAL*

15 S. L. R. 135 : 65 I. C. 37

—S. 35—Hundi insufficiently stamped—Admissibility in evidence. *See* EVIDENCE ACT S 91. 2 Lah. 330.

—S. 35—Unstamped Document—Admissibility—Secondary evidence if admissible

S. 35 of the Stamp Act does not cover the case of a copy of a document. Where the primary evidence is inadmissible, secondary evidence of that primary evidence can be in no better position. 18 A. 205 Ref. A clerk of the Court cannot admit a document in evidence; that is a duty reserved for that Court. (*Le Rossgnol, J.*) *RAHIM BAKHS V. MAHOMED AYUB* (1922) Lah. 354 : 66 I. C. 153.

—S. 35—Unstamped bond—Suit on—Copy compared with original and filed—Subsequent loss of bond—Copy if admissible on payment of penalty.

A suit was filed on an unstamped bond. A copy of the same was compared with the original by the court clerk, certified to be correct, filed in court and then the original was allowed to be taken away—Subsequently it was lost.

*Held*, production and presentation of a document are not identical with admission and secondary evidence of the contents of an unstamped document, which has been lost or destroyed, can under no circumstances be allowed. 23 Mad. 49 follid.

Where the primary evidence itself is inadmissible, secondary evidence of that primary evidence can be in no better position. (*Shadi Lal, C. J. and Harrison, J.*) *MUHAMMAD AYUB v. RAHIM BAKSH*. 3 Lah. 282 : (1922) Lah. 401.

[On Appeal from 66 I. C. 153 ; (1922) Lah 354]

—Ss. 54 and 55—Mandatory injunction—Roots of tree penetrating neighbour's land—Obligation of owner of tree. *See* (1921) DIG. COL. 1022. *BHUDEB MOOKERJEE v. KALACHAND MALLIK*. 66 I. C. 536.

—S. 62—Provision of Stamp Act self contained as regards penalties for unstamped receipts—Prosecution improper—Absence of mens rea, *See* (1921) DIG. COL. 1024 *NEMAI CHARAN SAHU v. EMPEROR* 64 I. C. 286

—Art. 33—Gift deed—Valuation not given—Power to ascertain—Value of property—Stamp duty payable.

**SUCCESSION ACT (1865), S. 57.**

Where a gift deed contains no statement as to the value of the property gifted, the instrument as it stood does not require any stamp under the Stamp Act, and the Collector has no authority to investigate the value of the property with a view to impound the instrument and cause it to be stamped with reference to the value so ascertained. (*Piggott, Gokul Prasad and Lindsay, J.J.*) *MAHOMED MUZAFFAR ALI In the matter of*, 44 A. 339 : L. R. 3 A. 89 : 20 A. L. J. 161 : (1922) All. 82 : 65 I. C. 811.

—Art. 47—Policy of sea insurance—Protection note—Want of stamp—Admissibility in evidence.

A document alleged to be a sea-policy was given by defendants to plaintiffs and it was in these terms —“Given in writing by the undersigned persons. To wit: that we accepted the liability on goods shipped from the port of Muscat in the boat J for Bombay That liability is to exist up to the time the said goods have been discharged on the Bombay bunder having passed any intermediate ports. The insurance is accepted in accordance with the usage of English policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. through broker. The signatures are to be duly affixed to the stamped pakka (i. e.) formal policy.” The document was not stamped. The cargo was lost on account of an accident. In a suit for damages, *Held*, that the document in question was a policy of sea-insurance within art. 47 of the Stamp Act. The document rendered the executants liable for a fixed sum for the insurance of the goods shipped by a particular boat and fixed a definite period. Therefore it is open to the plaintiffs on payment of the necessary penalty, to tender the document in evidence. (*Shah, A. C. J. and Crump, J.*) *TRICAMJI DAMJI AND CO v. VIRJI KANJI*. 24 Bom. L. R. 820 67 I. C. 965.

STATUTE—Construction—When provisions of one section can be used to defeat those of another. *See* T. P. ACT, Ss. 60 & 98 20 A. L. J. 476 (P. C.)

*See* UNDER INTERPRETATION.

**SUCCESSION ACT (1865), S. 50—Will—Attestation—Testatrix a marksman—Only one attesting witness—Endorsement of Sub-Registrar that execution was admitted—Effect.**

Where the writer of a will affixed only a mark by the pen of the scribe, and there was only one attesting witness on the day of execution, but the next day the Sub-Registrar signed an endorsement stating that the testatrix admitted execution before him.

*Held* the Sub-Registrar also can be considered to be an attester for the purposes of S. 50 of the Indian Succession Act—Case Law referred to. (*Das and Adams, J.J.*) *SARADA PARSAD TEJ v. TRIGUNA CHARAN RAY*. 1 Pat 300 : (1922) P. 402

—S. 57—Will—Codicil—Revocation—Conduct

S. 57 of the Succession Act is exhaustive. 30 M. 359 Ref. That section read with S. 3 of the Hindu Wills Act means that a Hindu will cannot be revoked except in the manner mentioned in

## SUCCESSION ACT (1865), S. 103.

S. 57 subject to the proviso contained in S. 3 of the Hindu Wills Act. A codicil will not be impliedly revoked merely by the destruction or mutilation of the will, and the codicil notwithstanding remains ineffectual, unless it appears that in revoking the will, the testator intended to revoke the codicil as well. No doubt a codicil is *prima facie* dependent on the will and before the passing of the Wills Act it was recognised that a codicil fell to the ground with the will when the Will was revoked. Where the will and the codicil are so independent of each other that either could stand alone, a revocation of the one does not operate as a revocation of the other. The conduct of the sons could not be accepted as evidence of the intention of the testator in the matter of revocation of the will though no doubt his own declaration might under certain circumstances be admissible. 8 P. D. 169, foll. (*Mookerjee and Cumming, JJ.*) SURENDRA NATH CHATTERJEE v. SHADAS MOOKERJEE. 35 C. L. J. 488 : (1922) Cal. 182

—Ss. 103 and 250—Probate—Application for—Caveator—Interest necessary in—Objection to validity of bequest.

A legatee under a will as such has no right either to denounce the will or to call for proof of its solemn form 17 M. 373, to entitle a person to it lodge a caveat and contest a will in probate proceedings, he must have an interest in the property. The mere possibility of his filling a character that could give him an interest in the event of intestacy is not sufficient. It is not the province of the court on the application for probate to go into the question of title with reference to the property of which the will purported to dispose or the validity of such disposition. 18 B. 749 : 12 B. 164 4 C. 1 Ref. (*Ayling and Odgers, JJ.*) RAJAMANIKAM v. FARRAR. 16 L. W. 455 : (1922) M. W. N. 626.

—Ss. 106 and 107—Parsi will—Construction—Bequest to son—Son dying a minor—Gift over—English rules of construction.

Held on the construction of the will in the case that the bequest in favour of the testator's son was vested in interest at the date of the testator's death and it was not diverted by the son's death before attaining majority.

*Per Shah A. C. J.* : The exception to S. 107 of the Succession Act would apply even where a part of the income is directed to be applied for the benefit of the legatee.

*Per Pratt, J.* The exception to S. 107 of the Succession Act goes beyond the English law and it is sufficient to bring the case within the exception if the direction is to apply so much as may be necessary of the income to maintenance. (*Shah, A. C. J. and Pratt, J.*) RATANBAI RUSTAMJI v. CAWASJI EDALII. 24 Bom. L. R. 1124.

—S. 187—Hindu Wills Act, S. 2—Compliance with after suit.

S. 187 of the Succession Act is made applicable to Hindus by S. 2 of the Hindu Wills Act and so long as compliance with the section is prior to the decree, the fact that it was after the institution of the suit makes no difference. The court is entitled to proceed with the suit. (*Mookerjee and Cumming, JJ.*) CHAKU CHANDRA PRAMANICK v. NARUSH CHANDRA CONDOO. 36 O. L. J. 35.

## SUCCESSION CERTIFICATE ACT.

## —S. 311—Scope.

Held on the facts, the true construction of the will was that the legacies were intended to be given to the legatees as from the testatrix's death and to become due at once, but that it was recognised by the testatrix that they would not in fact be paid until the determination of the litigation as the funds would not be available for their payment, until then, there was no direction to be found that the legacies should not be paid until the determination of the litigation though, no doubt, it was recognised that they would not be, but as the funds were invested and bearing interest there was no reason for holding that the testatrix's intention as expressed in the will was that the legatees should not get interest but that the interest should accumulate for the sole benefit of the residuary legatee. (*Schwabe, C. J. Coultis Trotter and Kumaraswami Sastri, JJ.*) ZAMINDAR OF BHADRACHELLAM v. SRI RAJA VENKATADRI APPA RAO. (1922) Mad. 457 : 43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.)

—S. 331—Brahmos, if Hindus—Declaration under Act III of 1872—Effect of

A person by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say, something further than mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under Act III of 1872 is effective only for the purposes of the act and does not involve a renunciation of the Hindu faith. (*Gleaves, J.*) JNANENDRA NATH ROY *In the goods of*. 26 C. W. N. 799.

—S. 331—Burma Laws Act. (XIII of 1898) S. 13—Hindus—Community derived from inter marriage between Hindus and Burmese—Kalais of Burma Law applicable. See (1921) DIG. COL. 1027 MA YAIT v. MAUNG CHIT MAUNG.

42 M. L. J. 193 : 1 Bur. L. J. 15 : 30 M. L. T. 126 (P. C.) : 4 U. P. L. R. (P. C.) 45 : (1922) P. C. 197 : 66 I. C. 609.

SUCCESSION CERTIFICATE ACT (VII of 1889), Ss. 14) 7 and 25—Will—Application for certificate—Probate—Nature of proceedings under the Act—Decision on question of right.

The words "such a will" in the concluding clause of S. 1 Sub S. (4) of the Succession Certificate Act refer to a will to which either the Succession Act or the Hindu Wills Act applies, 18 Bom. 608 and 2 A. L. J. 126 foll. S. 1 (4) of the Succession certificate Act does not preclude a person under a will to which neither the Succession Act nor the Hindu Wills Act applies. The mere fact that he might have applied for a probate is not an adequate ground for refusing to entertain his application for a succession certificate. 16 Bom. 712 foll.

A Subordinate Judge of the second class invested with the functions of a District Court under S. 26 of the Succession Certificate Act, is competent to entertain an application for a succession certificate in respect of debts exceeding Rs. 5,000.

Proceedings under the Succession Certificate Act are of a summary nature, and the only thing which the court is required to decide is whether the applicant has a *prima facie* right to collect the debts, and the decision of the Court under the

## SUCCESSION CERTIFICATE ACT, S. 4.

Act, upon a question of right does not bar the trial of the same question in any other proceeding between the same parties. (*Shadi Lal C. J.*)  
*RATTAN SINGH v. CHANDHRI RAJ SINGH*  
 2 Lah. L. J. 578 : 63 I C. 302.

—S. 4—Dower Debt—Inheritance by mother—Subsequent death of the husband—Liability inherited in specific shares—Claim against one of the heirs—Succession certificate if necessary. *See* (1921) DIG. COL. 1028 *SHADI JAN v. SYED WARIS ALI*. 64 I C. 1.

—S. 4—Debtor—No obligation to pay debt to person without certificate or probate.

A debtor is not under any legal obligation to pay the debt to any representative of the deceased creditor who does not produce a certificate, or probate or Letters of Administration or some authority to collect the debts due to the deceased. (*Broadway and Abdul Qadir, JJ*) *THAKAR DAS v. THE FIRM OF BASHI MAL KISHEN CHAND*. 64 I C. 385.

—S. 4—Joint Hindu family—Suit by son for recovery of debts due to his deceased father.

It is competent to a son in a Mitakshara family to sue for recovery of the debts due to his deceased undivided father without the production of a succession certificate. (*Suhaswardy and Cuming, JJ.*) *SITAL PROSHAD PODDAR v. KAIFUT SHEIKH*. 26 C W N 488 : 65 I C 367 : (1922) Cal. 149.

—S. 4—Survivorship—Hindus—Illegitimate son of a shudra—No succession Certificate necessary. *See* HINDU LAW, SUCCESSION. 68 I. C. 417

## SUCCESSION PROPERTY PROTECTION ACT (XIX of 1841)—Scope of—Succession to large estates—Disputes as to—Breach of peace.

The object of the Curator's Act (19 of 1841) is to protect the property appertaining to large estates in case of a dispute as to succession. That Act in some respects stands in a similar position to S. 145 Cr. P. Code with respect to certain specified properties whereas its scope is large inasmuch as it embraces all properties moveable and immoveable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper court. (*Jwala Prasad, J.*) *BISO RAM v. EMPEROR*. (1922) P. 372 : 23 Cr. L. J. 236 : 66 I. C. 76

—Ss. 3 and 5—Appointment of Curator—When justified.

To apply the Act XIX of 1841 to any particular case it is a condition precedent that the Judge should find or be satisfied that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application was *bona fide*. Without that finding the Court has no jurisdiction to act under the Act and its order is revisible 12 M. 341 Ref (*Krishnan J.*) *KOTHANDARAMA REDDY v. JAGATHAMBAL AMMAL*. 16 L. W. 924.

—S. 18—Appeal from decision of District Judge.

## TORT.

No appeal lies under the provisions of S. 18 of Act IX of 1841 against the decision of a District Judge. (*Walsh and Stuart, J.*) *GAJADHAR v. MEGHA*. 44 All. 546 20 A. L. J. 358 : (1922) A. 337 : L. R. 3. A. 652.

## SUITS VALUATION ACT, (VII of 1887) S. 8—Valuation for court fees—Suit falling under S. 7 (4) (c) of the Court Fees Act—Same valuation for purposes of jurisdiction.

Under S. 8 of the Suits Valuation Act the valuation for purposes of Court Fees determines the valuation for purposes of jurisdiction also. (*Scott Smith J.*) *NANDAN MAL v. SALIG RAM*. (1922) Lah. 236 : 66 I C. 34.

—S. 8 (14)—Mortgage—Redemption—Suit for—Valuation.

The amount of the Court-fee to be paid and the valuation of a suit for redemption of a mortgage depends on the amount of the mortgage. It is an ancillary part of the claim that an account should be taken and any amount found due to or by one of the parties should be awarded to the party to whom it is due. This does not alter the nature of the suit nor increase the value of it. 31 A 44 foll (*Banerjee and Gokul Prasad JJ*) *CAHIDDU SINGH v. JAHANJHAN RAI*. L R 3 A. 630.

SUMMONS—Issue of—Court's duty to enforce attendance—Practice. *See* PRACTICE—SUMMONS. (1922) Pat 200

TORT—Breach of contract—Procuring of—Actionable wrong—Continuing cause of action.

Where a third party procures a breach of Contract of personal service by employing the servant himself with knowledge of the subsisting contract he commits an actionable wrong and the wrong continues so long as the breach continues. (*Robinson, C J and Heald J.*) *THE INDO-BURMA OIL FIELDS v. BURMA OIL COMPANY, LTD*. 11 L. B. R. 26 : 64 I. C. 794.

—Cause of action—Death of injured person—Right of legal representatives

Where a man dies by the tort of another, his heirs have a cause of action for damages and the principle embodied in the Fatal Accidents Act is applicable to cases arising in Berar as a rule of equity, justice and good conscience. (*Kotwal and Moenair, A. J. C.*) *RAKHMABAI v. DHANRAJ*. 64 I. C. 311.

—Defamation—Privilege—Statements in pleadings—Not absolutely privileged. *See* PENAL CODE, S. 499. 65 I. C. 204.

—Defamation—Suit for damages against vakil if maintainable—English and Indian law.

Where a vakil in the course of his argument described plaintiff as a liar and swindler, held a suit for damages against him was not maintainable in law.

The rule of English law, laid down in *Munster v Lamb* (1883) 11 Q. B. D. 588, as regards immunity of Counsel for words uttered in the course of the administration of the law, is also applicable to India as a principle of justice, equity and good conscience. 24 C. W. N. 9 : 82 and 10 Mad. 28 followed. (*Das and Agami, JJ.*)

## TORT.

JAGAT MOHAN NATH SAHI DEO v. KALIPADA GHOSH.  
1 Pat. 371 : (1922) Pat. 85 :  
3 Pat. L. T. 276 : (1922) P 104 : 66 I. C. 861.

—Privilege—Master and pupil—Infliction of corporal punishment—Enforcement of discipline—Justification. See MASTER AND PUPIL  
15 L. W. 501.

—Trespass—Essentials of—Use of force—Justification.

Unlawful entry is not an essential element to constitute trespass.

The mere fact that there was a general notice forbidding trespass is not sufficient to dispense with a request to withdraw—Before force is used a trespasser must always be given an opportunity of withdrawing peacefully. (*Newbould and Pantou, JJ.*) KUMUD LANTA CHAKRAJORTHY v. BIGNOLD.  
68 I. C. 664

TRADE MARK—Injunction against imitation—points of similarity, the proper test. See SP. REL. ACT, S 54.  
20 A. L. J. 537.

TRADE NAME—Injunction—Colourable imitation—Test of

The principle underlying the use of trade-names is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. In other words a person shall not carry on his business in such a way as to represent that his business was the business of another person. The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that at the act of the defendants in assuming the name complained of does an injury to the plaintiffs' rights. There is no question in such cases of property or monopoly in the name. There is no property in the word but at the same time it is fraud on a person who has established a trade and carries it on under a given name that some other person assumes the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. (*Mulla J.*) THE NATIONAL BANK OF INDIA v. THE NATIONAL BANK OF INDORE.  
24 Bom. L. R. 1181.

TRADE USAGE—Evidence of—When can be set into vary terms of written contract—must not render contract insensible, inconsistent or unreasonable. See CONTRACT—TRADE USAGE.  
26 C. W. N. 354.

TRANSFER OF PROPERTY ACT (IV of 1882)—Applicability.

Per Kumarasamy Sastry J.:—The T. P. Act applies only to alienation *inter vivos* and has no application to disposal of property by will. (*Schwabe C. J., Coutts-Trotter and Kumarasamy Sastry, JJ.*) RAJA OF BADRACHLAM v. VENKATADRI APPA RAO.  
43 M. L. J. 486 :

(1922) M. W. N. 532 : 16 L. W. 369 :  
31 M. L. T. 221 (H.C.) : (1922) Mad. 457.

## TRANSFER OF PROPERTY ACT, s. 6.

—Applicability Gift between Mahomedans  
—Condition restraining transfer—Estate taken by donee. See MAHOMEDAN LAW—GIFT.  
20 A. L. J. 466.

—Ss. 3 and 58—Immovable property—Royalty—Commission—Interest in immovable property—Mortgage—Attestation

Royalty is in reality the price paid for a portion of the soil the payment whereof is distributed over a number of years. An interest in a royalty is not an interest in immoveable property and a mortgage of the interest does not require attestation. (*Das and Adami, JJ.*) KRISHNA KISHORE ADHIKARY v. THE KUSUNDA NYADI COLLIERIES, LTD. (1922) P 36 : 65 I. C. 673.

—S. 3—Notice—Constructive notice—Registration

The registration of an instrument is constructive notice of its contents. (*Shadr Lal, C. J. and Harrison, J.*) MT. MALAN v. TARA SINGH.  
4 L. L. J. 23 : (1922) Lah. 64.

—S. 3—Notice—Registration—Mortgage

The registration of a mortgage is sufficient notice to a subsequent purchaser of the incumbrance on the property. (*Maung Kin J.*) AUNG KAING SAING v. MAUNG SAN, I Bur L. J. 204.

—S. 3—Notice—Registration—Effect of.

Registration does not operate as constructive notice and the purchaser from an ostensible owner whose title deeds are themselves complete is not bound to search the registrar on office to see if the original owner may not have given a title to somebody else. (*Batten, J. C.*) MT. KASTUR BAI v. BALIRAM.  
68 I. C. 732.

—S. 5—Transfer of property—Definition not applicable to Pres. Towns Ins. Act.

The definition of "transfer of property" in S. 5 of the Transfer of Property Act does not apply to transfers contemplated by the Presidency Towns Insolvency Act. (*Marten, J.*) MAHOMED HASHAM & Co. *In re.*  
24 Bom. L. R. 861.

—S. 6—Service inam—Swasthivachakam service in Hindu temple—Liability of inam to be attached and sold in execution—Private alienation of inam—Invalidity of. See INAM, SEBKVICE INAM  
42 M. L. J. 477.

—S. 6 (a)—Hindu reversioner—Interest of—If transferable.

It is not competent to a Hindu reversioner to relinquish or transfer his interest to any one during the life-time of the widow. If he purports to relinquish his interest in favour of the widow, her interest is not in any way enlarged. (*Macleod C. J. and Coyajee, J.*) DAYARAM PREMJI v. BECHARDAS.  
24 Bom. L. R. 351 : (1922) Bom 437 :  
67 I. C. 936.

—Ss. 6 (a) and 42—Hindu reversioner—Transfer of interest—Subsequent accrual of title—Estoppel feeding the title. See (1921) DIG. COL. 1035 ANNADA MOHAN ROY v. GOUR MOHAN MALLIK.  
65 I. C. 27.

—S. 6 (a)—Mother's estate—Right of sons to share in—If can be relinquished.

## T. P. ACT (1882), S. 6.

*Semble* : The right of sons to get share in the mother's estate is only a *spes successionis* within the meaning of S. 6 (a) and as such cannot be relinquished. (*Rankin, J.*) SHASHI BUSHAN SHAW v. HARI NARAIN SHAW. 48 Cal. 1039 66 I. C. 705.

—S. 6 (e)—*Applicability—amount in court deposit pending suit.*

The income of an estate which is the subject matter of litigation held in a Bank to the credit of the successful litigant is not property falling within S. 6 (e) of the T. P. Act. (*Schwabe C. J. Coultis Trotter and Kumaraswamy Sastry, J.J.*) ZEMINDAR OF BADRACHALAM v. VENKATADRI APPA RAO. 43 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.) (1922) Mad. 457

—S. 6 (e)—*Mere right to sue—Assignment of—Claim for unascertained damages—English and Indian Law.*

A claim for unascertained damages for breach of contract is not assignable, as it is a mere right to sue *Glegg v Bromley* (1912) 3 K. B. 474 re.

Where under the terms of a contract, the defendants were to take delivery of certain goods from and as a result of their failure to do so the goods were after arbitration resold for a lower price brought a suit for the balance, but pending the suit assigned it to the plaintiff.

*Held*, that the suit was not maintainable, as the assignment was not of property with an incidental right to sue, but of a mere right to sue within the meaning of S. 6 (e) of the T. P. Act.

*Held*, also upon the facts, the resale was not justified under S. 107 of the Contract Act and the claim was one for unascertained damages.

*Per Richardson, J.* In England there is no definite statutory rule that a bare right of action cannot be assigned. There is a statutory provision making choses in action assignable which is subject to a limitation placed upon it by the courts that the assignment must not offend the law of maintenance. In India there is an imperative statutory rule that a mere right to sue cannot be transferred. Nevertheless the results may be in many respects similar. The Indian Legislature when it enacted S. 6 (e) of the Transfer of Property Act, no doubt had in mind the expressions used in the English cases "a bare right of action" or "a mere right to litigate." On the question of construction which arises in India the language of Parker, J., in *Glegg v. Bromley* (1912) 3 K. B. is at least a valuable guide.

Even if it be assumed that the goods were properly resold and that the claim asserted in the plaint and transferred to the plaintiff is a claim to an ascertained sum, it would still be for consideration whether this claim is in the particular circumstances a mere right to sue or property with an incidental remedy for its recovery within the meaning of Parker, J., in *Glegg's case* (1912) 3 K. B. 474. (*Sanderson, C. J. and Richardson, J.*) JEWAN RAM v. RATAN CHAND KISSAN CHAND. 26 C. W. N. 285

—S. 6 cl. (e)—*Right to sue—Contribution—Right to—Assignment.*

## T. P. ACT (1882), S. 14.

A right to contribution is not a mere right to sue for damages and is assignable. (*Kumara-swami Sastri J.*) G RAMASWAMI IYER v. DEIVASIGAMANI PILLAI. 43 M. L. J. 129 : (1922) M. W. N. 442 : 16 L. W. 282 ; 31 M. L. T. 156 (H. C.) : (1922) Mad. 397.

—S. 10—Condition restraining alienation—Sale with agreement that vendee must not sell to any one but the vendor or his heirs for a fixed price—Agreement void. See (1921) DIG. COL. 1036. DOL SINGH v. KHUB CHAND. 64 I. C. 408.

—Ss. 10 and 11—*Restraint on alienation—Time uncertain—Legality.*

The word absolutely in S. 10 of the T. P. Act must be read with some qualification. A restraint on alienation absolute in its terms but limited to last for a period of uncertain duration is invalid under S. 10 of the T. P. Act 14 C. L. J. 303 ; 43 I. 165 Relied on (*Drumel and Lyle A. J. C.*) KUAR NAGESHAR SHAI v KUAR MATA PRASAD. 25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh 236.

—Ss. 14 and 54—*Contract for the sale of land—Contract for pre-emption—Rule against perpetuities.*

Although contracts for the sale of land which can be specially enforced immediately or contract creating a right of pre-emption which cannot be specially enforced until the proper occasion arises in the future do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinarily personal contracts and stand in a category by themselves. The principle which underlies the rule of perpetuities applies to this class of contracts. The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England. Under Hindu law, neither equitable interests nor executory interests in immovable property are recognised.

*Per Kanga, J.* A contract with regard to land which is calculated to defeat the rule against perpetuities which is one of public policy is void under S. 23 of the Contract Act 41 B. 438, 38 M. 114 ; 24 M. 449, 25 C. W. N. 901 Ref. (*Macleod, C. J. and Kanga, J.*) DINKAR RAO GANPATRAO v. NARAYAN. 24 Bom. L. R. 449 : (1922) Bom. 84.

—S. 14—*Rule against perpetuities—Lessor and lessee—Right of pre-emption to lessor—Permanent lease—Contract to convey land.*

Where on the creation of a permanent lease the lessee covenants that if he or his representatives intend to transfer the whole or a portion of the leasehold interest, the transfer would be made in favour of the lessors for proper price or to third



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parties only with the permission of the lessor and that any transfer in contravention of this covenant would be invalid. *Held*, that the covenant is void as offending the rule against perpetuities and therefore not binding on the lessee, (*Woodroffe and Ghose, JJ*) SWARNA KUMAR GHOSH v PRAHLAD CHANDRA SARKHEL.

26 C W N. 374 (1922) Cal 474.  
67 I. C. 719.

—S. 14—Rule against perpetuities—Personal covenant—Covenant for pre-emption—unlimited in point of time.

A covenant for pre-emption unlimited in point of time is void as offending the rule against perpetuities. Therefore an agreement among the members of a family that in case one of them had to sell his portion of the family property he would offer it for sale in the first instance to the other members cannot be specifically enforced. 25 C. W. N. 901, 38 M 114; 5 C W. N. 343 Ref. (*N. R. Chatterjee and Cuming, JJ.*) RASH BEHARI GANGULY v SHABHARANJAN SAMADDAR. 64 I. C. 1001

—S. 35—Election—Donor making a gift beyond his powers—Subsequent execution of will by donee—Recital of gift—Devisee, if precluded from contesting the will, *See* (1921) DIG. COL. 1038 RAMAYYA v. MAHALAKSHMI

42 M. L. J. 583 : (1922) Mad. 357;  
64 I. C. 481

—S. 36—Landlord and tenant—Rent—Apportionment.

Where an assignee from a tenant of his interest subsequently gets an assignment of the interest of the landlord, the assignor of the landlord's interest is entitled to the rents accrued up to the date of the assignment on the principle of S. 36 of the T. P. Act from the assignee. (*N. R. Chatterjee, and Panton, JJ.*) BIKRAM KUMAR BOSE v. MOHIT KRISHNA KUNDU. 64 I. C. 178

—S. 36—Mortgage—Deposit for redemption—Profits—Date from which claim begins.

From the day of the deposit to redeem a mortgage the property is transferred to the mortgagor and under S. 37 of the T. P. Act mortgagor is entitled to the collections made thereon. (*Gokul Prasad, J.*) LALA GANGA RAM v. MEWA RAM SINGH. (1922) All. 275.

—S. 40—Judicial sales—Title—Vagueness in notice—Effect.

Judicial sales would be robbed of all their security if vague references to antecedent contracts could be held to invalidate the buyer's title. (*Lord Dunedin, J.*) NUR MAHOMED PERBHOY v. DINSHAW HORMASJI. (1922) P. C. 393

—S. 41—Ostensible owner—Duty of transferee—Reasonable enquiry into transferor's title. *See* (1921) DIG. COL. 1039 BALLU MAL v. RAM KISHUN. 64 I. C. 14.

—S. 41—Ostensible owner—Manager of property during owner's absence—Entry of manager in Municipal house tax register—Effect of—Dealings with property.

The possession of a manager cannot be treated as sufficient evidence of ostensible ownership

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with the consent, express or implied, of the real proprietor within the meaning of S. 41 of the T. P. Act. The entry of the name of the manager in the municipal house tax register on his own application was only made for the purpose of assessment and collection of house-tax and was not intended for registering title. Such an entry is not always enough to induce a person to think that the person whose name was entered was the proprietor and a right to sell the property which was entered in his name. 12 A. L. J. 411; 19 C. W. N. 1055; 23 A. 442 Ref. (*Stuart and Khairya Lal JJ*) MAHOMED SULAIMAN v. SAKINA BIBI. 20 A. L. J. 654; 44 All. 674 : (1922) All. 392; L. R. 3 A. 509.

—S. 41—Ostensible owner—Transfer of title.

The transferee from an ostensible owner has to plead and prove that he took reasonable care to ascertain that his vendor had power to make the transfer and that he took the sale deed in good faith and for consideration. (*Batten J. C*) MT KASTUR BAI v BALIRAM. 68 I. C. 732.

—S. 41—Purchase of property benami by husband in the name of his wife—Rights of decree holder against the husband purchasing such property—Mortgagee from widow—Bonafide transferee for value.

Where a husband purchased property in the name of his wife and held her out to be the true owner of the said property, a purchaser of the property in execution of a decree against the husband is estopped from denying the rights of a mortgagee from the wife who took the mortgage in good faith and without notice of the benami character of the wife's title. The purchaser in execution of the decree against the husband is his successor-in-interest and is affected by the same estoppel as would affect the husband under S. 41 of the T. P. Act (*Chatterjee and Cuming, JJ*) ANNODA MOHAN ROY CHOWDHURY v. NILPHAMARI LOAN OFFICE, LTD, 26 C W. N. 436 : 65 I. C. 245.

—S. 41—Representation—Mistake—Effect of

S. 41 of the T. P. Act, like S. 115 of the Evidence Act applies to a case where the person sought to be estopped has acted under a mistake of fact. 20 Cal 296 rel. (*Hallifax, J C*) RAM PRASAD v. IMARATBAI. 18 N. L. R. 27 : (1922) Nag. 79 : 65 I. C. 477.

—S. 41—Transfer by ostensible owner—Silence—Estoppel—Judgment.

Where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who allows the other to hold himself but shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted would have led to a discovery of it. The circumstances which would prompt enquiry might be infinitely varied but it might

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be said that they must be of such specific character that the court could place its finger on them and say that upon such facts some particular enquiry ought to have been made. It is not enough to assert generally that enquiries should be made or that a prudent man would make inquiries. Some specific circumstance should be pointed out as the starting point of an inquiry which might be expected to lead to some result. These principles apply to the case of sales as well as mortgages. 11 B. L. R. 46, 19 W. R. 292; 26 A. 490 Rel.

One who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby sell it to a *bona fide* purchaser cannot afterwards assert his title against the latter. It may be difficult on the concrete facts of a particular case to determine what standing by is culpable. It is the duty of a man who knows that another is relying on a document bearing a counterfeit or his signature to give notice of the forgery without delay. 6 A. C. 82, 1904 A. C. 806 (1893) 1 Ch. 736 Rel. (*Mockerjee and Cumming JJ.*) BAIDYA NATH DUTT v. ALEFIAN BIBI. 36 C. L. J. 9.

—S. 43—*Applicability of—Estoppel when arises—Erroneous representation.*

Before advantage can be taken of S. 43 of the T. P. Act it must be shown that there was an erroneous representation and whether there was such representation or not is a question of fact (*Newbould and Fenton, JJ.*) SRIMATI SAHADAMOYI DAS v. ATUL CHANDRA ROY. 68 I. C. 203.

—S. 43—Mortgage of an enfranchised inam—Subsequent enfranchisement—Acquisition of title. See (1921) DIG. COL. 1040 SONTYANAGOPALA DASU v. INAPUTALAPULA RANI. 64 I. C. 328.

—S. 43—Mortgage without lawful right—Subsequent acquisition of title—Estoppel.

Where a person mortgages property as having a right to do so but in fact without any title and subsequently acquires title as to a portion of the property he must make good his representation to the extent of the property which has come to his hands. (*Coutts and Ross JJ.*) KAMLA PRASAD v. NATTUNI NARAYAN SINGH. (1922) Pat. 136; 3 Pat. L. T. 401; 66 I. C. 149; (1922) P. 347.

—S. 43—Transfer by ostensible owner—Alienee—Rights of—Notice of defect in title—Effect of.

It is a rule of law that in order to allow the real owner of property to recover from an alienee the property taken from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the title or the existence of circumstances which ought to have put the purchasers on an enquiry which if prosecuted would have led to a discovery of the real title. (*Prideaux, A. J. C.*) LAL SINGH v. PARAS RAM. (1922) Nag. 226; 68 I. C. 332.

—S. 49—Mortgage—Mill and machinery—Insurance against fire—Loss—Rights of mortgagee against insurer. See INSURANCE.

1 Bur. L. J. 28.

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—S. 50—Landlord and tenant—Assignment by landlord—Payment of rent in advance after assignment—Discharge of tenant. See (1921) DIG. COL. 1040 RAM LAL MARWARI v. MANDEO MARWARI. 3 Pat. L. T. 128; (1922) P. 339.

—S. 51—Hindu widow—Alienation—Absence of necessity—Alienee's right to improvements.

An alienee from a Hindu widow has to make enquiries as to whether there was any necessity for the alienation and in the absence of same cannot be taken to have believed in good faith that he was absolutely entitled to the property, in order to claim compensation for improvements under S. 51 T. P. Act (*Lindsay and Kanharya Lal, JJ.*) HANS RAJU v. MT. SOMNI. 44 A. 665; L. R. 3 A. 402; 20 A. L. J. 524; 4 U. P. L. R. (A) 118; (1922) A. 194; 67 I. C. 314.

—S. 52—Applicability of—Execution sale—Revenue sale.

The strong weight of authority, though not the express language of the section, is in favour of the view that the doctrine of *lis pendens* applies to execution sales as well as sales for non payment of government revenue. 26 Cal. 966 foll. (*Das and Adams.*) MATHURA PRASAD SAHU v. DASAI SAHU. 3 Pat. L. T. 296; 65 I. C. 325; 1 Pat. 287; (1922) P. 542.

—S. 52—Administration suit—Title to property.

Speaking generally the doctrine of *lis pendens* does not apply to administration suits. If in such a suit a particular partition of the estate is sought to be affected in a particular way, the doctrine would apply (*Robinson, C. J. and Heald, J.*) A. L. A. R. FIRM v. MAUNG THIVE. 1 Bur. L. J. 133.

—S. 52—Contentious suit—Compromise decree—Effect of. See (1921) DIG. COL. 1041 BHARAT RAMANUJ DAS MAHANTA v. SRENATH CHUNDRA SAHOO. (1922) Cal. 388; 66 I. C. 273.

—S. 52—Doctrine of, if applicable to involuntary transfer.

The doctrine of *lis pendens* applies to involuntary transfers also. 25 C. 179, 266; 966; 15 C. 94; 15 C. 756 Rel. (*Hallifax, Kotwal and Moti, A. J. C.*) JOGESHWAR v. MOTI. 66 I. C. 631.

—S. 52—Doctrine of—Notice, if essential—Movables. See (1921) DIG. COL. 1041 BHARAT RAMANUJ DAS MAHANT v. SARAT KAMINI DOSI. (1922) Cal. 358; 66 I. C. 273.

—S. 52—Lease for agricultural purposes.<sup>1</sup>

The letting out of land for cultivation is not a transfer covered by S. 52 of the T. P. Act (*Hopkins S. M.*) MATHURA v. BADRI. L. R. 3 A. 108 (Rev.)

—Ss. 52 and 69—Suit for redemption—Sale under power reserved in the mortgage.

The doctrine embodied in S. 52 of the T. P. Act has no application whatever to a mortgagor who has given under that mortgage an express power of sale and he cannot by starting a suit for redemption derogate from that which he in express terms conferred on the mortgagee. As assignee

## T. P. ACT (1882), S. 52.

from the mortgagee is entitled to exercise the power of sale. (*Countis Trotter and Ramesam, JJ.*) RAMAKRISHNA MUDALI v. THE OFFICIAL ASSIGNEE OF MADRAS, 45 Mad. 774 : 16 L. W. 133.

(1922) M. W. N. 447 : 43 M. L. J. 566 : (1922) Mad. 390.

—S. 52—Mortgage decree—Execution sale of property under money decree—Effect of.

Where after a mortgage decree had been passed and before its execution, the mortgaged property was sold in execution of a money decree and purchased by the decree holder and subsequently the holder of the mortgage decree executed it and purchased the property, held that the sale in execution of the mortgage decree would prevail over the sale in execution of the money decree. The purchaser of the property under the money decree having purchased it while the mortgage decree was in existence must be taken to have purchased it subject to the mortgage charge. (*Miller, C. J. and Adami, J.*) CHAMAN LAL v. KAMARUDDIN MIAN,

3 Pat. L. T. 757 : 67 I. C. 262.

—S. 52—Pre-emption suit—Declaratory decree affecting sale—Effect on prior suit. See LIS PENDENS. 3 Lah. 264.

—S. 52—Suit for specific performance—Alienation pending decree—Title—Effect of decree in suit. See LIS PENDENS, 49 Cal. 495.

—S. 53—Fraudulent transfer—Fraud completed—Right to recover the property.

Where a fraudulent transfer has been effected and the fraud has been carried out, the Court will not assist the party to a fraud to obtain possession of the property nor would they assist him to succeed by preventing the other party to the fraud from showing the true nature of the transaction. 18 Bom. 372, 5 Bur. L. T. 156, 35 Cal. 551, 31 Bom. 405, 38 Bom. 10 ref. (*Robinson, C. J. and Heald, J.*) MAUNG TIN v. MA MAI MYINT 11 L. B. R. 83 : 65 I. C. 459.

—S. 53—Fraudulent transfer—Fraud carried out—Position of parties.

The law as to the rights and the duty of the Court to interfere between parties guilty of a fraud is clear. If a sale has been executed with the object of defeating creditors and that fraud has been carried into effect to any material extent, the Courts will not aid either party to take advantage of his fraud but will let the estate lie where it falls. But where the fraud has not been carried out, when nothing has been done under it, the Courts will aid the vendor to retain possession of the property and will not allow the vendee to take it, that is to effectuate the fraud to which he is a party. (*Robinson, C. J. and Duckworth, J.*) MAUNG PO ZU v. MAUNG PO KWA, 11 L. B. R. 323 : 65 I. C. 322.

—S. 53—Fraudulent transfer—Intention to defeat or delay creditors—Proof.

Where a person creates a permanent lease at a low rent with the object of defrauding the creditors the lease is voidable even though the lessee did not equally share the intention to defraud. (*Lindsay and Kanhaya Lal, JJ.*) AMINA BIBI v. SAHYID YUSUF, 20 A. L. J. 731 : (1922) All. 449 : 4 U. P. L. B. (A) 209.

## T. P. ACT (1882), S. 54.

—S. 53—Fraudulent transfer—Intention to defraud—Not carried out—Effect of.

Where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud but asks to have his act undone, the court would refuse relief and would leave the parties to the consequences of their misconduct, dismissing the claim when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence when he set it up in opposition to the person whom he had invested with the legal title. Upon this rule has been engrafted the distinction that although where the intended fraud has been carried into effect, the court will not assist the true owner, yet if he has not defrauded any one, and the purpose for which the assignment was made has not been carried into execution, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. 35 C. 551 : 33 C. 967 : 18 C. L. J. 616 : 22 C. L. J. 197 Rel. (*Mookerjee and Chokker, JJ.*) DHIRENDRA KUMAR BOSE v. CHANDRA KANTA ROY 36 C. L. J. 82 : 68 I. C. 648.

—S. 53—Plaint in suit to set aside deed of settlement by a judgment debtor—Not a step in aid of execution. See LIMITATION ACT, ART. 182 (5). 42 M. L. J. 303.

—S. 53—Voidable transfer—Avoidance by creditor—Proof of—Execution proceedings.

A transfer in fraud of creditors is voidable at their option. Where a creditor attaches in execution the property so transferred that is a sufficient exercise of the option to avoid the transaction. (*Countis and Das, JJ.*) NAURATAN LAL v. MRS. MARGARET ANNE STEPHEN, 3 Pat. L. T. 613 : 68 I. C. 369.

—S. 54—Contract for pre-emption or resale—Offends rule against perpetuities if no time fixed. See T. P. ACT, SS. 14 AND 54 24 Bom. L. R. 449.

—S. 54—Contract of sale—Delivery of possession—Ejectment—Defence.

A person in possession of property under a contract of sale but without a registered sale deed can resist a suit in ejectment by the owner or any person claiming under him under subsequent title. (*Robinson, C. J. and Duckworth, J.*) SANTHAYI AMMAL v. M. K. MAHOMED, 11 L. B. R. 94 : 65 I. C. 405.

—S. 54—Contract for the sale of land—Law before the T. P. Act.

Prior to the T. P. Act, 1882, a contract for the sale of immoveable property created an equitable interest in the land and made the purchaser the owner in equity. Consequently a contract or covenant for pre-emption in such a sale was void as infringing the rule against perpetuities.

*Obiter* : The result would be the same under the T. P. Act though a contract for sale does not create an interest in immoveable property. (*Macleod, C. J. and Kanga, J.*) DINKARRAO GANPATRAO v. NARAYAN, 24 Bom. L. R. 449 : (1922) Bom. 84.

## T. P. ACT (1882) S. 54.

—Ss 54 and 55—*Contract for sale—Transfer of possession—Effect of*

Where a person enters into possession of immoveable property belonging to another under an agreement that he was to appropriate the rent, and profits of the property in lieu of interest on money advanced by him, such an agreement does not create any interest in immoveable property in favour of the person so entering into possession and he could not resist a claim for possession by the owner or his transferee 29 M. 336; 8 I. C. 1089; 8 L. B. R. 553 foll. (*Robinson, C. J. and Macgregor, J.*) MAUNG PO NGWE v YACOOB ALLY

1 Bur. L. J. 33. (1922) L. B. 25 67 I. C. 652.

—S. 54—*Contract for sale—Vendee in possession of property—No registered sale deed—Payment of purchase money—Suit by vendor for possession—Defence.*

Where a person agrees to sell his property to another who is already in possession and who has paid the purchase money but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property, although the time has passed within which the vendee could have sued to get a sale-deed, (*Macleod, C. J. and Shah, J.*) VENKATESH DAMODAR MOKASHI v. MALLAPPA BHIMAPPA CHIKKALKI. 46 Bom. 722 24 Bom. L. R. 242. (1922) Bom. 9 66 I. C. 688

—S. 54—*Sale—Completion of Sale-deed—Non-registration—Effect of—Specific performance.*

A mere agreement to sell does not require registration but if a document is a sale-deed the mere want of registration will not make it anything less than a sale-deed. Where the sale-deed is unregistered the vendee cannot rely upon it as evidence even in a suit for specific performance (*Chevis and Abdul Raoof, J.*) MUSSAMMAT FARMEHRI DEVI v. AUTAR SINGH.

4 U. P. L. R. (L) 59

—S. 54—*Sale deed—Registration—Agreement to reconvey not registered—Inadmissible in evidence.* See (1921) DIG. COL. 1046 BALA KHANDAPA VAZIRDE v. SADASHIV HARI CHIVATE. 64 I. C. 294.

—Ss. 54 and 129—*Sale—Price—Dower—Mahomedan law—Transfer of property in lieu of dower.*

A transfer of immovable property in lieu of dower amounts to a sale and can only be effected by a registered document under S. 54, T. P. Act. When it is not so effected, the transaction conveys no title to the transferee. (*Kotwal, A. J. C.*) FAHMID-UN-NISSA v HIRALAL.

64 I. C. 126.

—Ss. 54 and 107—*Transfer of property—Agreement for—Delivery of possession—Effect of.*

When in pursuance of an agreement to transfer property the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, subject to the proviso that specific performance can be obtained between parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined, 21

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Ch. D. 9: (1892) 2 Q. B. 255 31 C. L. J. 75 Rel. on (*Mookerjee and Cumming, J.*) GAJENDRA NATH DEY v. MOULVI ASHRAF HOSSAIN. 36 C. L. J. 48: 27 C. W. N. 159.

—S. 54 118 and 123—*Transfer of immoveable property worth more than Rs. 100—Future maintenance—Provision for—Writing and registration.*

A transfer of land of the value of more than Rs. 100 by a husband to his wife to be enjoyed by the latter during her lifetime in discharge of her claim to future maintenance can be made without writing. The expression "price" in S. 54 of the T. P. Act means money. Such money need not necessarily be handed over in current coin at the time but includes money which might be already due or might be payable in the future (*Sahwabe, C. J. Coutts Trotter and Kumara-swami Sastri, J.*) MADAM PILLAI v. BADRAKALI AMMAL 45 Mad. 612. 42 M. L. J. 410: 15 L. W. 464 30 M. L. T. 274: (1922) M. W. N. 345. (1922) Mad. 311: 68 I. C. 687 (F. B.)

—Ss. 54 and 134—*Transfer of a mortgage debt—Registration* See (1921) DIG. COL. 1047. OFFICIAL RECEIVER, TRICHINOPOLY v. LAKSHMAN AIYAR. 68 I. C. 752.

—S. 54—*Unregistered sale—Property worth less than 100 rupees—Delivery of possession—Effect of.*

Under section 54 of the Transfer of Property Act, an unregistered sale deed followed by delivery of possession is effective to pass title where the property conveyed is worth less than 100 rupees. As the document purporting to be a sale is not one for the validity of which registration was a requisite, it could be treated as an agreement to sell even if it did not operate to create title under section 54 of the T. P. Act. 5 B. 143, 8 C. P. L. R. 1 foll. (*Mitra, A. J. C.*) HARLAL SA v. BAPU. 18 N. L. R. 8: (1922) Nag. 58.

—S. 55—*Agreement to sell—Co sharer—Right to get a conveyance.*

Where a co-sharer in certain property has agreed to sell certain property it is open to the vendee to insist on his executing a conveyance of such interest as he has in the property at least in cases where it is not proved that the co-sharer has no sort of a title to the property (*Stuart, J.*) SAKTO MAL v. GOPAL CHAND (1922) All. 439: 4 U. P. L. R. (A) 5: 66 I. C. 313.

—S. 55—*Vendor and purchaser—Duty of vendor to convey title free from reasonable doubt—Breach—Damages.*

Knowledge of the purchaser as to the defects in the title of the vendor does not deprive him of his right to recover damages, and the manager of a joint Hindu family who has agreed to sell immovable property belonging to himself and the minor members of the family, is personally liable for failure to perform the contract when it is found that it is not binding on the minors. The vendee is entitled to a refund of the earnest money paid by him (*Broadway and Abdul Qadir, J.*) LACHHMAN DAS v. JOWAHIR SINGH. 44 P. L. R. (1922),

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— S. 55 (1)(a) and (2)—*Covenant for title—Contract to the contrary—Auction sale—Notification of conditions of sale.*

Where the conditions of an auction sale were duly printed and published and the would be purchasers were distinctly told to satisfy themselves as to the nature of the property sold there is a "Contract to the contrary" and the principles of S. 55 of the T. P. Act regarding the existence of an implied covenant do not apply. If after the purchase it turns out that the property was subject to incumbrances, the doctrine of *caveat emptor* applies to the case. (*Broadway and Abdul Qadir, JJ.*) MT. JUGLO v. ABDUL SALAM. 65 I. C. 734.

— S. 55 (1) cl. (d)—*Sale of land—Duty to execute and deliver proper conveyance—Delivery of ineffectual conveyance—Effect of.*

On a sale of land it is the duty of the seller to execute and deliver a valid conveyance to the property and if for any reason, he executes an ineffectual or invalid conveyance he has no answer to a suit for specific performance for the agreement to sell and for the execution of a legal and binding sale deed. 6 Mad 641 diss, 20 Mad. 19, 20 Mad. 250, 12 C. L. J. 454 ref. (*Robinson, C. J. and Duckworth, J.*) SANTHAYI AMMAL v. M. K. MAHOMED. 11 L. B. R. 94. 65 I. C. 405.

— S. 55 (1) (g)—*Encumbrance—Vendee paying of—Effect.*

Where the vendor intended to sell and the vendee intended to buy a thing different from what, as a matter of fact, was sold and bought, under S. 55 (1) (g) it is the duty of the vendor to pay off all encumbrances unless the vendee had agreed to do so. If as a matter of fact, an encumbrance which ought to have been paid off by the vendor under S. 55 of the Transfer of Property Act was paid off by the vendee, under the provisions of S. 69 of the Contract Act, the vendor would be liable to repay. (1922) P. C. 176, 6 Bom. L. R. 832 : 30 All 172 followed. (*Walish, and Ryves JJ.*) RAM GOPAL v. THAKUR BAKHTAVAR SINGH. (1922) All. 508.

— S. 55 (1) (g) (2)—*Sale of property free from incumbrances—Moneys paid to discharge mortgages or to avoid execution sale—Right to be repaid.*

Where properties are sold free from incumbrances and the purchaser pays off mortgages on the property or pays off decrees obtained on those mortgages, he is entitled to a refund from the purchaser of those moneys spent by him to clear his title. (*Lord Buckmaster*) NATHU KHAN v. THAKUR BURTONATH SINGH. 26 C. W. N. 514 : 42 M. L. J. 444 : L. R. 3 P. C. 82 : 20 A. L. J. 301 : 24 Bom. L. R. 571 : 15 L. W. 635 : (1922) M. W. N. 323 : 35 C. L. J. 417 : (1922) P. C. 176 : 66 I. C. 107 (P. C.)

— S. 55 (4) (a) and (5) (b)—*Unpaid purchase money—Interest—Purchaser taking possession of property sold—Liability to pay interest. See (1921) Dig. Col. 1049 PANDURANG BALAJI v. MAHADEO GOPAL JOG. 48 Bom. 195 : (1922) Bom. 186 : 64 I. C. 492.*

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— S. 58—*Mortgage—Construction—Simple or usufructuary—Tests of—Interest—Charge on property.*

Under a mortgage deed the mortgage was to be in possession of the mortgaged properties and to set off the rents and profits towards interest and if any portion of the interest was unpaid the mortgagee might recover the interest month after month from the mortgagor. The mortgagors were to redeem the property on payment of the principal money. *Held* that the mortgage was neither a simple nor usufructuary mortgage and that the interest was not a charge on the mortgaged property. 2 A. 537 ; 33 A 107 Ref. (*Schwabe C. J. and Wallace, J.*) NAMMALWAR CHETTY v. KRISHNASWAMI CHETTY. 16 L. W. 743.

— Ss—58 and 100—*Lease—Security of property for rent—Mortgage or charge—Distinction*

Where a lease deed in addition to making the lessee personally liable for rent made certain property the security for the same and restrained the lessee from alienating such property so long as the rent remained unpaid. *Held*, the transaction did not amount to a mortgage.

The broad distinction between a mortgage and a charge is that whereas the latter only gives a right to payment out of a particular fund or property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immovable property. The line of distinction is clear in England, but is not so well marked in India. (*Das and Adams, JJ.*) SHIVA PRASAD SINGH v. BENI MADHAB CHOWDHURY. 1 Pat. 387.

— S. 58—*Mortgage—Delivery of possession of land as security for money—Absence of writing or registration—Rights of parties.*

Where a person delivers possession of land to secure the payment of a debt but there is no writing or registration in evidence on the transaction, it is not a mortgage. In a suit the proper decree to be passed would be one for recovery of possession on repayment of the debt. (*Pratt, J.*) MAUNG AUNG v. MAUNG SHWE LIN. 1 Bur. L. J. 203.

— S. 58 and 105—*Mortgage or lease—Zuripeshgi—Redemption—Existence of debt.*

The test to find out whether a Zuripeshgi is a mortgage or lease is to find out whether there is a secured debt and a right of redemption. In a Zuripeshgi lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may thereupon re-enter. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term, where however the interest created in the lessee continues after the expiration of the term until the advance which is essentially a loan and not an advance of rent is paid, the transaction has the essential characteristics of a mortgage. (*Miller*)

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*C. J. and Mulla, J.*) MAHARAJAH KESHO PRASAD SINGH v. CHANDRIKA PRASAD SINGH.

3 Pat. L. T. 797 : 68 I. C. 394 (2)

—Ss. 58 and 59—*Mortgage—Registration—Effect of—Non payment of consideration—Execution of sale deed—Priority.*

In the absence of a provision in a mortgage that it is not to become effective until payment of the consideration money the mortgage becomes operative from the date of its execution. Consequently, where after the execution and registration of a mortgage the mortgagor executes a sale deed of the property the vendee does not get priority over the mortgagee even though the consideration for the mortgage was paid after the execution of the sale. (*Das and Adam JJ.*) RAGHUNATH BHAGAT v. AMIR BAKHSI.

1 Pat. 281 : 3 Pat. L. T. 307. (1922) P 299 : 65 I. C. 329.

—S. 58 — *Mortgage — Test of Interest—Provision for.*

A very important test to apply, wherever the question is raised whether a transaction amounts to a mortgage or not, is to see whether any interest is to run upon the sum of money that may be due by one party to another in consideration of which the transaction is entered into. If no interest is payable by the debtor to the creditor and if document expressly states that the transaction is entered into for the purpose of paying off the sum due by the debtor to the creditor it is difficult to understand how the transaction can be regarded as a mortgage. (*Das and Adam JJ.*) KRISHNA KISHORE ADHIKARY v. THE KUSUNDA NYADI COLLIERIES LTD.

(1922) P. 36 65 I. C. 673.

—S. 58 (a)—*Mortgage—Implied covenant—Terms of the mortgage.*

There is an implied personal covenant to pay in the case of most mortgages, except where there is a right of sale under the mortgage itself 44 C. 388 Ref. (*Halliday and Dholey, A J. C.*) JIWANDAS v. JANKI.

5 N. L. J. 49 : 65 I. C. 53 : 18 N. L. R. 145 : (1922) Nag. 98

—Ss. 58 (a) and (b)—*Mortgage—Simple mortgage—Provision for entering into possession on default of payment of interest—Effect of.*

Under a simple mortgage, the mortgage money including interest was to be paid in two instalments failing the payment of any one instalment the mortgagee was entitled to take possession of the property and pay himself the principal and interest out of the usufruct. The mortgagee did take possession under that clause. Held that the relationship between the parties continued to be that of a mortgagor and mortgagee under a simple mortgage. The mortgagor did not lose his right of redemption by the fact that the mortgagee was given an additional security for his money by taking possession of the land 21 M. L. J. 1147 (P. C.) Rel. (*Batten, J. C.*) PUNA v. LAXMAN PRASAD.

65 I. C. 654.

—S. 58 (a) and (b) — *Usufructuary mortgage—Right of sale.*

Where a due date has been fixed for payment of the mortgage money, the mortgage is not a

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pure usufructuary mortgage and the mortgagee is entitled to sell immediately after the due date has passed even though he still remained in possession of the property.

6 C. L. J. 143 ; 34 Bom 462 foll. (*Coutts and Ross, JJ.*) JAG SAHU v. MUST RAM SAKHI KUER :

1 Pat. 350 : (1922) Pat. 58 3 Pat. L. T. 332 : (1922) P. 167 : 65 I. C. 668.

—S. 58 (c)—*Mortgage by conditional sale—Sale in lieu of prior debt—Condition for reconveyance.*

Where in lieu of a portion of the amount due under a mortgage the mortgagor (cosharer) purported to transfer his share in the village out and out in favour of the mortgagee and the deed also contained a covenant for reconveyance of the property by the vendee in case the money was repaid. Held, that the transaction was one of mortgage by conditional sale (*Kanhaya Lal and Sulaiman, JJ.*) MOHINDRA MAN SINGH v. MAHARAJ SINGH.

20 A. L. J. 810. L. R. 3 A. 600.

—S. 58 (c) — *Mortgage by conditional sale—Sale with intention to reconvey—Distinction—Surrounding circumstances.*

The question whether a transaction is a mortgage by conditional sale or sale with an agreement to reconvey must be determined with reference to the intention of the parties as gathered from the document and surrounding circumstances 12 A. 387, 38 A. 570 ; 22 A. 149 Rel. One of the tests is to see whether the relation of debtor and creditor subsists between the parties. (*N. R. Chatterjee and Panlon, JJ.*) CHANDI CHARAN CHOWDHURY v. NABIN CHANDRA DE.

67 I. C. 113.

—S. 59—*Attestation—Meaning of—Invalid mortgage—Personal decree*

To satisfy the requirements of S. 59 of the T. P. Act the witnesses must sign their names after seeing the actual execution of the deed. Merely witnessing the execution is not sufficient compliance with law. 35 M. 607 P. C. Ref.

A mortgage deed which is not enforceable as such by reason of non-registration or want of attestation is admissible in evidence to prove a personal covenant to pay on the strength of which a simple money decree can be passed 16 C. 540 10 C. 740 ; 22 C. 434 ; 4 C. L. J. 510 dist. (*Robinson C. I. and Duckworth, J.*) QUAH CHENG GWAN v. MAUNG PO MYI.

66 I. C. 589.

—S. 59—*Attestation—Proof of—Admission of execution if dispenses with proof of proper attestation. See EVIDENCE ACT Ss. 70 AND 69.*

24 Bom L. R. 1296.

—S. 59 — *Attestation — Proof of—Admission of execution—Effect of. See (1921) DIG COL. 1052. MUSSAMMAT HIRA BIBI v. RAMDHAN LAL.*

(1922) Pat. 42 : 4 U. P. L. R. (Pat.) 3 : (1922) P. 70

—S. 59—*Attestation—Scribe—If can be an attester—Meaning of attestation. See (1921) DIG. COL. 1053 SRISTIDHAR GHOSH v. RAKHYA-KALI DAS.*

26 C. W. N. 264 : (1922) Cal. 168.

—S. 59—*Attestation—Scribe signing as witness,*

T. P. ACT (1882), S. 59.

Where a mortgage is signed by the writer as well as the mortgagee without indicating that they signed as attestors, the mortgage is not validly attested 35 A 254; 4 Pat L. J. 511 Ref (Sanders, J. C.) MAUNG PO. THAUNG v P. L. N. R. M. MUTHIA CHETTY. (1921) 4 U. B. R. 78: 65 I. C. 64.

—S. 59—Deposit of title deeds—Loan—contract in writing—Registration necessity for

Defendant borrowed money from plaintiff in Bombay and deposited the title deeds of his house the transaction was recorded in a writing which ran as follows: "We have taken Rs. 1,000 from you. In security of that we have given our house in godhra.....in mortgage for the above amount. And we have also given to the copy of the record we shall execute a *pacca* document in respect of the same whenever you may ask us. Its interest is settled at eight annas. It is agreed that you should return to us the copy of the record on paying the above amount." The above writing was not registered nor was the *pacca* document demanded or taken. In a suit to recover the advance by sale of the mortgaged property, the defendant admitted the advance.

Held, that the writing in question contained everything that was necessary for the purpose of proving an agreement creating a mortgage and that it required registration. Being unregistered it was inadmissible in evidence and plaintiff could not have a decree for the money by sale of the property sought to be mortgaged. The defendant having admitted the advance plaintiff was entitled to a decree personally against him.

In the absence of a document accompanying the title deed, it would have been open to the plaintiff to prove orally what was the intention with which the document was deposited and whether it was meant to be considered as a security. But as the defendant executed a document in writing the court must refer to it in order to ascertain what the contract was. The fact that the defendant agreed to execute another document in formal terms, if he was asked for one, does not affect the value of the document signed, provided it is evidence of a complete transaction which can be spelt out of its wording. The whole point is whether the document created a charge upon the property referred to therein, and once there is a writing with reference to the deposit of title deeds, then it is quite clear that the Court must refer to that writing, and can only refer to it, in order to determine what were the conditions, on which the title deeds were deposited. (Macleod, C. J. and Coyajee, J.) CHUNILAL SOMESHWAR BHATT v. VITHALDAS KARSANDAS. 24 Bom. L. R. 502: (1922) Bom. 440: 68 I. C. 1005.

—S. 59—Mortgage—Attestation—Essential requisites of—Attestor signing before executant—Invalidity.

Attestation of a mortgage deed within the meaning of S. 59 of the Transfer of Property Act must be made by the witnesses signing their names after seeing the actual execution of the deed. Mere acknowledgement of his signature is not sufficient to show valid attestation. An attestation is an act done after execution and until the deed has been executed there can be no

T. P. ACT (1882), S. 59

attestation. 35 M 607: 6 N. L. R. 152 Ref. (Prideaux, A. J. C.) MT GODAWARIBAI v. SAMPAT, 68 I. C. 198.

—S. 59—Mortgage—Attestation—Validity Invalid attestation—Bond—Enforceability.

A mortgage deed is not validly attested unless the attestors had actually seen the executant sign the document. Where a mortgage is invalid for want of proper attestation it can be enforced as a bond against those who are personally liable under it (Spencer and Devadoss, JJ.) KURU KONDI SAMA RAO v FIRM OF MARWADI VANNAPI VAIJJI, 43 M. L. J. 745. (1922) M. W. N. 708.

—S. 59—Mortgage—Deposit of title deeds—Necessity for registration.

A memorandum merely evidencing a deposit of title deeds by way of equitable mortgage does not require registration. In any event the mortgage can be proved by other evidence. 4 L. W. 472; 16 L. W. 615 P. C. Ref. 24 Bom. L. R. 502 diss (Spencer and Devadoss, JJ.) VADAMALAI PILLAI v. SUBRAMANIA CHETTIAR. 16 L. W. 936.

—S. 59—Equitable mortgage—Deposit of title deeds—Letter accompanying deposit—Necessity for registration—Punjab.

Defendants who were indebted to plaintiff bank executed a pro-note for a sum of Rs. 8,000 and at the same time as security handed over a number of title deeds. They also gave a letter to the plaintiff which opened with the following words—

"We under this writing, deposit with you as security 12 deeds relating to property of the value of Rs. 8,587 mentioned in the list in lieu of a pro-note for Rs. 8,000 in respect of which a separate pro-note has been executed to-day."

On a question whether the existence of the mortgage could not be proved unless the letter was registered.

Held, that the letter did not require registration inasmuch as the equitable mortgage was complete without the letter, the letter was not a writing which had been made as the evidence of the contract, but only a writing which was evidence of the fact from which the contract was to be inferred. 11 B. L. R. 405, foll.

13 C. 322; 33 C. 410; 7 B. L. R. 55 and 23 I. C. 129, dist.

An equitable mortgage can be created by deposit of title-deeds and is recognised and enforceable by law in the Punjab 53 P. W. R. 1907; 31 P. R. 1916, foll.

The plaintiff is entitled to proceed against properties mortgaged to the defendant by third parties without impleading the original mortgagors. 29 A. 385 F. B., foll.

27 A. 511, diss. (Leslie-Jones and Broadway, JJ.) THE FIRM OF RAM MOHAN LAL v. THE BHARAT NATIONAL BANK, LTD. 3 Lah. L. J. 373.

—S. 59—Mortgage bond—No proof of attestation—Personal decree.

A mortgage bond properly attested, but not proved in conformity with S. 68 of the Evidence is not receivable in evidence to prove the personal obligation thereby created, 3 M. 337: 35 M. 607

## T. P. ACT (1882), S. 59.

Rel. 26 C. 78 dist. (Suhrawardy and Cuming, JJ.)  
 SUDHAYA KUMAR SINGH v. GOUR CHANDRAPAL.  
 35 C. L. J. 473 : (1922) Cal. 160 :  
 27 C. W. N. 134 : 68 I. C. 86

—S. 59—Mortgage for less than 100 Rs. Delivery of possession—Terms of mortgage—Un-registered instrument—Secondary.

Delivery of possession of the property mortgaged would effectively create a mortgage for less than 100 Rs. Where there is a document un-registered evidencing the mortgage, its terms can only be proved by the document or by secondary evidence of its contents in case the original is not forthcoming. (Saunders J. C.) MAUNG PO DIN v. MAUNG PO NYEIN. 66 I. C. 360.

—S. 59—Mortgage—Due execution—Attestation—What constitutes

Formalities imposed by law against perjury and fraud must be strictly observed. A mortgage is not duly executed and cannot operate as a mortgage or create a charge unless it was in fact signed by the mortgagor in the presence at least of the attesting witnesses. 35 M. 607, 27 C. L. J. 548 Ref. (Richardson and Suhiawardy JJ.) ARJUN CHANDRA BHADRA v. KAILAS CHANDRA DAS. 36 C. L. J. 373.

—S. 59—Mortgage—Registration—Rights of parties before registration—Attachment of debt in the hands of mortgagee.

Until the mortgage deed has been duly registered the mortgagee is not under any obligation to advance any mortgage money to the mortgagor consequently it is not open to a creditor of the mortgagor to attach the mortgage money in the hands of the mortgagee until registration of the mortgage. (Lindsay and Gokul Prasad, JJ.) TULSHI RAM v. HARAKH NARAIN BHAGAT. L. R. 3 A. 430 : (1922) A. 384.

—S. 59—Mortgage—Unregistered—Enforceability as a bond.

Where owing to non-registration a mortgage is not enforceable as a mortgage, it is open to the creditor to obtain a simple money decree on the covenant to repay. 9 M. 441 ; 12 O. C. 275 ; 20 O. C. 155 Ref. (Kanhaya Lal, J. C.) RAM AUTAR v. RAM ASRE. 66 I. C. 680.

—S. 59—Possession given under a bond—Non-registration of the bond.

Where the plaintiff was put in possession of a plot of land under a bond containing a separate stipulation for interest in case the defendants failed to get the document registered. Held : that as the principal, money secured was less than Rs. 100 a valid mortgage was created under S. 59 of the Transfer of Property Act and no registration was necessary. (Lyle, A. J. C.) JHAM SINGH v. GAURI SHUNDAR. (1922) Oudh 123.

—S. 60—Clog on redemption—Permanent lease by mortgagor to mortgagee—Lease and mortgage forming part of the same transaction

Where a mortgage and a permanent lease by the mortgagor to the mortgagee form part of the same transaction the lease is a clog on the equity of redemption and the court would not

## T. P. ACT (1882), S. 60.

recognise or enforce it 46 B. 409 foll. (Prideaux A. J. C.) VITHAL v. SHEIKH BHOLU 68 I. C. 237.

—Ss. 60 and 61—Mortgage—Deed of further charge—Redemption—Consolidation.

Where a deed of further charge expressly stipulates that the mortgagor would not be entitled to redeem the earlier mortgage without paying the money due under the further charge there is a covenant for consolidation and the earlier mortgage cannot be redeemed without payment of the money due under the later. 17 O. C. 301 dist. (Kanhaya Lal, J. C.) NAUNIDH LAL v. MAHADEO SINGH. 25 O. C. 134 : (1922) Oudh 58 : 65 I. C. 401.

—Ss. 60 and 82—Mortgage—Purchase by mortgagee of portion of the equity of redemption—Right of mortgagee how far affected.

A mortgagee who bought a part of the mortgaged property at a low price, because it was sold under the burden of his debt, must be considered to have paid to himself towards satisfaction of the mortgage the difference between the full price of what he bought and the price he paid for it.

There is no reason why only so much should be considered as having been paid as bears the same proportion to the whole debt as the value of the property bought bears to the whole property. 24 W. R. 83 foll. (Halliday, A. J. C.) ADKU v. RAJARAM. 64 I. C. 453.

—S. 60—Mortgage—Redemption—Clog—Long term for redemption—Effect of.

A covenant postponing redemption for a long term need not necessarily of itself amount to a clog on the equity of redemption but the effect of all the conditions in the deed must be considered as a whole and if those conditions would result in making redemption very difficult, if not impossible, at the end of the term the court may ignore the covenant postponing redemption and may allow redemption at any time on such terms as it thinks fit. 17 O. C. 313, 12 A. L. J. 927 Rel. (Daniels and Lyle, A. J. C.) KUNJ BEHARI LAL v. PANDIT PRAG NARAYAN. 9 O. L. J. 294 : (1922) Oudh 283 : 68 I. C. 529.

—S. 60—Mortgage—Redemption—Clog on—What constitutes—Long term by itself not unenforceable—Usufructuary mortgage.

A long term in a mortgage does not necessarily amount to a clog on the equity of redemption. It only does so where it is such as to render redemption practically impossible or where the bargain is unconscionable and the long term is unaccompanied by any corresponding advantage to the mortgagor. It is obvious that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest mounting up to an extent which may far exceed the value of the property. (Daniels A. J. C.) SAHYID ZULFIQAR ALI v. SURAJ PRASAD. 9 O. L. J. 365 : (1922) Oudh 221 : 68 I. C. 998.

—S. 60—Mortgage—Redemption—Expiry of period fixed—Contract to the contrary.



## T. P. ACT (1882), S. 60.

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiry of the specified period, though there is nothing to prevent the parties from making a special condition. 36 A 195 (P. C.); 39 C 828 (foli); 16 C P. L. R. 59 not foll. Unless there is an agreement to the contrary, the right of foreclosure and the right of redemption must be regarded as co-existent, (*Halifax, A. J. C.*) BALA v GHASIA.

64 I. C. 730.

## —S. 60—Mortgage—Redemption—Long term

Where the vendees from the mortgagors bring a suit for redemption before the expiry of the term of 60 years, they cannot raise the plea that the term of 60 years was excessive having regard to the value of the property and the necessities of family. (*Ryres and Stuart, JJ.*) RAM SAMUJH v. SHEORAJ TEWARI

20 A. L. J. 607

## —S. 60—Mortgage—Redemption—Mortgage money advanced by several mortgagors in specific shares,

Where mortgagors advanced money in specific shares on the security of specific portions of the mortgaged property but there was a provision that the money should be paid in a lump sum on redemption, *Held* that the mortgage could be redeemed in a single suit, (*Rafiq and Lindsay, JJ.*) LACHMI PRASAD v. GOKUL.

L. R. 3 A. 109 : 20 A. L. J. 157 :

(1922) A. 80 : 66 I. C. 206.

## —Ss. 60 and 62—Redemption—Period fixed for—Redemption before that date.

The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, the right to redeem and the right to foreclose are co-extensive and this principle is embodied in Ss. 60 and 62 of T. P. Act but there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the period specified for the redemption and take back the property. Such a provision is usually for the advantage of the mortgagor. There is nothing illegal or unusual for a debtor to come to an agreement with the creditor that he will have the right to repay the money before a certain date, although the mortgagee would not be entitled to foreclose him before that date 5 Bom. 22 ; 8 All. 95, 29 All. 471, 36 All. 195 ref. (*Chatterjee and Newbould, JJ.*) JAMIR HOWLADAR v. ARABJANBI.

65 I. C. 273.

## —Ss. 60 and 61—Mortgage—Redemption—Right of—Deed of further charge See (1921) DIGEST COL. 1054 ABHAI NARAIN TIWARI v. MATA PRASAD SINGH.

64 I. C. 83.

## —Ss. 60, 98—Right of redemption put off under certain circumstances—Effect of clause—Rule of construction.

Where, under the terms of a mortgage if the amount was not paid at a certain time, the right of the mortgagor to redeem would be suspended for a further fixed period.

*Held*, the provision offends against the statutory right of redemption conferred by S. 60 and hence

## T. P. ACT (1882) S. 60.

is of no effect. The provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them (*Sir Lawrence Jenkins*) MUHAMMAD SHER KHAN v. RAJA SETH SWAMI DAYAL.

44 A. 185 : 20 A. L. J. 476 :

90 L. J. 81 : 30 M. L. T. 220.

49 I. A. 60 : 42 M. L. J. 584 : 25 O. C. 8 :

24 Bom. L. R. 695 (P. C.) 35 C. L. J. 468 :

4 U. P. L. R. (P. C.) 50 : L. R. 3 (P. C.) 119 :

(1922) M. W. N. 378 : 68 I. C. 853 :

(1922) P. C. 17.

## —S. 60—Mortgage—Redemption—Sub-mortgage by mortgagee—Mortgagor when entitled to redeem sub-mortgage.

A mortgagee is fully entitled in law to effect an assignment of his mortgage rights either in whole or in part, and if he does so in part, this does not mean that he is destroying the indivisibility and integrity of the mortgage security *qua* the mortgage 91 P. R. 1905 Dist. A mortgagor is not entitled to redeem a sub-mortgagee without effecting a complete redemption of the entire mortgaged property. (*Moti Sagar and Abdul Raof, JJ.*) ANAND SINGH v. NIAMAT.

64 I. C. 211. (L.)

## —S. 60—Mortgage—Right of mortgagee to enforce security against every portion of the mortgaged property: See (1921) DIG. COL. 1056 SOTI SURAJ MAL v. THAN SINGH

(1922) A. 352 : 44 A. 146 : L. R. 3 A. 20 :

64 I. C. 451.

## —S. 60—Mortgage—Splitting up—Mortgage—Partial failure of consideration—Splitting up—Omission to include item in redemption suit.

On 12-2-1903 Bapat mortgaged his Kelghar property to Ganesh Joshi and his brother (plaintiffs) for Rs. 2,000, which consideration included a mortgage charge of Rs. 1,200 under a prior mortgage created by Bapat. In April 1900, the plaintiffs mortgaged their own properties together with their mortgagee interest in the Kelghar property for Rs. 4,000 to Narayan Paranjpe. The consideration here also included the mortgage claim of Rs. 1,186-1-6 under the mortgage of 1890. This mortgage was renewed on 28-5-1906.

In the meanwhile one Rodes who had obtained a money decree against Bapat in 1899 applied in 1901 to execute his money decree against Bapat and attached the Kelghar property. The plaintiffs intervened and put forward the mortgage of 1900. On 15-11-1902 the court ordered that the property should be sold subject to the mortgage lien of the plaintiffs and the property was accordingly sold and purchased by Rodes. Rodes sued in 1904 and obtained a declaration that the mortgage of February 1900 was fraudulent and not binding on him subject to a lien for Rs. 1,186-1-6 on the Kelghar property. In 1909 Rodes filed another suit against plff. and Narhar Paranjpe to recover possession of the property and the suit was decreed. The Kelghar property however remained in possession of the plaintiffs all along.

In 1917 the plaintiffs sued to redeem the mortgage of 1906 excluding the Kelghar property. *Held* that the omission to include the Kelghar

T. P. ACT, (1882) S. 60

property was no transgression of the rule against partial redemption enunciated in S. 60 of the T. P. Act (*Shah, A. J. C. and Crump, I*) GANESH MORESHWAR JOSHI v. VASUDEO VITHAL PARANJPE  
24 Bom. L. R. 911 : (1922) Bom. 424 :  
68 I. C. 741.

—S. 60—Mortgage—Splitting up—Right of redemption—Partial redemption.

Ordinarily a mortgagee is entitled to claim that his security should not be split up, but if he becomes by his own act the purchaser of a portion of the mortgage security, he has no longer any right to claim that the security should not be split up and mortgagor's or assignees from mortgagor's become liable for only so much of the mortgage debt as is proportionate to the portion of the mortgage security that they have purchased (*Robinson C. J. and Macgregor, J.*) KO THINE v. ISMAIL CASSIM MORAD.  
1 Bur. L. J. 117 :  
68 I. C. 887.

—Ss. 60 and 82—Mortgage—Splitting up—Safeguarding of rights of parties—Procedure

Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of the mortgagors have vested partly in a prior mortgagee and partly on a subsequent mortgagee after a suit had been brought by each of them to enforce his own mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired. Each can redeem to the extent of the shares of his mortgagors acquired by him, on payment of such proportionate amount as may be found due on that mortgage, including the cost of any repairs, that may have been carried out by the mortgagee, and free from any liability for such improvements as the mortgagee may have made, which were not needed for the protection or preservation of the mortgaged property 18 A. L. J. 396 ; 48 C. 22 ; 20 A. L. J. 404 ; 28 A. 155 ; 25 A. 446, 4 A. L. J. 74 Rel. (*Stuart and Kanhaiya Lal JJ.*) AMBA PRASAD v. WAHIDULLAH

20 A. L. J. 583. L. R. 3 A. 565.  
(1922) A. 405. 4 U. P. L. R. (A.) 178 :  
68 I. C. 260.

—S. 60—Mortgage—Tacking—Simple and usufructuary mortgage on the same day—Option to sue for interest at the end of each year—Redemption

Where a simple mortgage and a usufructuary mortgage were executed on the same day, over the same property and in favour of the same person, with a condition that the money under the simple mortgage was to be paid along with that due under the usufructuary mortgage and that the mortgagee might sue for the deficiency in interest, if any, in a particular year. *Held*, that there was a clear case of tacking and the usufructuary mortgage could not be redeemed without payment of the simple mortgage and the fact that the mortgagee was given an option of realising the deficiency in interest by a suit against the mortgagor personally, did not make the interest

T. P. ACT, (1882) S. 63.

cease to be part of the mortgage money and recoverable as such before redemption. (*Ryves and Gokul Prasad, JJ.*) ULFAT RAI v. KANHAIYA LAL.  
(1922) A. 41 : 20 A. L. J. 86 : L. R. 3 A. 125 :  
65 I. C. 819.

—S. 60—Partial redemption—When allowed. See MORTGAGE—REDEMPTION.

35 C. L. J. 332

—S. 60—Partial redemption splitting up of mortgage—Acquisition by mortgagee

Where the mortgagee has acquired a portion of the equity of redemption and thereby split up the integrity of the mortgage, it is open to the mortgagor to redeem as much of the property as did not belong to the mortgagee on payment of a proportionate part of the mortgage debt. (*Paggett and Walsh, JJ.*) SHIAM SARAN v. BANARSI DAS.  
20 A. L. J. 258 :  
4 U. P. L. R. (A.) 102. (1922) A. 192 : 66 I. C. 866.

—S. 60—Suit by mortgagee for his share of the mortgage money—Decree—Form of—Merger—Acquisition of interest.

In order to effect a merger, the two rights must be co-extensive in same share however small, though one be higher than the other. Ordinarily the acquisition of a share in the equity of redemption by one only of several mortgagees does not necessarily break up the integrity of the mortgage so as to entitle a mortgagor, interested in only a fractional part of the property, to redeem his share on payment on a proportionate amount. *Held* that the plaintiffs co-mortgagees by suing for their share of the mortgage money must be deemed to have admitted that the balance of the mortgage money had been satisfied by the acquisition of a proportionate share of the mortgaged property and that the pliffs should be given a decree for their share of the mortgage money as against a proportionate share of the mortgaged property. (*Stuart and Sulaiman, JJ.*) MOHAN LAL v. PARSHADI LAL.  
L. R. 3 A. 472.

—S. 61—Consolidation.

Where by each of two mortgages a separate property was mortgaged with possession and the second mortgage contained this clause "and when the whole of the mortgaged money due under this deed together with the amount due under the previous deed shall be paid then the mortgage shall be redeemable and the deed shall be taken back." *Held*, the mortgagee was entitled to consolidate the two mortgages by the "contract to the contrary". (*Stuart J.*) JADU RAI v. RAM BIRICH RAI  
(1922) All. 403. (1),

—S. 63—Mortgage—Accretions—Mortgage of shares in original capital of a joint stock company—Issue of new shares for increase of capital—Call money on new shares paid out of dividends on old shares—Rights of mortgagor on redemption See (1921) DIG CGL 1058 MOTILAL HIRABAI v. BAI MANI.  
46 Bom. 529

—S. 63—Mortgagor and mortgagee—Agreement by mortgagor to pay sums expended on repairs and improvements by mortgagee. Not compulsorily registrable. See REGN. ACT, Ss. 17 AND 49.  
68 I. C. 382.

T. P. ACT, (1882) S. 67.

—S. 67—Decree for sale—English mortgage.

In view of the provisions of S. 67 of the Act a decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage. (*Mookerjee and Buckland, JJ.*) ASKARAN BAID v. GOBORDHAN KOBRA.

26 C. W. N. 318 : (1922) Cal. 52.

—Ss. 68 and 66—Mortgage—Misdescription—Action in deceit.

In a mortgage deed certain property was misdescribed as belonging to the mortgagor; as it was not security for the mortgage debt because it belonged to a third party, it must be considered as non-existent for the purpose of mortgage and the only remedy the mortgagee would have against the mortgagor, for having inserted in the details of the mortgaged property which did not belong to him, would be an action in deceit. Misdescription of property forming security is not "insufficient" as defined in S. 66 which deals with waste by the mortgagor in possession and accordingly has nothing whatever to do with regard to the land which the plaintiff thought he got in mortgage. (*MacLeod, C. J. and Kanga, J.*) RAGUNATH SADASHIV THAKUR v. DADAJI SHAMRAO THARUR.

(1922) Bom 217

—S. 68—Usufructuary mortgage—Dispossession from a portion of the mortgaged property—Acquiescence—Right to claim interest.

Where a usufructuary mortgagee who is dispossessed by a portion of the mortgaged property keeps quiet without claiming compensation or possession, he is not entitled to claim interest in a subsequent suit for redemption. (*Lindsay, J.C.*) MAHADEO TEWARI v. SITLA BAKSH SINGH.

(1922) Oudh 102 : 65 I. C. 408.

—S. 68—Usufructuary Mortgage—Occupancy holding—Mortgage void—Suit to enforce personal covenant.

Where a usufructuary mortgage is void as effecting a transfer of an occupancy holding, the personal covenant in the mortgage is also void and unenforceable. 16 I. C. 42; 22 A. 205; 18 A. 121 Ref. (*Lindsay and Stuart, JJ.*) HAR PRASAD TEWARI v. SHEO GOBIND TEWARI.

44 A. 486 : 20 A. L. J. 318 : (1922) A. 134 : 67 I. C. 792.

—S. 68 (b)—Mortgage by widow—Death of widow before expiry of term—Rights of mortgagee.

Where a Hindu widow mortgages her husband's estate and dies before the expiry of the term whereupon possession is taken by the reversioners of her husband, it is open to the mortgagee to obtain a decree against the assets of the widow in the hands of the reversioners (*Dalal, A. J. C.*) CHHANNU LAL v. MT. RAJ KUAR.

9 O. L. J. 24 : (1922) Oudh 48 : 67 I. C. 16.

—S. 69—Mortgage—Default in payment of interest—Power to sell mortgaged property—Practice. See (1921) DIG. COL. 1061. JERUP TEJA & CO. v. PEERBHAY ADAMI PEERBHAY.

64 I. C. 634.

T. P. ACT, (1882) S. 74.

—S. 72—Mortgagee—Expenses of repair—Interest on moneys spent. See (1921) DIG. COL. 1062 TOHLUMAL v. BUTA. 67 I. C. 132.

—S. 72—Mortgage—Improvements on mortgaged property—Redemption. See (1921) DIG. COL. 1062 DNYANU LAXMAN v. FAKIRA EBRAM LOHAR. 64 I. C. 16.

—S. 74—Decree on prior mortgage—Payment by puisne mortgagee—Right to interest.

Where a puisne mortgagee pays off the money due on a prior mortgage decree, he gets the rights of the prior mortgagee including the right to get the interest. The puisne mortgagee is not debarred by the rule of *damdapat* from getting interest at the rates prescribed by the mortgage decree. (*Kotval, A. J. C.*) NARAYAN v. NATHMAL.

17 N. L. E. 200 : 65 I. C. 275 : (1922) Nag. 155.

—S. 74—Mortgage—Prior and subsequent—Payment of prior mortgage by puisne mortgagee—Suit by puisne mortgagee to enforce mortgage—Limitation. See LIM. ACT, ART. 132. 3 Pat. L. T. 539.

—Ss. 74 and 95—Mortgage—Prior and subsequent—Puisne mortgagee paying of prior mortgagee's decree—Right to a charge—Limitation—Lim. Act Arts. 61 and 132. See (1921) DIG. COL. 104 SHIB LAL v. MUNOI LAL.

44 A. 67 : (1922) A. 153.

—S. 74—Mortgage—Subrogation—Prior mortgage discharged by subsequent mortgage—Partial discharge.

In order to sustain a claim for priority under S. 74 of the T. P. Act there must be a complete discharge of the prior mortgage and a partial discharge of the prior mortgage by the puisne mortgagee does not entitle him to subrogation. 35 M. 183 foll; 38 A. 502 Dist. 41 M. L. J. 399; 36 C. 193; 48 I. C. 779 Ref. (*Spencer and Odgers, JJ.*) BRAHMANANDAM VENKATA LAXMINARAYANA RAO v. ALLAMNENT VENKAYYA.

43 M. L. J. 284 : 31 M. L. T. 170 (H. C.) : 16 L. W. 216 : (1922) Mad. 441.

—S. 74—Subrogation—Right when can be claimed.

The right of subrogation can be claimed only by a person who, though not primarily liable to discharge a debt, discharges it for his own protection or at the request of the party ultimately bound, and that right cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgage debt without having any interest to protect. A purchaser of the mortgaged premises, not under a covenant to pay, who pays off incumbrances on the property, is also entitled to the benefit of the securities though the purchase may be afterwards set aside (*Coults and Das, JJ.*) SIBANAND v. BABU JAGMOHAN LAL.

(1922) P. 499 : (1922) Pat. 331.

—S. 74—Subrogation—Scope—Two mortgages in favour of the same person.

The plaintiff held two mortgages in respect of the same property. The defendant a subsequent mortgagee of the same property satisfied the first

## T. P. ACT (1882), S. 76.

mortgage in favour of the plaintiff. The plaintiff then brought a suit for sale of the mortgage property wherein the defendant claimed priority to the extent of the mortgage he had satisfied. *Held*, the Transfer of Property Act does not purport to consolidate the law relating to mortgages in India but only defines and amends certain parts of the law. On principle there is difference between the case where a purchaser pays off a prior mortgage in favour of a third person and the case where he pays off a prior mortgage against the same creditor against whom he claims the right of subrogation. (*Ryves and Gokul Prasad, JJ.*) MOHAN LAL v. HEMRAJ L. B. 3 A. 145.

4 U. P. L. R. (A) 78. (1922) All 59 : 66 I. C. 618.

## —S. 76 (c)—Government revenue—Payment provided for on redemption—Charge.

Where the mortgage deed provided that if revenue should be assessed in future, the mortgagor would pay it and would not be entitled to redeem without paying it, *held*, the intention of the parties was to make it a charge.

Under S 76 (c) the mortgagee in possession is primarily responsible for payment of the revenue, (*Daniels and Lyle J. C.*) MUHAMMED HADI v. PARBATI, 25 O. C. 2. (1922) Oudh 91 : 9 O. L. J. 312 : 68 I. C. 549

## —S. 79—Mortgage—Fresh advance—undertaking by mortgagor to pay—Rights and liabilities of purchaser.

An undertaking by a mortgagor who takes a fresh advance that he will not redeem the mortgage until he has repaid the advance is legal and enforceable against himself, but it is not a charge on the land and it is not enforceable against a purchaser of the land. 17 O. C. 203 : 9 B. 233 : 9 B. 236 Ref. (*Simpson, A. J. C.*) GAYA PRASAD v. RACHPAL, 9 O. L. J. 484 : 4 U. P. L. R. (O. C.) 110

## —S. 79—Partition deed—Provision for discharge of debts according to allotment—Provision for charge on default—Effect of. See (1921) DIG COL. 1065 SETHA AYYAR v. SRINIVASA AYYAR, 30 M. L. T. 43.

## —S. 82—Contribution—Auction sale of portions of mortgaged property—Rights of purchasers inter se.

An auction purchaser in execution of a decree obtained upon a mortgage purchased the rights of the mortgagor and the mortgagee at the date on which the mortgage was made, any subsequent equities or liabilities which arose in respect of the mortgaged property could not attach to them inasmuch as they acquired the property free from any such liabilities or equities. 23 A. 355 : 19 A. 545 Dist (*Mears, C. J. and Banerjee, J.*) KARAMAT ALI v. THE GORAKHPUR BANK, LTD. 20 A. L. J. 337 : 44 A. 488 : L. R. 3 A. 369 : (1922) All. 495 : 67 I. C. 29

## —S. 83—Deposit of mortgage money—Sufficiency of—Penal provision for interest.

Where a mortgagor deposits the amount due on a mortgage disregarding a penal provision for payment of enhanced interest in the mortgage

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deed, if the court finds that the amount deposited covers the principal and reasonable interest thereon, then the deposit is a valid deposit under S 83 of the T. P. Act. (*Kotwal, A. J. C.*) TARA CHAND DIP CHAND v. NARAYAN, 18 N. L. R. 47 : (1922) Nag 199 : 65 I. C. 174

## —S. 83—Deposit of mortgage money—Suit by prior mortgagee for foreclosure without impleading puisne mortgagee—Final decree for foreclosure—Effect of—Right of prior mortgagee to deposit money due on puisne mortgage See C. P. CODE, O. 34, R. 1. L. R. 3 A. 217.

## —Ss 83 and 84—Deposit by mortgagor—Refusal by mortgagee to accept—Subsequent withdrawal of deposit—Interest if ceases to run.

Where deposit has been made under S. 83 of the Transfer of Property Act of the full amount due under the mortgage and due notice given and the mortgagee appeared in court but definitely refuses to accept the money, and subsequently the mortgagor withdrew it from court.

*Held*, that interest ceased to run from the date of deposit (*Ryves and Gokul Prasad, JJ.*) HUKAM SINGH v. BABU LAL 44 A. 198 : 20 A. L. J. 7 : 64 I. C. 971 : L. R. 3 A. 573 : (1922) All 181.

## —Ss. 83 and 103—Mortgagee a minor Deposit—Notice—Guardian ad-litem not appointed, effect of See (1921) DIG. COL. 1067 SHEO SARAN CHAUDHRI v. RAM LAGAN DAS, 44 All 64 : (1922) A 355 : 64 I. C. 413,

## —S. 83—Notice of deposit—Service of—Duty of court. See (1921) DIG COL. 1067. NIBARAN CHANDRA HALDAR v. PARBATI CHARAN NASKAR, 35 C. L. J. 202

## —S. 83—Tender—Continued readiness to pay—Proof of

It is necessary that a mortgagor should after tender keep the money ready for payment. To establish that the amount tendered had always been kept available for payment involves consideration of evidence and should not be allowed to be raised for the first time in second appeal. (*Coutts and Ross, JJ.*) JAG SAHU v. RAM SAKHI KUER, (1922) Pat. 58 : 3 Pat. L. T. 332 : 1 Pat. 350 : (1922) P. 167 : 65 I. C. 666.

## —S. 83—Tender by deposit in Court—When sufficient.

In a suit for redemption of a mortgage which provided that redemption shall take place in the fallow season but did not mention any specific month, the mortgagor made a deposit in court on 14th May 1919 but the mortgagee was actually served with notice after the crops were sown. *Held* that the deposit must be regarded as sufficient since the mortgagor was not responsible for the delay. (*Kanhayyalal, J. C.*) SANT RAM v. JARBHANDAN, (1922) Oudh 17.

## —Ss 84 and 103—Deposit of mortgage money cessation of interest—Minority of mortgagee—Appointment of guardian ad-litem—Steps to be taken by mortgagor. See (1921) DIG COL. 1068, KANNOO MAL v. INDERPAL SINGH, 44 A. 102 : 64 I. C. 907 : (1922) All. 147.

T. P. ACT (1882), S. 88.

—Ss 88 and 89—Attachment of property—Mortgage pending attachment—Decree for sale on mortgage—Purchase by money decree-holder—Exemption from sale under mortgage decree—rights of mortgagee.

Certain properties were attached in execution of a money decree and during the attachment the judgment-debtor mortgaged the properties. The mortgagee sued to enforce the mortgage and obtained a decree for sale. On the objection of the attaching decree holder the properties attached by him were exempted from sale under the mortgage. The money decree holder purchased the property in execution and obtained possession. In a suit by the mortgagee decree-holder for possession of the properties. *Held* that the order exempting the properties from sale under the mortgage decree had become final and that in the absence of an order absolute, the mortgagee was in the possession of a money decree-holder. Consequently the mortgage decree holder's suit was not maintainable (*Sir John Edge*). *SARJU PRASAD MISSIR v. MAKSUDAN CHOWDHURY*.

(1922) M. W. N. 793 (1922) P. C. 341  
31 M. L. T. 219 (P. C.)

—S. 89—Order absolute for sale—Effect of—Advance to pay off the mortgage.

The effect of the passing of an order absolute under S. 89 of the T. P. Act has the effect of extinguishing both the security and the rights of redemption in the entire mortgage. Consequently an advance of money for the payment of decree cannot revive the mortgage (*Rafiq and Stuart, JJ.*) *JAGANNATH PRASAD v. MT. CHATUR KUR*.  
L. R. 3 A. 619.

—S. 91 (f)—Suit for redemption—Right of attaching creditor. See (1921) DIG. COL. 1071 *HAN SU v. A. T. K. P. L. M. CHETTY*.

64 I. C. 525.

—S. 95—Co-mortgagors—Redemption of mortgage by one—Suit by other mortgagors against redeeming mortgagor—Limitation—Art. 148 applicable. See L.M. ACT ART. 132 AND 148.  
20 A. L. J. 611.

—S. 98—Anomalous mortgage—Mortgage with possession—Mortgage redeemable only after 5 years—Redemption barred after 20 years. See (1921) DIG. COL. 1072 *VADDIPARTHI NARAYANA MURTHY v. CADIMOETTI APPALANARASIMHULU*.  
68 I. C. 717

—Ss. 98 and 60—Anomalous mortgage—Redemption—Suspension of right—Clog on redemption.

The rights and liabilities of the parties to a mortgage transaction must depend on the terms of the instrument as controlled by the T. P. Act. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents of the property in satisfaction of interest, will be valid if it does not also hinder an existing right to redeem. A hindering such right existing in the mortgagor will be invalid and ineffectual. (*Sir Lawrence*

T. P. ACT (1882), S. 101.

*Jenkins*) *MAHOMED SHER KHAN v. RAJA SETH SWAMI DAYAL*. 44 A. 185 : 42 M. L. J. 584 : 30 M. L. T. 220 : 49 I. A. 60 : 90 L. J. 81 : 20 A. L. J. 476 : 25 O. C. 8 : 24 Bom. L. R. 695 : 35 C. L. J. 468 : 4 U. P. L. R. (P. C.) 50 : L. R. 3 P. C. 119 : (1922) M. W. N. 378 : (1922) P. C. 17 : 66 I. C. 853.

—S. 98—Clause suspending right of redemption—Effect—Rule of construction of section. See T. P. ACT, Ss 60 AND 98  
20 A. L. J. 476 (P. C.)

—Ss 100 and 58—Charge—Attestation if necessary—Elements necessary to create charge. See (1921) DIG. COL. 1073, *RAMASWAMI IVENGAR v. KUPPUSWAMI IYER*.  
66 I. C. 554.

—S. 100—Charge—Creation of—Right in future—Distinction.

For a document to create a charge on immoveable property under S. 100 T. P. Act, it must create such charge immediately on its execution, and not one that merely creates a charge that operates at some future time (*Scott-Smith and Harrison, JJ.*) *ABDUL SAMAD v. MUNICIPAL COMMITTEE, DELHI*.  
67 I. C. 939.

—S. 100—Lease—Security of property for rent—If creates a mortgage or charge—Distinction. See T. P. ACT, Ss 58 & 100.  
1 Pat 387.

—S. 101—Keeping alive—First mortgagee's decree—Satisfaction out of advance by stranger—Entitled to priority over puisne mortgagees. See MORTGAGE—SUBROGATION.  
(1922) Pat 174.

—S. 101—Merger—Acquisition of equity of redemption by mortgagee—Effect of—Presumption.

The last clause of S. 101 of the T. P. Act (ie) the words "continuance would be for his benefit" are merely a guide to the intention of the owner, and it seems to be clear that the question of benefit must be decided in view of the circumstances existing at the time of the transaction. Otherwise the nature of the title might be in suspense for an indefinite time. Where there is no mesne incumbrance outstanding at the time of the sale, the conclusion is inevitable that the mortgage has been extinguished, 18 Bom. 86 ; 26 B. 88 Ref. In any case, the terms of the section throw the onus on the owner to prove circumstances from which it can be inferred that it was to his interest to keep the charge alive so that at the time of the transaction that was his intention. (*Pratt and Fawcett, JJ.*) *BAI REVA v. VALIMAHOMED MYAMAHOMED*.  
24 Bom. L. R. 720 : (1922) Bom. 211.

—S. 101—Mortgage—Keeping alive—Payment of mortgage decree—Benefit.

There is a presumption that a person intends to keep alive a security when it is for his benefit to do so. But the Court cannot act upon that when no question was raised on the point in the Court of first instance and the other side had no opportunity of meeting such a case or the presumption.

T. P. ACT (1882), S. 101.

(N. R. Chatterjee and Pearson, JJ.) ALI MAHOMED KHAN v. SHEIKH MAHARAJ BEPARI  
36 C. L. J. 186 : 64 I. C. 266.

—S. 101—Mortgage—Keeping alive—Purchase of equity of redemption by prior mortgagee—Existence of puisne mortgagee.

Where a prior mortgagee purchases the equity of redemption in execution of a money decree against the mortgagor, he is presumed to keep alive his mortgage against puisne mortgagees who will have to redeem him. 10 C. 1035 Rel., 52 A. 138 ; 36 I. C. 756 dist. 32 A. 1 Ref. (Lindsay and Kanhaiya Lal, JJ.) RAM SARUP v. RAM LAL.

20 A. L. J. 596 : L. R. 3 A 525 : 44 A. 659.  
(1922) All. 394.

—Ss 105 and 107—Lease—Registration—Agreement among co sharers for distribution of profits

One of the essential conditions of a lease is that there should be a consideration to be rendered periodically or on special occasions to the lessor. Where there is nothing but an agreement between the co-sharers as to the method of distribution of profits and they agree that instead of dividing the profits each year that each party should take the profits for years in turn, the agreement does not require to be embodied in a registered instrument. (Lyle, A. J. C.) SITA RAM v. SARJU PRASAD. 25 O. C. 39 : 9 O. L. J. 184 : (1922) Oudh 201 : 68 I. C. 333.

—Ss. 106 and 116—Invalid permanent lease by head of religious endowment—Position of lessee.

Where a tenant took a lease for 10 years from the mutwalli of a mosque with a covenant for renewal and it was found that the covenant for renewal was *ultra vires* the trustee, the lessee holding over must be deemed to be holding on a monthly tenancy, 32 C. 123 Rel. (Mookerjee and Cumming, JJ.) GAJENDRA NATH DEY v. MOULVI ASHRAF HOSSAIN. 27 C. W. N. 159 : 36 C. L. J. 48

—S. 106—Notice to quit—Objection of legality of, not to be raised on appeal for the first time.

Where there is an allegation in the plaint as to the service of a due and proper notice to quit which is not denied in the written statement and no issue is raised as to the sufficiency of the notice, the debt must be held to have waited any objection to the adequacy of the notice. The objection cannot be permitted for the first time on appeal. (Robinson C. J. and Macgregor, J.) THE PUNJAB MOTOR COMPANY v. SHEIKH JUMAN.

1 Bur. L. J. 87.

—S. 108—Lease—Joint family—Hindu Law—Coparceners—Contemporaneous sale and mortgage.

The appellant was the lessee under a lease granted to him on the 12th September 1912. The lease in question affected a joint family estate that was held by the lessor and his infant son the first respondent. Contemporaneously with the lease two other documents were executed ; one was a sale of a part of the family property and the other

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a mortgage both in favour of the present appellant. The lease was an unusual document which contrived to secure that the lease should at the same time serve the purpose of a lease and a collateral security for the mortgage debt for, the terms provided, that out of the rent payable by the lessee under its terms, the interest that was due to him upon his mortgage debt should be deducted, the result being that after all the different payments had been made as the lease provided, the gross amount of Rs. 16,765 rent was reduced to Rs. 3,804 per annum. Held : it must be regarded as it was drawn and so regarding it is impossible successfully to contend that the lease is of such a character that it would justify the manager of a joint family estate binding the joint family property by means of its terms. (P. 348 C. 2.) (Lord Buckmaster) NARAIN DAS v. ABINASH CHANDER. L. R. 3 P. C. 129 : (1922) P. C. 347 : 31 M. L. T. 217 (P. C.) : 16 L. W. 780 : (1922) M. W. N. 791 : 4 U. P. L. R. (P. C.) 111.

—Ss. 108 (a) and 111—Forfeiture—Expression of intention to determine the lease—Time for removal of buildings created by the lessee. See 1921) DIG. COL. 1075. THACHARAKAVIL MANAVIKKARAMAN v. NOOR MAHOMED SAIT.  
(1922) Mad. 349 : 66 I. C. 48.

—S. 108 (c)—Covenant for quiet enjoyment—Extent of lessor's liability—Persons claiming under lessor—Meaning of—Interruption by trespasser.

S. 108 cl. (c) of the T. P. Act secures for the lessee the benefit of an unqualified covenant for quiet enjoyment. A qualified covenant for quiet enjoyment protects the lessee against interruption by the lessor, his heirs and assigns, or any other person claiming by or under him, them or any of them, whereas an unqualified covenant protects the lessee against interruption by the lessor, his heirs and assigns or by any other person or persons whomsoever. The covenant, in the unqualified form covers the case of interruption by the superior landlord or other person claiming title paramount, exercising a power of re-entry, or otherwise dispossessing the lessee. But even such a covenant does not include a case of disturbance by persons having no lawful title or right of re-entry ; for against them the lessee has his proper remedy and does not require a covenant nor can he on account of being evicted by such person, be relieved of his liability to pay rent. Like the express covenant the implied covenant protects the lessee against all disturbance by the lessor whether lawful or not, save under a right of re-entry, but, as, against other persons, it protects the lessee only against lawful disturbance. For the purposes of this rule the expression "person claiming under the lessor" means a person claiming under him the right to do the act complained of, so that if a lessor parts with the property or any adjoining property to a third person, and that person is in a position to rightfully claim under his title from the lessor, that he is authorised to do those acts, the lessor will be responsible. (1906) 1 K. B. 155 Rel. If this interpretation were not adopted, the lessor would be responsible for all interruptions by any person claiming title

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through him, whether assignee or under-tenant, however wilful or negligent the interruption. (*Mookerjee and Chotzner JJ.*) *NOWRANG SINGH v. JANARDAN KISHOR LAL SINGH DEO.*

36 C. L. J. 28.

—S. 117—*Agricultural lease—Casualty: no cultivation.*

A lease of lands for growing casuarina trees to be used as fuel is a lease for agricultural purposes within the meaning of S. 117 of the T. P. Act 8 L. W. 485; 38 M. 738 not followed, 24 M. 421; 13 C. L. J. 318 Ref. (*Spencer and Ramesam, JJ.*) *PAVADAI PATHAN v. RAMASWAMI CHETTI* 45 Mad. 710; 43 M. L. J. 191; 31 M. L. T. 76 (H. C.) (1922) M. W. N. 384; (1922) Mad. 351; 16 L. W. 264

—S. 108 cl. (j)—*Transfer of tenancy—Prohibition by statute—Effect of.*

The transfer of a tenancy right which is by contract heritable but not transferable can be validated by the Zemindar's consent. At the same time, the transfer of a tenancy right which has been made unlawful by statute is void from the beginning and cannot be validated by the consent of the Zemindar (*Fremantle, J. M.*) *NAND KISHORE v. BATUK PRASAD SINGH.*

L. R. 3, A. 111 (Rev); 4 U. P. L. R. (B. R.) 69

—Ss. 111 and 114—*Distinction between clauses of forfeiture and nullity—English Law and Indian law.*

English law undoubtedly did recognize a distinction between a condition of forfeiture and a clause of nullity, but whether it does still maintain that distinction is open to some doubt. The distinction has not been recognised in the Transfer of Property Act which is supposed to have given effect to the existing law in the country. (*Das and Adami, JJ.*) *HIRANANDAN OJHA v. RAMDHAR SINGH.* 1 Pat. 363; (1922) P. 528.

—S. 111 (b)—*Merger—Proprietary rights—Tenure holder—Merger, when takes place.*

Apart from statute a tenure does not necessarily merge in the proprietary rights upon the union of the two interests 18 C. W. N. 860, 29 C. L. J. 427 ref. Under S. 111, cl. (d) of the T. P. Act there must be a union of the entire interest of the lessor and the lessee to constitute merger. Where a proprietor purchases the interest of a tenure holder, there would be no merger unless the two interests are co-extensive. (*Chatterjee and Newbould, JJ.*) *MONMOTHA PAUL CHAUDHURY v. MOHENDRA NATH BOSE.* 65 I. C. 469.

(1922) Cal. 284

—S. 114—*Condition of forfeiture and clause of nullity—Distinction between—Relief against—English and Indian law.* See T. P. ACT Ss. 111 AND 114. 1 Pat. 363

—S. 114—*Relief against forfeiture—Section if subject to Calcutta Rent Act, See EJECTMENT.* 49 Cal. 150.

—S. 117—*Agricultural lease—Oral lease.*

The letting out of agricultural land need not be by a document only; it may be by oral agreement or even by conduct of parties, (*Suhrawardy and Cumings, JJ.*) *ALAM MULLA v. SURENDRA KUMAR KARFORIA.* 69 I. C. 57.

T. P. ACT (1882), S. 129.

—Ss. 122 and 123—*Gift—Essentials of—Intention to give—Acceptance—Gift of moveables*

In order that a transaction may operate as a gift there must first be a transfer of the property which in the case of moveable property may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. Under S. 123 of the T. P. Act a gift of moveables may be made by doing anything which has the effect of putting them in the possession of the donee or of any person authorised to hold them on his behalf. (*Das and Adami, JJ.*) *RAMESHWAR NARAIN SINGH v. RIKNATH KOER.* 67 I. C. 451

—S. 123—*Gift—Attestation—Proof of—Waiver of formal proof—Effect of.*

The attestation of a witness on the acknowledgment or admission of the executant of the document without witnessing the actual execution of the document is insufficient to create a valid gift. 35 M. 607; 45 C. 748, 35 C. L. J. 473 Ref. Though proof of the document might be waived, this does not affect the legal character of the document or its invalidity as a gift (*Miller C. J. and Mullick, J.*) *BABU BAIJNATH SINGH v. MT. BRIJRAJKUER.* (1922) P. 514; 68 I. C. 383.

—S. 123—*Gift—Delivery of possession—Hindu Law.*

Under the Hindu law, delivery of possession is not essential to the validity of a gift. 27 A. 169, 25 A. 353 foll. (*Ryves and Gokul Prasad, JJ.*) *DEBI SINGH v. BANSIDHAR.*

(1922) A. 44; 66 I. C. 480.

—S. 123—*Gift—Partition—Distinction—Registration—Necessity for.*

A division of property by a father in his lifetime to his children except in the case of an orasa is not a partition but in reality a gift. Therefore it is invalid in the absence of a registered deed. (*Maung Kin, J.*) *PO. MAUNG v. AUNG DIN.*

1 Bur. L. J. 26.

—S. 123—*Hindu Law—Gift—Delivery of possession—Necessity for.*

A Hindu lady who is the full proprietor of immoveable property can by a registered instrument, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life-time and without retaining any power of alienation over it. Delivery of possession is not essential to the validity of the gift 14 C. 446, 34 C. 853; 24 M. 513; 34 B. 287; 4 A. 40, 16 A. 185. (*Mears, C. J. Piggott, Gokul Prasad, Kanhaiya Lal and Sulaiman, JJ.*) *LALLU SINGH v. GUR NARAIN.*

20 A. L. J. 744; L. R. 3 A. 437; (1922) All. 467; 68 I. C. 798.

—Ss. 129 and 54—*Transfer of property in lieu of dower—Registration.*

Where a party desires to get out of the requirements of S. 54, T. P. Act, on the ground that his personal law treats a sale in lieu of dower as a gift and pleads that under S. 129, T. P. Act, the gift can be effected orally, he must prove by clear

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evidence that the transaction was one which was intended and purported to be effected under that law. Otherwise the Court must take it for what it ostensibly is. (*Kotwal, A. J. C.*) *FAHMIDUN. NISSA v. HIRALAL.* 64 I. C. 126

———**S. 130—Arrears of rent due—Assignment of.**

The transfer of a right to arrears of rent and current dues can only be made by an instrument in writing under S. 130 of the T. P. Act (*Das and Adami, JJ.*) *RAMESHWAR NARAIN SINGH v. RIKNATH KOERI.* 67 I. C. 451.

———**S. 130—Promissory note—Assignment by separate writing—Rights of transferee.**

A promissory note can be transferred by an assignment in writing in places to which the T. P. Act has been extended but of course it would not render the transferee a 'holder in due course' (*Duckworth, J.*) *PALWAN v. KANA.* 66 I. C. 501.

———**S. 137—Railway receipts—Negotiability of—Assignment of, when passes title to goods**  
*See CONTRACT ACT, SS. 102, 108, 178.*

1 Bur. L. J. 90.

**TRUST—Co-trustees—Suit in ejectment—Omission to implead some of the trustees as parties—Effect of.**

The general rule is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiffs they must be added as defendants. Co-trustees are subject to the above rule. 5 C. L. J. 527; 34 M. 406; 8 Cal. 42, 39 Mad. 456; Ref. Where some of several trustees of a temple brought a suit for possession of its endowments without impleading their co-trustees and obtained a decree, the High Court on appeal, instead of dismissing the suit, remanded the case to the lower Court for addition of the other trustees as parties and for trial of the suit, on payment by the plaintiffs of all costs incurred till then. (*Spencer and Ramesam, JJ.*) *THINA SHANMUGA MOOPANAR v. SUBBAYYA MOOPANAR.* 42 M. L. J. 133.

(1922) M. W. N. 106; 15 L. W. 283.  
(1922) Mad. 317; 31 M. L. T. 266 (H.C.)

———**Creation of—Uncertainty—Court unable to administer trust—Effect of.** *See HINDU LAW, WILL, CONSTRUCTION.*

42 M. L. J. 385 (P. C.)

———**Public trusts—Dedication—Formalities necessary—Intention to create.** *See TRUSTS ACT.*

42 M. L. J. 258.

———**Religious and charitable purposes—Trustee—Delegation of functions—Improper.**

"Fiduciary duties cannot be made the subject of delegation," so that where property was in the hands of a person charged with expenses necessary for certain religious and charitable purposes, and his son purporting to act as his attorney executed a morasi mukurari pattah of the lands. Held, that the pattah was *ultra vires* and conveyed no title, for even if the father was not in the strictest sense a trustee, his position was

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none the less a representative one. (*Lord Buckmaster*). *K. S. BONNERJI v. SITANATH DAS.*

26 C. W. N. 236; (1922) M. W. N. 98;  
L. R. 3 P. C. 34; 42 M. L. J. 403; 30 M. L. T. 182;  
20 A. L. J. 294; 15 L. W. 452; 35 C. L. J. 321;  
24 Bom. L. R. 565; 66 I. C. 140; (1922) P. C. 209;  
49 I. A. 46 (P. C.)

**TRUST—Transfer—No right to associate in management.**

It is not competent to the author of a religious endowment to introduce a stranger into the trusteeship and to join him in dealing with trust property. (*Spencer and Krishnan, JJ.*) *KOTASSERI E. V. SANKARAN NAMBI v. KANHOLI I. D. ANTHARJEMAM.* 43 M. L. J. 572; (1922) Mad. 259; (1922) M. W. N. 428; 16 L. W. 26.

———**Trustee—Liability to account for income**  
**Public Trust.**

One essential of trust is that it should be imperative. If a man can carry out or not carry out the alleged trust just as he likes, then there is no trust. In other words, if he is entitled to put the money into his own pocket, he is not a trustee known to the law. (*Marten, J.*) *THE ADVOCATE GENERAL OF BOMBAY v. YASUFALLI EBRAHIM* 24 Bom. L. R. 1060

———**Accounts—Liability for—Dealing on his account with rents of leasehold property—Extent of liability.**

Where a trustee is sued by the beneficiary for the recovery of possession of certain leasehold property and its profits appropriated by the trustee, the value of the produce rents at the time and place of the receipt is the measure of the liability and not the price fetched by sales at a later date. The fluctuations of the market are ordinarily matters too remote to be taken into consideration in estimating liability in such cases. If the person liable to account for the produce rent to his employer should, without fraud, convert it to his own use, his liability cannot be measured by the price at which the produce was subsequently sold. If the market should fall it would not diminish his liability. If it should rise, there is no reason why his liability should be increased. The rise and fall of the market are circumstances too remote to be taken into consideration. (*Miller, C. J. and Mullick, J.*) *RAI BAHADUR HARIHAR PRASAD SINGH v. MAHARAJA KESHO PRASAD SINGH.*

3 Pat. L. T. 638.

———**Delegation of functions—*Ultra vires*.** *See TRUSTS.*

26 C. W. N. 236.

**TRUSTS ACT (1882)—Applicability of—Public trusts—Formalities necessary for dedication—Intention—Executory trust—Enforceability of.**

The Trusts Act does not apply to public trusts and consequently no formalities are required by law to create them—Yet, there must be a definite and imperative declaration of trust by the donor who must also have parted with his rights in the property for the benefit of the beneficiaries. A mere intention to dedicate in future does not constitute a public trust.

The law relating to the enforceability of executory trusts has no application to charitable trusts where the beneficiaries are mere volunteers,



## TRUSTS ACT (1882), S. 5.

(*Oldfield and Krishnan, JJ.*) VENKATACHALA-PATHI AIYAR v. CHAKRAPANI AIYAR

42 M. L. J. 258 : 15 L. W. 279 :  
(1922) M. W. N. 123 : (1922) Mad. 83 :  
66 I. C. 844.

—Ss. 5 and 6—*Private trust—Essentials of—Minor Incapacity to be the author of a trust*

To create a valid trust of immoveable property in favour of a private individual the provisions of Ss. 5 and 6 of the Trusts Act must be strictly complied with. A minor cannot create a valid trust. (*Krishnan and Odgers, JJ.*) KRISHNA PATTAR v. LAKSHMI. 45 Mad. 415 :

42 M. L. J. 119 : (1922) M. W. N. 117 :  
30 M. L. T. 238 : 16 L. W. 886 : (1922) Mad. 57 :  
66 I. C. 858.

—Ss. 23, 51—*Liability.*

If the person liable to account for produce sent to his employer should without fraud convert it to his own use his liability cannot be measured by the price at which the produce was subsequently sold. (*Miller, C. J. and Mullick, J.*) HARIHAR PRASAD SINGH v. MAHARAJAH KESHO PRASAD SINGH. (1922) P. 593

—S. 77 (c)—*Public trust—Failure of trust—Rights of donor and his heirs.*

The land in suit having been given for the purpose of being used as a road to connect the main road with a public garden was held by the District Board as a trustee for the public, and when the land on which the gardens were planted was sold to a private individual and the gardens ceased to exist, the fulfilment of the purpose for which the land in suit had been given became impossible. The trust was then extinguished under S. 77 (c) of the Trusts Act and the donor of the property was entitled to recover the land given. 7 A. 362 Ref. (*Martineau, J.*) GELA RAM v. DR. BOARD MUZAFFARGARH.

4 U. P. L. R. (Lah.) 79 : 67 I. C. 434.

—S. 95—*Land purchased by one with money belonging to another—Effect.*

Where lands are purchased with plaintiff's money in the name of the defendant with a recital in the sale deed that the purchase was on behalf of the plaintiff, the defendant is only a constructive trustee for plaintiff and his liability arises under S. 95 of the Trusts Act. (*Krishnan and Odgers, JJ.*) KRISANA PATTAR v. LAKSHMI AMMAL. 45 Mad. 415 : 42 M. L. J. 119 :

(1922) M. W. N. 117 : 16 L. W. 886 :  
66 I. C. 858 : 30 M. L. T. 238 (H. C.)  
(1922) Mad. 57.

—S. 95—*Money retained wrongfully—Liability to pay interest.* See INTEREST.

42 M. L. J. 74.

UNDUE INFLUENCE. See UNDER CONTRACT ACT, S. 16

U. P. COURT OF WARDS ACT (III of 1899) S. 34

—Hindu ward—*Management of Court of Wards—Contract of debts—Son of ward under no personal obligation to discharge debts.* See H. LAW, DEBTS. 20 A. L. J. 241.

(IV of 1912) Ss. 8 and 10—*Release from Court of Wards—Effect on acts done during its superintendence.* See (1921) DIG. COL. 1083

## U. P. COURT OF WARDS ACT S. 54.

NARINDRA BAHADUR SINGH v. THE OUDH COMMERCIAL BANK.

42 M. L. J. 58 : (1922) M. W. N. 61 :  
26 C. W. N. 326 : L. R. 3 P. C. 25 :  
(1922) P. C. 1 : 64 I. C. 187 (P. C.)

—S. 37—*Disqualified owners—Death of—Property inherited from proprietor—Superintendence of Court of Wards—Effect on contract by heir.*

The heir of a deceased disqualified proprietor is liable to be sued in court on a personal contract entered into by him even though the superintendence of the Court of Wards had not ceased at the time of the contract. (*Lindsay and Kanhaiya Lal, JJ.*) DALIP SINGH v. KHURSHED HUSAIN. 20 A. L. J. 715 : L. R. 3 A. 462 :

(1922) ALL. 459 : 4 U. P. L. R. (A.) 216 :  
68 I. C. 747.

—Ss. 37 and 45—*Scope.*

S. 37 does not disqualify a successor to the property of a person under Court of Wards from incurring any liability which might affect the property after the debts and liabilities have been discharged.

Where the defendant successor of the ward was never so declared, and he made no application under S. 10 and the property inherited by the defendant was under the superintendence of the Court of Wards, but only for a specific purpose, namely for the discharge of the debt and liabilities which were due to the ward at the time when the estate was taken over under its superintendence by the Court of Wards: Held, after these debts were discharged and the estate was released, any liability incurred by the successors of the lady who was the ward might be enforceable, except in so far as that liability created a charge on the property which was under the superintendence of the Court of Wards while such debts and liabilities had remained undischarged. (*Lindsay and Kanhaiya Lal, JJ.*) DALEEP SINGH v. KUR SHED HUSAIN.

20 A. L. J. 715 : L. R. 3 A. 462 :  
(1922) A. 459 : 4 U. P. L. R. (A.) 216 :  
68 I. C. 747.

—S. 54—*Notice of claim—Estate under charge of Collector—Notice to special manager.* See (1921) DIG. COL. 1383 LACHMI NARAIN v. DURG BIJAI SINGH. 65 I. C. 365.

—S. 55—*Disqualified proprietor being a trustee of endowment—Suit in his own name.*

S. 55 of the U. P. Court of Wards Act has no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as trustee. He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager, and the idol in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of S. 55 of the Act. Consequently the disqualified proprietor can sue as manager of the idol. (*Lindsay and Kanhaiya Lal, JJ.*) SRI THAKURJI v. HIRA LAL.

20 A. L. J. 609 : L. R. 3 A. 581 :  
(1922) A. 408 : 44 A. 634.

## U. P. COURT OF WARDS MANUAL R. 70.

U. P. COURT OF WARDS MANUAL RULE 70—*Special Manager—Grant of occupancy rights.*

The Special Manager of the Court of Wards has power to confer occupancy rights on approved tenants if they were entitled by length of occupation. (*Fremantle J. M.*) *RAJA SURAJPAL SINGH v. BHIMSEN.* L. R. 3 A. 234 (Rev.)

U P. EXCISE ACT, (IV of 1902) S 60—*Conviction under—Essentials of*

A conviction under S 60 of the U. P. Excise Act should state the act of which the accused is found guilty and the particular breach of the Act established against him by this act so found. A general conviction under the section which contains many inconsistent alternatives is bad. (*Walsh, J.*) *MUNSHI LAL v. EMPEROR.*

L. R. 3 A. 34 (Cr) 20 A. L. J. 198 : (1922) A. 21 : 66 I. C. 184 : 23 Cr. L. J. 248.

—Ss 60 and 64—*Selling liquor after prescribed hours—Arrest—Legality of.*

A Police officer has no power to arrest a person under Ss. 60 and 64 of the U. P. Excise Act in the absence of a report as regards the commission of an offence of selling liquor after the prescribed hours. (*Lindsay, J.*) *SHANKAR LAL v. EMPEROR.* (1922) A. 264 : 65 I. C. 433 : 23 Cr. L. J. 81.

U. P. LAND REVENUE ACT (III of 1901)—*Provisions under Ch. 7—Division of houses—Jurisdiction of Revenue Court.*

A Revenue Court making a partition under the provisions of Ch. 7 of the Land Revenue Act has no jurisdiction to make a division of a house. The law with regard to buildings is definitely settled and the plaintiffs, who founded their case upon the partition in order to put forward the title which they wished to vindicate, are out of court. The order of the Revenue Court cannot give them a title to the premises in dispute 23 All. 191 distinguished. (*Lindsay J.*) *GOVIND PERSHAD v. KALIAN.* (1922) All. 216.

—S. 4 (12)—*Land recorded as khudkasht for 40 years—No proof of occupation by sub-tenant—Accrual of Sir rights.*

Where land has been recorded as khudkasht for 40 years it can be presumed that sir rights accrued before the Agra Ten. Act. 1901. Cultivation by the proprietor himself with his own stock may be proved. (*Pearson, J. M.*) *JAGROOP v. MT. PARTABI.* L. R. 3 A. 416 (Rev.)

—S. 4 (12) (b)—*Sir land—Land in cultivation of sub-tenant*

In a suit in ejectment brought in 1920 the land was found to have been in the cultivation of the sub-tenant for the last 29 years. Held that under S. 4 (12) (b) of the U. P. Land Revenue Act the land could not be sir. (*Burn, J. M.*) *DUKHI RAI v. MITAI RAI.* L. R. 3 A. 508 (Rev.)

—Ss. 10 and 36—*Exproprietary tenant—Fixing of rent.*

In fixing the rent of ex-proprietary tenants under S. 36 of the U. P. Land Rev. Act no account should be taken of the rents paid by tenants recorded as non-occupancy tenants of more than 12 years' standing. (*Hopkins, S. M. and Porter, J. M.*) *PANDIT BENI MADHO v. MT. SAHODRA.* L. R. 3 A. 326 (Rev.)

## U. P. LAND REVENUE ACT (1901), S. 34.

—Ss. 15 and 218—*Patwari—Misconduct—Appeal—Powers of Commissioner.*

Where on account of the misconduct of a patwari, the Dy. Commissioner transferred him to another circle but the Commissioner on appeal dismissed him. Held that it was not open to the Commissioner on appeal to enhance the punishment but that he could report the matter to the Board of Revenue. (*Hopkins, S. M. and Fremantle J. M.*) *KULWANT LAL PATWARI v. THAKURAIN ANPurna Tuer.* 4 U. P. L. R. 7 (B. E.)

—S. 32—*Khewat—Mutation of names—Absent proprietors—Person in possession—Rights of.*

The Khewat under S. 32 of the U. P. Land Revenue Act is a register of proprietors. Neither that section nor any other section of the Land Revenue Act provides for the record of persons in possession of the property of absent proprietors. If the parties or any of them claim to be entitled to possession of the property in the absence of the proprietor or claim to have succeeded to his proprietary right on the presumption of his death they should take action in the Civil Courts. (*Hopkins, S. M. and Fremantle, J. M.*) *MT. RITURAJ v. DIP NARAIN TEWARI.*

4 U. P. L. R. (B. E.) 64

—S. 32 (a)—*Khewat—Entires in—Value of*

The Khewat or proprietary register is declared under S. 32 (a) of the Land Rev. Act to be a register of all the proprietors in the mahal, including the proprietors of a specific areas, specifying the nature and extent of the interest of each. It is a register of proprietary rights and not of possession. The initial entry in the register is made by the revenue courts on the basis of possession. (*Hopkins, S. M. and Fremantle J. M.*) *LACHMAN PRASAD v. MUSSAMMAT FARRUKH BEGAM.*

4 U. P. L. R. (B. E.) 41 : L. R. 3 A. 540 (Rev.)

—Ss. 33 and 35—*Order of Tahsildar under—Undisputed mutation case—Effect of order—Power of Collector.*

The order of a Tahsildar passed under the authority S. 35 of the U. P. Land Rev. Act, though it may not have a binding effect upon Revenue Courts under S. 44 in other and subsequent proceedings it is a legal and proper order finally disposing of the proceeding to which it relates. A second application under S. 34 relating to the same succession is incompetent.

Under S. 33 (2) of the Act the Collector is not required into enquire into the correctness of any entry in the revenue records on a mere allegation of error. A *prima facie* case must be made out for an enquiry under the section. (*Hopkins S. M. and Porter J. M.*) *CHAUDHURI NANBAHAR SINGH v. MT. KRISHNA KUNWAR.*

L. R. 3 A. 306 (Rev.)

—S. 34 (5)—*Notice of ejectment—Legality of—Decree of civil court awarding entire mahal—No mutation*

Where a person whose name was entered in respect of 1-6 of the mahal gave a notice of ejectment claiming that his title to the entire mahal had been declared by a civil court, though mutation had not taken place, the notice is bad

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under S. 34 (5) of the U. P. Land Rev. Act. (*Hopkins, S. M. and Burn, J. M.*) **NAKCHED PANDE v BIBI RUKAIYAKHANAM.**

**L. R. 3 A. 90 (Rev.)**

— **S. 34 (5) — Redemption — Proprietary rights—Ejectment.**

Under S. 34 on the U. P. Land Rev. Act a suit by a proprietor who has obtained a decree for redemption of his share to eject a tenant is not maintainable until he has reported the redemption. (*Burn J. M.*) **SOBH v. DARYAI.**

**L. R. 3 A. 456 (Rev.)**

— **S. 34 (5)—Scope of—Mutation—Rights of transfer.**

It is a necessary corollary of S. 34 (5) of the Land Rev. Act that until application for mutation is made by a transferee the right to file suits or applications in the Revenue Courts rests with the transferor. (*Hopkins S. M. and Fremantle, J. M.*) **MUSSAMMAT SAHOODRA v. LAL SINGH.**

**L. R. 3 A. 361 (Rev.) : 4 U. P. L. R. 65 (B. R.)**

— **Ss. 35 and 42—Scope of—Mutation proceedings—Evidence recorded by Tahsildar—Consideration by Sub-Divisional Officer—Legality.**

There is a clear distinction between proceedings under S. 35 and proceedings under S. 42 of the U. P. Land Rev. Act. An order passed under S. 42 is binding on all Revenue Courts in respect of the subject-matter of the dispute and by the Tenancy Act and Rent Act such a matter cannot be litigated in any court but a Revenue court. Orders passed under S. 35 read with S. 40 deal merely with the entry in the village records of proprietary rights, and orders regarding such entry may be challenged in a civil court. There is nothing in the law to prevent a Sub-Divisional Officer in a disputed case of mutation from considering evidence which has been recorded by a Tahsildar or qualified Naib Tahsildar. (*Hopkins, S. M. and Burn, J. M.*) **MUNSHI LAL v. CHEDI LAL.**

**L. R. 3 A. 342 (Rev.)**

— **S. 36—Expropriatory tenant—Assessment of rent.**

Where rent has not been assessed on an expropriatory tenant, the responsibility therefor rests as much on the cosharers as on the lambardar under S. 46 of the Land Revenue Act. (*Lindsay and Kanhaiya Lal, J.*) **KUBI BEHARI LAL v. ABDUL HADI.**

**L. R. 3 A. 260 (Rev.) : 4 U. P. L. R. (B. R.) 200.**

— **S. 36 (4)—Mortgage—Accrual of expropriatory rights—Statement that rights had been given up—Effect.**

Where a proprietor continued in possession after the execution of a mortgage of his land and a declaration that he had given up his expropriatory rights, he could apply under S. 36 (4) of the Act for definition of his expropriatory rights. (*Fremantle J. M.*) **BEHARI BARBAI v. BHOLAI SINGH.**

**L. R. 3 A. 488 (Rev.)**

— **S. 38 (3)—Mutation of names—Dispute as to—Duty of Assistant Collector.**

S. 39 (3) of the U. P. Land Rev. Act contemplates an enquiry by the Tahsildar and also that

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the Assistant Collector should take into consideration the evidence given before the Tahsildar, or Naib Tahsildar with powers of a Tahsildar. (*Hopkins, S. M. and Fremantle, J. M.*) **BHARNI SINGH v. RAMPAT SINGH.**

**L. R. 3 A. 492 (Rev.)**

— **S. 40—Mutation proceedings—Evidence to be considered**

Where there is a dispute as regards mutation, evidence taken before the Tahsildar is not admissible in an enquiry by the Revenue Courts. When there is a contest the Tahsildar should at once forward the record to the Sub-Divisional officer. In mutation cases regard must be had to actual and not constructive possession. (*Hopkins, S. M. and Fremantle, J. M.*) **WILAYAT SHAH v. WAHID SHAH.**

**4 U. P. L. R. 10 (Rev.)**

— **S. 41—Jamabandi—Correction—Dispute as to class of tenure**

Where during the hearing of a case for correction of the *Jamabandi* a dispute arises respecting the classes of tenure of certain tenants the Assistant Collector is bound under S. 42 (2) of the Land Revenue Act to follow the procedure prescribed for the trial of suits under the Ten. Act. (*Hopkins S. M. and Fremantle, J. M.*) **JIWAN LAL v. GHOOREY.**

**4 U. P. L. R. (B. R.) 88.**

— **S. 41 (2)—Jamabandi case—Ex parte decision—How far res judicata**

Where the procedure prescribed by S. 41 (2) of the U. P. Land Revenue Act is not followed a summary order in a case for correction of *Jamabandi* without examining the witnesses of the opposite party does not operate as *res judicata* in a subsequent proceeding for a correction of *jamabandi*. (*Fremantle, J. M.*) **RAJA SHEOMANGA SINGH v. NEKSA.**

**L. R. 3 A. 245. (Rev.)**

— **S. 42—Correction of jamabandi papers—Proper procedure not followed—Decision not binding.**

Where in proceedings to correct the *jamabandi* papers, the procedure laid down in S. 42 U. P. Land Revenue Act was not followed, but the court acted on the report of the Tahsildar without taking evidence itself, the decision had no binding effect. (*Burn, J. M.*) **BANSI SINGH v. SHAH MD. YASIN.**

**L. R. 3 A. 2 (Rev.)**

— **S. 42 — Proceedings under — Duty of officer.**

In a case under S. 42 of the U. P. Land Revenue Act the Sub-Divisional officer alone can decide the case; and he must decide it on the evidence recorded by himself solely. (*Burn J. M.*) **DURGA PRASAD v. JAGAT SINGH**

**L. R. 3 A. 201 (Rev.)**

— **Ss. 42 (2) and 57 — Dispute as to entry—Agreement to be bound by statement of a party—Decision accordingly—Procedure.**

In a dispute between parties as to the occupancy right in a certain holding, they agreed to be bound by the statement of one of them and the settlement officer acting upon that statement decided the claim without raising any issues or recording any evidence. Held, that the procedure of the settlement officer was not illegal or improper and his decision was binding on all the

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Revenue Courts. (*Hopkins S. M. and Fremantle, J. M.*) MAHESHAH AHIR v. DASRATH TIWARI.

L. R. 3 A. 57 (Rev.)

—S. 43—Under-proprietary and ordinary holdings—Ejectment from latter—Apportionment of rent.

Where a person recorded as tenant of a particular area of land is held by the civil court to be under-proprietor of a portion and ejected from the remaining area, the rent to be recorded against the under-proprietary holding should be the amount left over if the rent of the ordinary holding had been separately recorded under S. 43 of the Land Revenue Act. (*Burn, J. M.*) RAM NATH KUMARI v. THE MANAGER, COURT OF WARDS AJUDIA ESTATE.

L. R. 3 A. 89 (Rev.)

—S. 57—Decision of record officer—If binding in Revenue Court.

Under S. 57 of U. P. Land Revenue Act the decision of the Assistant Record officer at the revision of records in disputed cases is not binding on the Revenue Courts. (*Hopkins, S. M.*) Mr. BAL RAJI v. PARGASH

L. R. 3 A. 427 (Rev.)

—S. 57—Nature of proceedings under—Suit for ejectment—Prior decision if binding.

Where a large number of cases were lumped together and tried in one proceeding under S. 57 of the Land Revenue Act and an omnibus issue raised and decided, a decision as to the paternity of a person which was not in issue in the previous proceedings does not operate as *res judicata* in a subsequent suit for ejectment. (*Hopkins S. M.*) KUNWAR MD ABDUL LAL KHAN v. MT SUNDARIA.

L. R. 3 A. 246 (Rev.)

—S. 57—Settlement entries—Presumption—Rebuttal—Previous entries.

All the cases lay down is that the entries prior to settlement cannot be treated as proving by themselves that the settlement entries are wrong. They can be used to rebut the settlement entries. (*Pearson, J. M.*) MUSAI PATHAC V. DAWAN DAS.

L. R. 3 A. 447 (Rev.)

—S. 107—Partition—Cosharer—Rights of Hindu daughter—Large interest under father's will.

Under S. 107 of the U. P. Land Revenue Act a recorded cosharer is entitled, to apply for partition. The expression cosharer has not been defined anywhere by the Act, but reading S. 107 with S. 32 and S. 111, there can be no doubt that the cosharer who is entitled to apply for partition, must be a recorded cosharer of some kind of proprietary interest in the mahal and not a person entitled merely to collect rents or realise a share of the profits on behalf of a proprietor, such as a mortgagee, lessee, or the kadam or an assignee of the rents.

A Hindu widow in possession of an estate which has devolved on her by inheritance from her husband, represents the estate and combines in herself for certain purposes the interests of herself and the reversionary body whom she represents. The interest which a Hindu daughter receives under a devise from her father though limited in character is similarly such as will

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entitle her to claim a partition, because she represents herself as much as those who are likely to succeed to her on her death. She is not a mere assignee of the profits. She is the proprietor for the time being though of a limited interest. She can manage the property in the way she likes and let it out to any person whom she chooses and short of making a transfer, she possesses all proprietary rights including a right to hold the property in severalty or enjoy it jointly with her cosharers, as may suit her interests. 3 A. 400; 90 C 53; 3 A. L. J. 481; 12 A. 51, 31 Bom. 560; 33 A. 443 Ref. (*Lindsay and Kanhaiya Lal, JJ.*) BAHADUR SINGH v. MUSSAMMAT MOHNI KOER.

20 A. L. J. 780;

4 U. P. L. R. (A) 204: (1922) A. 483; 68 I. C. 989.

—S. 107—Question of proprietary title—Partition—Appeal.

If in a suit for partition the objectors admit the proprietary title of the applicant but deny the right to demand a partition a question of proprietary title is raised and an appeal lies to the District Court from the decision of the Revenue Court 28 A 185 Ref. (*Stuart, J.*) MUSTAGAB KHAN v. THAKUR SRI LAXMI NARAIN.

(1922) A. 26: 66 I. C. 550.

—Ss. 110 and 111—Question of title—Objections.

A question of proprietary title, even if it has been decided by a competent court, has to be raised in objection under S. 110 U. P. Land Revenue Act—S. 111 relates to the method of disposing such objections. (*Hopkins, S. M.*) CHANDIKA BAKSH SINGH v. KAILASH NARAIN.

4 U. P. L. R. 24 (B. R.)

—Ss. 111 and 120—Partition—Application for—Division into pattis—Question of proprietary title.

Where an applicant for partition applied that his share in certain *pattis* should be divided off but the court included in the partition some other *pattis* on the ground they formed portions of an undivided mahal notwithstanding the objections of the owners of those *pattis* Held, that the court had no power to do so as the objection of the owner of the other *pattis* raised a question of proprietary title which could only be disposed of under S. 111 of the Land Revenue Act. (*Hopkins S. M. and Fremantle J. M.*) GANGA CHARAN v. KUNWAR BAHADUR

L. R. 3 A. 254 (Rev.)

—Ss. 111 and 233 K—Partition—Question of title not raised in partition suit—Suit in Civil Court—Pendency of—Effect of. See (1921) DIG. COL. 1085 RAM SUBHAI SINGH v. DIP NARAIN SINGH.

44 A. 74: (1922) A. 158.

—S. 111—Revenue Records—Entries in—Alteration pending suit—Right to rent. See (1921) DIG. COL. 1086 MUBARAK FATIMA v. MAHOMED QULI KHAN.

43 All 697.

—S. 111—Scope of—Mode of disposing objections. See U. P. LAND REVENUE ACT, Ss. 110 AND 111.

4 U. P. L. R. 24 (B. R.)

—S. 117—Partition—Groves—Mode of.

## U. P. LAND REVENUE ACT (1901), S. 117.

In the case of a partition of groves, the partition has to be made on the basis of value and not on the basis of area. (*Hopkins S. M.*) JAGESWAR v. SHEO SHANKAR LAL. L. R. 3 A. 484 (Rev.)

—S. 117—*Partition—Land held in severalty—Decision—Provision against—Wajib-ul-arz—Value of,*

The Gorakhpur and Faati Settlement Rules of 1886 authorised the Settlement Officer under S. 65 (c) of Act 12 of 1878 to record the arrangement made by himself and agreed to by the co-sharers, respecting *inter alia* divisions of common land with regard to any custom or constitution peculiar to the mahal. Held, that it was doubtful whether the expression "division of common lands" referred to partition as that word was understood in revenue law. In any case the statement that "only the common land is divided" (*i. e.*) that the land held in severalty is not divided was clearly in respect of a matter which was outside the settlement officer's authority to bring on record. Further a custom regarding partition could not have grown up between 1863 and 1884 (*Hopkins, S. M.*) SHEO PAL SINGH v. SHEO BHADRA DUBE. L. R. 3 A. 396 (Rev.)

—Ss. 117, 123 and 125—*Scope of—Land held in severalty—Common land.*

Prima facie there is no reason why a greater sanctity should be attached, as in S. 123 to common land in the casual or temporary occupation of a co-sharer than to land in which he has acquired rights or the equivalent rights given by S. 127 "Severalty" in the Act means "separate ownership" and not "separate proprietary possession," (*Hopkins, S. M. and Fremantle, J. M.*) GOKUL v. SHADI. L. R. 3 A. 380 (Rev.)

4 U. P. L. R. (B R) 99.

—S. 118—*Partition—House—Jurisdiction of Revenue Court.*

A revenue court making a partition under the provisions of Ch. VII of the Land Rev. Act has no jurisdiction to make a division of houses. Consequently plaintiffs who founded their case upon the partition in order to put forward the title which they wish to vindicate are out of court. (*Lindsay, J.*) GOVIND PERSHAD v. KALIAN. (1922) A 216 : 66 I. C. 910.

—S. 127—*Khudkasht—Claim of exproprietary tenancy—Omission to object—Effect of.*

Some khudkasht lands of 11 year's standing at the time of a partition were allotted to another co-sharer as non-occupancy tenant land. The allotment was published and no objection was made that at the time when the lots were prepared the land had become khudkasht of 12 years' standing and therefore subject to exproprietary right. Held, thereafter, exproprietary rights could not be claimed under S. 127 of the U. P. Land Rev. Act (*Ferard S. M. and Harrison J. M.*) NANDAN v. NAKCHHED. L. R. 3 A. 299 (Rev.)

—S. 131—*Khudkasht land—Allotment of to be held as tenant—Partition—Commencement of tenancy—Liability to pay rent*

No rent is payable to the new proprietors or to any one else by the Khudkasht holder in the joint mahal whose land has been allotted to a new

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mahal in which he is not a proprietor, until the 1st July following the date of confirmation of partition. Up to that date he is a khudkasht order; from that date he is a tenant and can only count occupation from that date towards accrual of occupancy right. (*Ferard S. M. and Hopkins J. M.*) HARDWARI v. SURAJBHAN. L. R. 3 A. 279 (Rev.)

—Ss. 132 (iii) and 133 (i) d—*Partition proceedings—No order, of confirmation—Appeal—Procedure.*

A partition was directed by a Deputy Commissioner to take place according to the terms of a certain compromise—An appeal was preferred to the commissioner, but it was dismissed on the ground that partition proceedings had not come up for confirmation and therefore S. 132 (iii) did not apply.

Subsequently the Deputy Commissioner passed an order confirming the partition Held an appeal against this order must also be treated as an appeal against the partition proceedings, (*Hopkins S. M. and Fremantle, J. M.*) HARIHAR BAKSH SINGH v. SRI DUTTA SINGH. L. R. 3 A. 25 (Rev.)

—S. 133—*Appeal—Original orders of Collector—Commissioner.*

Appeals lie to the Commissioner from original orders of the Collector passed under Ss. 109 and 114 as well as from original orders confirming or rejecting a partition proceeding or partition, (*Hopkins S. M. and Porter, J. M.*) UMRAO SINGH v. PIRTHI. L. R. 3 A. 330 (Rev.)

—S. 133—*Order confirming partition—Appeal—Manner of partition—Question as to.*

Where a person has been a party to a partition he cannot on an appeal from an order of confirmation raise all questions of detail which should be thrashed out by objection to the Partition Officer and corrected, when necessary, by appeal to the Collector before the partition is confirmed. (*Burn, S. M.*) HAKIM MD. HAMID ALI KHAN v. HAKIM MD. MAHBOOB ALI KHAN. L. R. 3 A. 410 (Rev.)

—S. 133 (1) and (2)—*Partition—Order of collector confirming partition—Appeal.*

Where no appeal has been preferred to the Collector against an order of the Asst Collector, no appeal lies from the Collector's order confirming a partition. (*Fremantle, J. M.*) GAYA DIN TEWARI v. KUNWAR BAHADUR LAL. L. R. 3 A. 34 (Rev.)

—Ss. 160, 161, and 162—*Taquair—Land sold for arrears of revenue—Incumbrance—Benefit to property.*

Taquair is revenue and for arrears of *taquair* land could be sold free of all incumbrances. Where the sale certificate shows that the land was sold under the provisions of Ss. 160 and 161 of the U. P. Land Rev. Act and purchased free of all incumbrances, the court may presume that the proceedings were lawfully taken and that the *taquair* had been granted for the benefit of the property sold. (*Lyle, A. J. C.*) BABU RAM v. BABU RAM. 66 I. C. 620.

## U. P. LAND REVENUE ACT (1901), S. 199.

———Ss. 199 and 100—*Applicability of—Proceedings in lambardari case—Appeal.*

The proceedings in a lambardari case are proceedings of a judicial nature. The expression "any proceeding of a judicial nature pending before any Revenue Court" in S. 199 of the U. P. Land Revenue Act is wide enough to cover proceedings in an appellate court. (*Hopkins, S. M.*)  
MULA SINGH v. GANGA SAHAI.

L. R. 3 A. 110 (Rev.)

———S. 212 (b)—*Second appeal—Question of fact—Powers of commissioner.*

If an order of the original court is reserved on appeal, it is open to the Commissioner in second appeal to re-open the facts found by the courts below. (*Fremantle, J. M.*) SHEO NATH v. GHUSAI AHIR.

L. R. 3 A. 217 (Rev.)

———S. 212 (c)(iii)—*Finding of fact—Evidence not fully dealt with—Interference.*

Where the evidence has not been fully and properly dealt with in the courts below, the commissioner has power to interfere with concurrent findings of the court below. (*Pearson, J. M.*) ANMOL PANDE v. LACHMI NARAIN.

L. R. 3 A. 523 (Rev.)

———S. 213—*Appeal to Board of Revenue—Findings of fact by Commissioner—Interference.*

It is not justifiable on third appeal for the Board to go behind the findings of fact of the Commissioner on the ground that he was dealing with the case under a misapprehension and thought it was a mere question of correction of papers, not realising that his decision would have the effect of a final one as to status. (*Pearson, S. M.*) LACHMAN v. BALDEO BRAHMAN.

L. R. 3 A. 451 (Rev.)

———S. 213—*Third appeal—Failure to follow custom in appointing lambardar—Wajib-ul-arz—Value of.*

Failure to follow the local custom in appointing a lambardar is a good ground for third appeal. In making such appointments, it is not necessary to go beyond the *wajib ul arz*, whatever its evidentiary value may be as regards other customs. (*Hopkins, S. M. and Burn, J. M.*) WILAYAT HUSAIN v. YUSAF HUSAIN.

L. R. 3 A. 32 (Rev.)

———S. 233 (K)—*Partition of mahal—Abadi land—Jurisdiction of Civil Court.* See (1921) DIG. COL. 1086 SHIAMKUNWAR v. FATEH SINGH.

64 I. C. 295.

U. P. MUNICIPALITIES ACT (II of 1916)—*Lane—Vesting of—Right to complain for trespass.*

Under the U. P. Municipalities act land used as a public thoroughfare within the limits of the Municipality, vests in the Municipal Board. An act of trespass is an act of interference with the surface of the soil and with the use of the land as a public lane, and no one except the Municipal Board has a right to complain of such trespass. (*Piggott, J.*) MD. RAZI KHAN v. MD. ASKAR KHAN.

(1922) All. 485.

———Ss. 2 and 116 (g)—*Public street—Encroachment.*

A land or street over which the public as such have no right to pass along, does not become

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"public," only because there is an underground sewer of old times within the meaning of S. 2 of the U. P. Municipalities Act (II of 1916) and S. 116 (g) does not help the Municipal Board, as it deals with only public streets, payments, etc., which vest in the Municipality. (*Gokul Prasad, J.*) MUNICIPAL BOARD OF BENARIS v. RAM KISHNA DAS.

(1922) All. 386.

———S. 178—*Alteration in building abutting on public road.*

A building the walls of which are 40 feet from the road cannot be said to be abutting on or adjacent to a public road or street. The mere fact that the proposed compound wall would if constructed abut on a public road does not require a notice under S. 178 of the Act to the Board. (*Lindsay, J. C.*) MAHOMED RAZA v. EMPEROR.

65 I. C. 767 : 23 Cr. L. J. 191.

———S. 185—*Material alteration—What is.*

The raising of the plint and the alterations made in the size, position or number of the doors or windows cannot be treated as material alteration within the meaning of S. 185. (*Kanharya Lal, J. C.*) EMPEROR v. BABU RAM.

25 O. C. 1 : 67 I. C. 828 : 23 Cr. L. J. 476.

———S. 295—*Obstructing Municipal Servant in the performance of his duty—Advising vendor not to pay license fee.* See (1921) DIG. COL. 1087 BALDEO PANDEY v. EMPEROR.

64 I. C. 130.

———S. 324—*Application—Suit against a contractor of Board by lessee of land.* See (1921) DIG. COL. 1087 MAHOMED G. AZAN FAR ULLAH v. BABU LAL.

(1922) All. 477 : 64 I. C. 193 (F. B.)

———Ss. 333 and 314—*Powers of interim officer when a new municipality is created—Whether authorised to sanction prosecution.* See (1921) DIG. COL. 1088 JUGGAN v. EMPEROR.

65 I. C. 447 : 23 Cr. L. J. 95

U. P. RENT ACT (XII of 1881) S. 7—*Occupancy—Devolution.*

Under the U. P. Rent Act, occupancy tenancies devolve as if they are land and this excludes survivorship as well as descent. (*Fremantle, J. M.*) MT. MAHDAL v. MR. KHAIR UDIN HUSAIN.

L. R. 3 A. 30 (Rev.)

———S. 9—*Applicability—Succession to occupancy tenure—Reversioners claiming after death of widow—Sharing in alteration essential—Law—Governing.* See AGRA TENANCY ACT, S. 22.

20 A. L. J. 165.

UNIVERSITIES ACT, S. 25—*Regulations for conduct of examinations—Rule 5 if ultra vires.* See (1921) DIG. COL. 1088 TAJ AHMAD v. THE UNIVERSITY OF PUNJAB AT LAHORE.

4 Lah. L. J. 219 : (1922) Lah. 232.

UPPER BURMAH CIVIL COURTS REGULATION S. 13—*Suit for declaration of paternity—Effect of decree on order under S. 488 Cr. P. Code.*

A suit claiming a declaration that a person who had been required to maintain his son by the criminal court is not the father of the son is maintainable. The Civil Courts no doubt have no jurisdiction to cancel an order for maintenance

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or to grant an injunction against a criminal court, but there is no reason why the Civil Court having issued a declaration, the party who has obtained it should not apply to the Criminal Court, under S. 489 Cr. P. Code or otherwise for an order to stay the payment of maintenance (*Saunders, J. C.*) MAUNG PO THEIN v. MA ME SAN. 1 Bur. L. J. 82

## UPPER BURMA REGISTRATION REGULATION (II of 1897) Ss. 4 and 6—Execution of document—Unsigned document—Registration—Effect of.

Unsigned documents are compulsorily registrable under S. 4 of the U. B. Registration Regulation and are inadmissible in evidence without registration under S. 6. (*Heald, A. C. J.*) MA SAT PY v. MA SIN. 60 I. C. 16

**VAKALATNAMA**—Acceptance—Effect on pleader—Discharge, procedure for—Fresh vakalat if necessary for subsequent proceeding. See LEGAL PRACTITIONER. 35 C. L. J. 356.

**VAKIL.** See LEGAL PRACTITIONER.

**VATAN LANDS**—*Palkhi nam*—Treating *nam* as *vatan* and issue of *sanad*—What passes with the grant.

Where the Mahomedan rulers granted a village as *Palkhi Nam* to certain persons who were *Deshpande Vatan* and under the English settlements the same was classified as *Deshpande Vatan*, held that as the village was granted to the *vatan* and to pay their *Palkhi* expenses, it became an appanage of the *vatan*.

The effect of the P.C. decisions in *Suryanarayana v. Patanna* (45 I. A. 209) and *Venkata Sastrulu v. Setharamudu* (46 I. A. 123) on the presumption as to *nam* grants considered. (*Macleod, C. J. and Shah, J.*) TUNGABAI GOPAL DESAI v. KRISHNAJI RAMACHANDRA DESHPANDE. 46 Bom. 741 : 24 Bom. L. R. 252 : (1922) Bom. 5 : 67 I. C. 215.

— Sale in execution — Money decree against *vatan* — Sale after death of *vatan* — Estate represented by widow — Legal necessity — Sale valid. See BOMBAY HEREDITARY OFFICES ACT. S. 5. 24 Bom. L. R. 249.

**VATAN ACT S. 64**—*Vatan Register incorrect*—*Suit Maintainability*.

Where the order given by the Collector is not an order within the meaning of S. 4 (a) Para 3, Revenue Jurisdiction Act, but merely a direction to give effect to the *Vatan Register* as settled in 1895, a suit to declare that a *Vatan Register* was void and should not be given effect to would not lie. No action will be taken under S. 18 unless an application is made by an interested party. (*Macleod C. J. and Coyajee, J.*) GOVIND BALAKRISHNA BAVE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. (1922) Bom. 155.

**VENDOR AND PURCHASER**—Dispossession of vendee—Suit for damages—Limitation—Starting point. See LIM. ACT, ART. 97.

(1921) M. W. N. 634.

— *Title to property*—*Doubts of vendee*.

In the case of a purchaser while he is not on the one hand at liberty to raise doubts which are not rational, he cannot be compelled on the other hand

## WHIPPING ACT (1909), S. 4.

to take a title which will expose him to litigation or hazard. The question whether the doubt is reasonable must be determined on the facts of each case. (*Madgaonkar, A. J. C.*) KHEMCHAND RATANCHAND v. DHALOMAL 15 S. L. R. 180 : (1922) Sind 33 : 67 I. C. 19.

**VOIDABLE TRANSACTION**—*Nature of*—*Basis of claim for mesne profits by reversioners against alienee*.

A voidable transaction is good as against third parties till it is set aside, but as regards the person who has a right to avoid it, it is in a state of suspense until such party exercises his option. If he avoids it, it is treated as void from the outset as against him. It is on this principle that mesne profits are always allowed in a suit by the reversioners to recover property from a transferee from a Hindu widow after her death. (*Daniels and Lyle, J. C.*) MOHAMMAD HADI v. PARBATI. 25 O. C. 2 : (1922) Oudh 91 9 O L J 312 : 68 I. C. 549.

**WAGER**—Wagering contract—Necessity for the defendant to prove that both parties agreed neither to ask for nor to give delivery. See CONTRACT ACT, S. 30. 24 Bom. L. R. 60.

**WAGERING CONTRACT**—Common intention of parties—Onus of proof. See CONTRACT ACT, S. 30. 15 S. L. R. 193.

**WAIVER**—Evidence of—Inference from conduct. See CONTRACT ACT, S. 63. 64 I. C. 461.

**WAJIB-UL-ARZ**—*Construction*—*Custom or contract*—*Record prepared under directions of the Board of Revenue*.

A *Wajib-ul-arz* prepared in 1868 in accordance with the directions of the Board of Revenue to prepare a record of "custom and usage prevalent in an estate" contained a paragraph headed *Zikr-Haq-i-Shufa*.

On a question arising as to the interpretation of the *wajib ul-arz* in a pre-emption case. Held, that the *wajib-ul-arz* was only a record of custom and not of contract. (*Rafiq and Lindsay, JJ.*) SITAL PRASAD v. MAHABIR SINGH. (1922) A. 537 : 20 A. L. J. 954.

— *Entries in*—*Evidentiary value of*—*Riwaj-i-am*.

A *wajib-ul-arz* being part of a Revenue record is of greater authority than a *riwaj-i-am* which is of general application and is not drawn up in respect of individual villages: (*Le Rossignol and Campbell, JJ.*) GURBAKSH SINGH v. MT. PATAPO. 2 Lah. 346 : (1922) Lah. 234 : 66 I. C. 133.

— *Qarib*—*Meaning of*.

Where in the *Wajib-ul-arz* the provision governing inheritance in a family contained the word "qarib", Held in the absence of words of limitation, the term must be taken in its widest sense as meaning "nearest in degree." (*Lyle A. J. C.*) NIAMAT ALI v. ASHIQ ALI. 9 O. L. J. 127 : (1922) Oudh 96 : 67 I. C. 803.

**WHIPPING ACT, (IV of 1909) S. 4**—*Robbery*—*Hurt caused*—*When whipping to be ordered*.

## WILL—Codicil.

*Per Banerjee J.*: Under S. 4 of the Whipping Act, a sentence of whipping may be imposed where in the commission of a robbery, hurt is caused. It should be inflicted in cases where there is a certain amount of aggravation in the commission of the original offence. (*Mears, C. J. and Banerjee, J.*) *BADRI PRASAD v. EMPEROR* 44 A. 538 : 20 A. L. J. 388 : 4 U. P. L. R. (A) 67 : (1922) A. 245 : 66 I. C. 418 : 23 Cr. L. J. 274.

## WILL—Codicil—What is

A document signed by the testator which came into the hands of the trustees at the same time and under the same circumstances as the will itself and which gave directions to the trustees is a codicil though there is no reference to the will itself. (*Batten O, J. C.*) *MT. RAMDULARI v. BISHWESHWAR DAYAL*. 18 N. L. R. 143

———Codicil—Revocation of will when operative as revocation of codicil. See *SUCCESSION ACT S 57*. 35 C. L. J. 488.

———Construction—Absolute estate—Grant of—Absence of words of restraint on alienation—Provision for successive life estates.

In the absence of words imposing an effective restriction on the estate bequeathed the donee takes an absolute estate, even though the testatrix attempted ineffectually to create a succession of life estates. (*Mears, C. J. and Banerjee, J.*) *MARTIN v. HIRDEY RAM*. 44 A 397 : 20 A. L. J. 266 : L. R. 3 A 201 : (1922) A. 120 : 4 U. P. L. R. (A) 175 : 66 I. C. 869

———Construction—Absolute estate—Restriction on alienation.

Where a testator in terms gives an absolute gift to a legatee and subsequently professes to impose restrictions on alienation by the legatee or his heirs, the restrictions as to alienation are invalid and a legatee will take an absolute estate under the will. 18 W. R. 359; 4 Mad. 200 ref. (*Dalal, A.J.C.*) *LALA MANNI LAL v. RAJA PARTAB BAHADUR SINGH*. 9 O. L. J. 19 : (1922) Oudh 22 : 67 I. C. 8

———Construction—Bequest to charity—Vagueness—Uncertainty—Cyprus.

In construing a will bequeathing properties to a charity the primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that the testator had a particular object in view and that he intended the funds left by him should be appropriated to that object courts are bound to see that the persons appointed by the testator do not misappropriate the funds. If the Court can ascertain that there was a general charitable intention the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income will not be any reason for holding that the bequest failed either wholly or in part. The doctrine of cyprus should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance, and his failure to understand

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the situation should not fetter the Courts so long as the purposes specified by him are not vitiated.

If a testator has legally the power to dispose of his property by will his wishes should be given effect to if they are expressed in language which makes it clear what they are and how they should be carried out. When a testator creates a trust it must be for a definite and lawful object 23 B. 725, 31 B. 583, 31 C. 895, 37 M. L. J. 489 Ref. (*Abdull Raof and Campbell, JJ.*) *SUNDAR LAL v. KULLU RAM* 65 I. C. 820.

———Construction—Clause uncertain and repugnant to gift made—Operativeness.

A clause in a will to the effect that division of the testator's estate will not be made till his sons come of age and earn their livelihood and all his daughters are married, is inoperative both on the ground of repugnancy to a gift made and on the ground of uncertainty, because the events mentioned above might either not take place or be indefinitely postponed. (*Woodroffe and Cumming, JJ.*) *J. N. GHOSE v. B. B. DASI*. (1922) Cal. 302.

———Construction—English rules—Parsi will—Heirs—Time of ascertainment of.

The rule of law in construing wills is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as may be, consistent with law. Rules of construction developed by the English courts are highly artificial and are inapplicable to the construction of wills in India, 38 I. A. 54; 23 I. A. 18 Ref.

A Parsi testator died in 1905 leaving his widow D, his son J, J's wife, two daughters and four grandsons. By his will he directed that after the death of his widow his reversionary estate should be held in trust by his executors and that the income should be paid to J for life and on J's death to J's widow and children. There was a further provision that if J, died without issue, the executors should pay a lump sum to J's widow and divide a moiety of the residue among the testator's heirs as if he died intestate excluding J's widow. J died without issue and his widow as his administratrix claimed a share of the residuary estate of the testator. Held on the construction of the will, that the testator did not intend that his son J, should take any interest under the will as an heir and consequently J's wife could not claim a share of the residue. (*Lord Parmoor*). *DINBAI v. NUSSERWANJI RUSTOMJI*.

31 M. L. T. 213 (P. C.) : (1922) P. C. 311 : (1922) M. W. N. 787 : 4 U. P. L. R. (P. C.) 105 : 27 C. W. N. 199 : 49 I. A. 323.

———Construction—Gift to female—Absolute estate—"Malik", meaning of.

Where a Hindu testator died leaving a will stating that his wife would be *malik* of, and would have the interest of *mulkiat* in his properties. Held, that she took an absolute estate in the property bequeathed. The expression *malik*, is not a term of art and its meaning depends



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on the context. (*Wazir Hasan, A. J. C.*) *BIJAI BAHADUR SINGH v. MATHURA SINGH*

25 O. C. 345 : 9 O. L. J. 327 :  
4 U. P. L. R. (O. C.) 66 : (1922) Oudh 278 :  
68 I. C. 555.

—Construction—Gift to wife—Sir land—Absolute estate—Election—Person claiming under will cannot dispute other bequests

Where a testator bequeathed to his "wife for life 500 rupees per mensem besides *siratmakbuza* (Sir lands) in her possession". Held that the wife took an absolute estate in the sir lands. Where a person claims property under a will and has no title to it apart from the will, he cannot dispute the right of another legatee under the will. (*Sir John Edge*) *RANI BIJAI RAJ KUNWAR v. THAKUZ JAI INDRA BAHABUR SINGH*.

44 A. 435 : 31 M. L. T. 69 (P. C.) : 9 O. L. J. 385 :  
4 U. P. L. R. (P. C.) 76 : 25 O. C. 260 :  
(1922) Oudh 318 : 36 C. L. J. 511 :  
68 I. C. 876 : 49 I. A. 262

—Construction—Gift to female—Absolute estate in earlier part of the will—Restrictions on power of alienation and mode of enjoyment—Effect of.

A Hindu testator provided in his will that after him his daughter should be malik with power to alienate and to enjoy the property down to her son, grandson etc. The daughter was to live in the testator's ancestral *bhita* and perform the pujas inaugurated by him and it was provided that she should not otherwise transfer the property, except in the case of unavoidable necessity or for the education of her son etc. On a question arising as to the nature of the estate taken by the daughter Held, that though the earlier words in the will by themselves would create an absolute estate still considering all its terms it must be held that the earlier part was qualified by the provisions in the other parts of the will and that the daughter got only a limited estate. In constructing a will regard must be had to the central idea of the testator rather than to isolated expressions in the will, 24 C. 406 ; 14 C. W. N. 458 ; 18 C. W. N. 140 ; 40 C. 274 dist 8 C. L. J. 20 ; 12 C. L. J. 391 ; 12 C. W. N. 412 ; 35 C. 896 foll. (*Chatterjee and Cumming J.J.*) *SURENDRA NATH CHATTERJEE v. SAROJBANDU BHUTTACHARJEE*.  
26 C. W. N. 893.

—Construction—Legacy on a condition precedent if takes effect when the condition by reason of subsequent events becomes impossible of performance.

A testator bequeathed a sum of money to some of his relatives asking them to re-excavate a tank with the money and take the surplus. But the testator himself re-excavated the tank before his death:

Held, that the re excavation of the tank was a condition precedent, i.e., there was no gift intended unless the condition was fulfilled. The ascertainment of the testator's intention shown by the will cannot be varied by events which occur afterwards. That intention must be determined from the terms of the bequest, and where the performance of the condition appears to be the motive of the bequest the impracticability of the performance will be a bar to the claims of the

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legatee. In such a case the bequest does not take effect, discharged of the condition. (*Mookerjee and Buckland, J.J.*) *RAJENDRA LAL GHOSE v. SRIMATI MRINALINI DAS*.  
26 C. W. N. 378 :  
(1922) Cal. 116.

—Construction—"Malik" and "Varis"—Estate conferred.

Where in a will executed by a Hindu in favour of his wife, the words "malik" and "varis" occur and there is nothing in the text or circumstances to indicate an intention to cut down the absolute estate clearly and unmistakeably, then an absolute estate must be deemed to have been bequeathed. (*Kennedy, J. C. and Kemp A. J. C.*) *TIRATHMAL LOKOMAL v. THANWARSINGH*.

15 S. L. R. 202 : 66 I. C. 720.

—Construction—Nature of estate created—*Maqbuza*—Meaning of.

A Hindu testator in Oudh gave his wife all his moveable and immoveable property subject to the terms and conditions in the will one of which was that she was to be the absolute owner of that *ilaga* in Hardoi District and that as regards the remaining property viz: the *ilaga* in Kheri Dt. and the *maqbuza* in Hardoi Dt she was to have the rights sanctioned by law and was to be in proprietary possession. Held that the widow took an absolute estate in the *ilaga* in Hardoi Dt. and a widow's estate in the remainder of the testator's property in Hardoi and Kheri Districts, (*Daniels and Lyle, A. J. C.*) *KUAR NAGESHAR SAHAI v. SHIAM BAHADUR*. 9 O. L. J. 262 : (1922) Oudh 231.

—Construction—Powers of executor—Power of sale—Mortgage—Suit to enforce mortgage.

An executor under a will with express power to sell has power to mortgage except in cases where a prohibition against mortgage can be inferred from the terms of the will. In a suit upon a mortgage made by an executor under a will with express power of sale the onus is not on the mortgagee to prove as part of his case that the executor was acting properly in effecting the mortgage. (*Sir Walter Schwabe, C. J. and Wallace J.*) *PARTHASARATHI NAIDU v. MUKUNDAMMAL*.  
43 M. L. J. 551 : 16 L. W. 670 :  
(1922) M. W. N. 729 : 68 I. C. 856.

—Construction—Principles of. See HINDU. LAW—WILL. 3 Pat. L. T. 133 (P. C.)

—Construction—Principles of.

In all cases the primary duty of a court is to ascertain the true intention of the testator from an examination of the entire will. The court is in fact entitled to put itself into the testator's chair and say having regard to the language used in the different clauses, when read together what the testator's intention was. (*Kanhaya Lal, J. C. and Lyle A. J. C.*) *MOHAMAD YAKUB KHAN v. MAHAMAD SHAHID ALI KHAN*.

25 O. C. 21 : 9 O. L. J. 160 :  
(1922) Oudh 87 : 67 I. C. 556.

—Construction—Rule of succession not to be altered—Disinherision of heirs.

A testator cannot create a new rule of succession unknown to Hindu law. A document executed by a Hindu before his death recited that from the date of its execution the executant ceased to have

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any connection with his first son, that the latter was to have no concern with any of the former's property and that after the death of the executant and his wife the first son was to have no rights as a son and the other sons should perform all the funeral ceremonies. *Held* that the meaning of the document was that the first son was to lose all his rights in his father's property from the date of the execution of the document, and that the recital that he would not have the rights of a son after the death of the executant, referred to rights of a religious character and not to rights in the property. The document was not a will and was inadmissible in evidence for want of registration. It was also ineffectual for another reason, viz. that while it contained no mention of a gift of the property being made to any person it purported to after the rule of the Hindu law regarding succession. Such an attempt to after the mode of succession is void. 38 C. 603 *Ret.* (*Broadway and Martineau, JJ.*) *MADAN LAL v. LABHU RAM*

(1922) Lah. 421 : 67 I. C. 431

———Construction—Subsequent event—Condition precedent—Impossibility of performance arising out of act of parties—Claim of Legatee. *See* (1921) DIG. COL. 1005 *RAJENDRA LAL GHOSE v. RAKHAL DAS ROY.*

48 Cal. 1100 : 64 I. C. 977.

———Executor—Legatee creating mortgage pending administration—Decree on mortgage—Executor if entitled to declaration of invalidity of decree.

Pending the complete administration of the estate of the deceased, one of the legatees mortgaged his interest and upon that a decree was obtained. In a suit by the executor for a declaration that the properties were not saleable and for an injunction preventing such sale.

*Held*, as the defendant had done nothing to prejudice the title of the executor the suit was not maintainable. Accepting the legatees' interest as security did not amount to throwing a cloud on the title. (*Spencer and Ramesam, JJ.*) *SOUNDARATHAMMAL v. NARAYANASWAMI AIYAR.*

42 M. L. J. 567 : 15 L. W. 639 : 31 M. L. T. 50 (H. C.) : (1922) Mad. 306

———Execution—Proof of—Quantum of evidence necessary—Similarity of signatures—Value of—Appreciation of evidence by trial judge

A will is one of the most solemn documents known to law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. Where no formalities are prescribed by law, proof of the testator's signature is all that is needed, but, in cases of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which though it may not be fatal, is a serious defect. Mere resemblance in signature is of no value where witnesses

## WILL—Oral Will.

are available to prove the execution of the will and they are not called or are not believed. Where no evidence was forthcoming to show when the alleged will was found or why it was kept back until a claim based on intestacy was put forward, and no other details of the history of the will were placed before the court and the attesting witnesses had not been called, the conclusion is irresistible that the will is not genuine. (*Lord Buckmaster.*) *RAM GOPAL LAL v. AIPNA KUNWAR.* (1922) P. C. 366 31 M. L. T. 277 (P. C.)

69 I. C. 31 : 49 I. A. 413 : 44 All. 495.

———Genuineness—Shaky signature.

The fact that the signature is shaky but not uncharacteristic is almost in favour of the will being genuine, because, if a man sets himself to commit a forgery, he would naturally try to make the signature as exactly like the genuine signature as he could, and certainly would not introduce shakiness into the signature. (*Lord Dunedin*) *PALCHUR SANKARAREDDI v. PALCHUR MAHALAKSHMAMMA* 17 L. W. 1 : 31 M. L. T. 307 (P. C.) : (1922) P. C. 315.

———Legacy—Suit by legatee against executor de son tort

The argument that an executor *de son tort* could not be sued by a legatee, at any rate, in the absence of the legal personal representative, applies only where there is any legal representative. But when a representative of the deceased or a person in possession of the estate is proved to have received enough to pay all demands against the estate in full no such rule can apply. *Per Kumarasami Sastri, J.*—When the same heirs are brought on record in a suit covering both the personal properties of the widow and the properties in which she has a limited estate, the legal representatives should be said to be on record as her own legal representatives. It seems that in order to apply the doctrine that a person claiming under colour of a hostile title cannot be made executor of his own wrong, a claim must be made *bona fide* Cootev. (*Whittington* (1873) L. R. Eq. 19534 *Rel.* (*Schwabe, C. J. Coult's Trotter and Kumaraswami Sastri, JJ.*) *ZAMINDAR OF BHADRACHALAM v. SRI RAJA VENKATADRI APPA RAO.* (1922) Mad. 457 : 48 M. L. J. 486 : 16 L. W. 369 : (1922) M. W. N. 532 : 31 M. L. T. 221 (H. C.)

———Legacy—Suit for—Limitation—Interest on. *See* LIM. ACT ART. 123 ETC.

(1922) Mad. 457.

———Letters of administration—Proof of will—Capacity of testator. *See* (1921) DIG. COL. 1096 *GORDHANDAS NATHALAL PATEL v. BAI SURAJ,*

64 I. C. 257.

———Life estate—Creation of—Remainder, vesting of.

Whenever a life estate is created by will the remainder cannot remain in suspense but must vest in some one. (*Daniels and Lyle A, J. C.*) *KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD.* 25 O. C. 189 : 9 O. L. J. 235 : (1922) Oudh 236.

———Oral will—Proof—Recital in an unregistered deed.

The fact of the oral will can be proved by the admission of the plaintiff, although it is found in

## WILL—Oral Will.

a recital in a deed which, to take effect as a deed of gift, would require registration. If the recital is required to be used to prove an oral will, then it can be proved, and any question of registration is irrelevant. (*Macleod C. J. and Shah, J.*) *BAI SITA v. BHEGI LAL AMRITLAL* (1922) Bom. 149.

—*Oral will—Strut proof—Discrepancy in Statements of witnesses—Finding of fact.*

Courts must insist on precise proof of the terms of a nuncupative will but this does not mean that an oral will cannot be proved unless all the witnesses give precisely the same words in telling what the testator said. It is only to be expected that the recollection of the witness should use slightly different terms of expression but if the effect of the language is the same it does not matter. The question whether the will has been proved is one of fact and the findings of the lower appellate court will be binding on second appeal. (*Hallifox, A. J. C.*) *BHAWANIRAM v. DAMMAR SINGH*. 5 N. L. J. 183 : 66 I. C. 413 : (1922) Nag. 46.

—*Power of appointment—Exercise of the power in donee's life time—Restriction on the power—Donee if takes absolute estate in the property.* See (1921) DIG. COL. 1099. *BAPUJI RUSTOMJI KARAWALLA v. HAJI ESMAIL HAJI AHMED*. 46 Bom. 694 : (1922) Bom. 337. 64 I. C. 644

—*Proof of—Nature of disposition—Credibility of witness—Standard of proof—Examination of attesting witnesses—Testamentary capacity—Onus—Duty of Appellate Court.* See (1921) DIG. COL. 1097. *PRASANAMAYI DEBI v. BAIKUNTA NATH CHATTORAJ*, 49 Cal. 132 : 66 I. C. 782

—*Proof of—Preparation—Suspicious circumstances—Charge—Acquittal—Effect of—Natural provisions.* See (1921) DIG. COL. 1098. *SAROJINI DAS v. HARIDAS GHOSH*. 66 I. C. 774. (1922) Cal. 12.

—*Testamentary capacity—Proof of—Sound and disposing state of mind—Directions given by testator—Will prepared in accordance with—Signature—Registration.*

Testamentary capacity is a relative thing; it is to be considered with reference to the particular will—the question being not whether the testator had capacity for will making, but whether he had capacity to make the disputed will. He may have had capacity to make that will in the circumstances and yet not have had the capacity to make a more complex will or he may not have had the capacity to make the will in suit and yet have had capacity to make a less complex or different one; whether he understood the particular thing he was doing is the vital question.

Where a testator has given instructions for the will while in health and executes the document prepared in accordance therewith while in illness slight proof of knowledge and approval will suffice, and the will may be held valid, though at the time of execution the testator merely recollects that he has given those instructions but believes that the will which he is executing is in accordance with them. (*Mookerjee and Chotzner, JJ.*) *SARADINDU NATH RAI CHAUDHURI v. SUDHIR CHANDRA DAS*. 35 C. L. J. 569 : 69 I. C. 48.

## WORDS.

*Will Undue Influence* — *Legacy* — *Setting aside.* See (1921) DIG. COL. 1109. *RAJA RAJESWARA SETHUPATHI AVERGAL v. KUPAUSWAMI AIYAR*. 68 I. C. 352.

*WORDS* — *Aulad—Meaning of.* See *DEED—CONSTRUCTION*. (1922) Lah. 215.

—*Adam wusal—Meaning of—Not realised—Not realisable.* See *AGRA TEN ACT Ss. 8 AND 9*. L. R. 3 A. 348 (Rev).

—*Bahamah wajah—With all rights* See *HINDU LAW, GIFT*. 65 I. C. 653.

—*Bakasht* — *Meaning of.* See *BENGAL TENANCY ACT S. 22 (2)*. 3 Pat. L. T. 13.

—*Biswi—Meaning of.* See *LAND TENURE, OUDH*. 90 L. J. 141.

—*Fas landan—Meaning of—Lineal descendants—Daughters and daughter's sons if included.* See *BERAR INAM RULES CL. 111, R. V.*. 65 I. C. 72.

—*Haqa chaharum—Meaning of.* See *LANDLORD AND TENANT—CESS*. 20 A. L. J. 646.

—*Har—Meaning of* See *DEED—CONSTRUCTION*. 65 I. C. 598.

—*Kasht—Bakasht—Meaning of* See *B. T. ACT, S. 22 (2)*. 3 Pat. L. T. 13.

—*Maqbuza—Meaning of.* See *WILL, CONSTRUCTION*. 90 L. J. 262.

—*Malik—Absolute right.* See *HINDU LAW—WILL*. 42 M. L. J. 492 (P. C.)

—*Malik—Meaning of.* See *HINDU LAW—WILL*. 3 Pat. L. T. 133. (P. C.)

—*Malik—Meaning of—Will—Absolute estate.* See *WILL—CONSTRUCTION*. 90 L. J. 327.

—*Malik—Meaning of.* See *WILL—CONSTRUCTION*. 15 S. L. R. 202.

—*Malik—Meaning of.* See *DEED—CONSTRUCTION*. (1922) Pat. 70.

—*Malik—Malikwa waris—Female donee—Absolute estate.* See *HINDU LAW—WILL, CONSTRUCTION*. 64 I. C. 752

—*"Malik Mustakil kamil"—Meaning of—Do not necessarily confer absolute estate.* See *DEED—CONSTRUCTION*. (1922) Pat. 74.

—*Marfat—Meaning of.* See *C. P. CODE, S. 47*. 64 I. C. 124.

—*Mokra—Meaning of.* See *LANDLORD AND TENANT—PERMANENT TENANCY*. 35 C. L. J. 90.

—*Naslan bad naslan—Meaning of.* See *LEASE—CONSTRUCTION*. 65 I. C. 707.

—*Paramsana—Meaning of.* See *LAND TENURES—OUDH*. 90 L. J. 141

## WORDS

——Public place—Meaning of—Place to which public have access. *See* GAMBLING ACT S. 13. 20 A. L. J. 80.

——Putra Poutradi Santati—Meaning of—Absolute—No difference whether found in a will or lease. *See* LEASE. 24 Bom. L. R. 300.

——Putrapautradi Krame — Perpetual and heritable estate. *See* HINDU LAW, GIFT. 64 I. C. 518.

——Qabiz—Meaning of *See* HINDU LAW WILL. 65 I. C. 462.

——QARIB—MEANING OF — *See* WAJIB-UL-ARZ. 9 O. L. J. 127.

——Shawls—Meaning of. *See* RAILWAYS ACT, S. 72. 24 Bom. L. R. 416.

——Taqaui—Meaning of. *See* U. P. LAND REVENUE ACT Ss. 160, 161, 162. 66 I. C. 620.

——Teji-mandi — Teji — Mandi — Meaning of. *See* CONTRACT ACT, S. 30. 24 Bom. L. R. 60.

——Thika—Mokra—Meaning of. *See* LANDLORD AND TENANT—PERMANENT TENANCY. 35 C. L. J. 90.

——Waris—Meaning of. *See* WILL CONSTRUCTION. 15 S. L. R. 202.

——Waris—Meaning of, *See* HINDU LAW WILL. 65 I. C. 462.

——Walda'—'Bhaiya'—Meaning of. *See* 65 I. C. 308.

**WORKMAN'S BREACH OF CONTRACT ACT (XIII of 1859)—Applicability—Artificer—Contractor.**

A contract by a person to carry stones on his camels is not the contract of an artificer or workman or labourer within S. 1 of the Workman's Breach of contract Act. (*Shadi Lal, C. J.*) JAFAR v. EMPEROR. 3 Lah. 371.

——S. 1—Contract with two workmen or artificers—Proceedings under the Act—Elements of offence.

## ZEMINDARI.

Notwithstanding the language of S. 1 of the Workman's Breach of Contract Act, it is open to an employer to start proceedings under the Act in respect of a contract entered into with two artificers jointly. In a case under the Act, the court has to find on the evidence whether the artificers have received an advance of money (*Oldfield and Devadoss, JJ.*) KANDASAMI MUDALI v. GURUSWAMI PILLAI. 44 M. L. J. 53 : 31 M. L. T. 475 (H. C.) : 16 L. W. 883.

——S. 2—Artificer—Meaning of—Musician if within the Act—Discretion of Court.

A person who plays a musical instrument in a band is not an artificer, workman or labourer within the meaning of S. 1 of the Workman's Breach of Contract Act.

S. 2 of the Workman's Breach of Contract Act, as amended by Act XII of 1920 gives a Magistrate complete discretion to order either the re-payment of the advance or the performance of the work. (*Saunders, J. C.*) NGA THA GYAN v. NGA BA E, (1922) U. B. 9 : 64 I. C. 370 : 23 Cr. L. J. 2.

——S. 2—Refusal to work—Physical fitness—When an offence.

A person can be held to have refused "wilfully and without lawfully or reasonable excuse" only if it is proved that he was physically fit at the time (*Macgregor, J.*) HEETH LAL KADRIA v. MOOKSUD ALLY. 1 B. L. J. 109.

**WORKS OF DEFENCE ACT (VII of 1903) —Demolition of platform—Acquiescence in existence.**

Where the cantonment authorities acquiesced in the existence of a platform for 30 years, they had no power to demolish it. Nor would the Indian Works of Defence Act afford any authority for its demolition (*Stuart, J.*) RAM RATAN v. KING-EMPEROR. L. R. 3 A. 15 (Cr). 20 A. L. J. 169 : 65 I. C. 855 : 23 Cr. L. J. 199 : (1922) A. 86.

**ZEMINDARI—Haq-i-chaharum—Right of Zemindar—Liability of purchaser of house property**  
*See* LANDLORD AND TENANT—CESSES.

20 A. L. J. 646.

# THE YEARLY DIGEST

## 1922

### SUPPLEMENT.

#### ACCOUNTS.

##### ACCOUNTS—*Mistake in.*

A person is always entitled to prove if he can that there was a mistake in the accounts and that he signed them as correct by mistake. (*Batten, J. C.*) SETH BHOJ- AJ v. PANDA SHANKAR NATH. (1922) Nag 265.

##### ADMINISTRATION—*Jurisdiction—Release of a share.*

Pending the administration of the estate the District Judge has jurisdiction to direct the share of one of the heirs who gives an undertaking to be responsible for his share of debts to be made over to him. Such an order of the District Judge merely operates as an order of discharge of the Receiver so far as that share is concerned (*Coutts and Das, J.J.*) MT. DULHIN SONA KOER v. SAIED SHAH MAHMUDDUL HAQUE

(1922) P. 585.

##### AGRA TEN. ACT (II of 1901).—*Agreement relating to land—Admissibility.*

Agreements relating to land when reduced to writing and filed in any Court are inadmissible in evidence, unless they are stamped and registered according to the law in force at the date of their execution, except in so far as they relate to the subject-matter of the suit and have been embodied in any order or decree of the Court (*Hopkins S. M. and Porter, J. M.*) MUKTA PRASAD v. MOJI LAL. L R. 3 All. 315 (Rev.)

##### —S. 68—*Lease—Thekadar's right to grant.*

The thekadar has the ordinary powers of a landlord including the power to grant a lease. (*Simpson, A. J. C.*) BHUSAN v. JAGESHWAR. (1922) Oudh 216.

##### —S. 95—*Record of rights—Entries in—Effect.*

In a suit for a declaration that a tenant was a tenant of *sir*, it was proved that in the last record of rights prepared before 1902 the land had been recorded as an occupancy holding and not as *sir*, while admittedly there was no case for applying cl. (b) or (c) of the definition of *sir* in S. 4 (12) of the United Provinces Land Revenue Act, 1901.

#### APPEAL.

*Held*, that the entry in the record of rights was conclusive proof that the land was not *sir* and that evidence and inference to the contrary were unavailing. (*Fearl S. M. and Harrison, J. M.*) RAGHUNANDAN SINGH v. BABU MATHURA PRASAD. L R 3 All 302 (Rev.)

##### —S. 201 (3)—*Suit for profits.*

In suits for profits brought by the plaintiff against his brother lambardar, the defendant pleaded that he and his brother were members of a joint Hindu family and that such a suit was not maintainable; *Held* the names of the parties to the suit being entered on a moiety share in each of the two mahals and having regard to the view taken of the S. 201 (3) of the Tenancy Act by the High Court the claim of the plaintiff, whose name was entered on a moiety of the property, ought to have been decreed. There is a presumption resulting in preventing persons from pleading that the family is a joint Hindu family, as against the entries in the khewat, 32 All 779 ref. to. (*Lindsay and Gokul Prasad, J.J.*) SHEO NARAIN v. BALA RAO. 44 All 616: (1922) All. 332.

##### ALLUVION AND DILUVION—*Change in river course—Land washed away and placed adjoining another's land—Right to.*

The mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B, 27 C. 768 Rel. Whoever has land, wherever it is, whatever may be the accident to which it has been exposed, the ground remains the property of the owner, (*Simpson and Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD v. NARAYAN DAS. 9 O. L. J. 518.

##### APPEAL—*Decree for joint possession—One of the plaintiffs not made respondent—Bringing him on record after the death of another.*

The defendants appealed against a decree for joint possession in favour of 5 plaintiffs to High Court but only four plaintiffs had been made respondents, *Held*, the appeal could not be heard because the decree was one for joint possession so that even if the appeal were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree.

## APPEAL

Where after the death of one of the respondents the plaintiff, who had been omitted from the category of respondents was, after the period of limitation, substituted in his place. *Held* the appeal could not be maintained. 19 Cal. W. N. 290 foll. (*Counts and Dcs JJ.*) *TEJ NARAIN SAHU v. DAL RAMSAHU.* (1922) P. 606.

## Issue to be decided by courts.

In appealable cases the courts below should, as far as may be practicable, pronounce their opinion on all the important points so as to avoid remand, expense and delay. (*Sir John Edge*) *MAHOMED SULAIMAN v. KUMAR BIRENDRA CHANDRA SINGH.* (1922) P. C. 403.

Right of—Party dismissed from record—Prejudice *Sec* (1921) DIG. COL. 23 AGENT. B N, W. RY. CO. v. JAGANNATH AGARWALLA 66 I. C. 903.

## APPELLATE COURT—Evidence—Cogent grounds to alter conclusion of trial court

Cogent grounds would be needed to alter the conclusion drawn by the trial Court from the oral evidence which the appellant gave. (*Lord Sumner*) *SOCRATES ATYCHIDS v. SECY OF STATE FOR INDIA.* (1922) P. C. 371.

BENAMI—Test of—Evidence of Benami. *See* (1921) DIG. COL. 38. MT. PEWANDABAI v. CHATAN LAL. 15 S L R 84

## BENGAL LAND REVENUE SALES ACT (XI of 1859), S 3—Arrears.

Where 10th November, 1862 was merely the date when the *kabuliat* was signed and the tenant in September, 1862 had taken over a then existing tenancy of the estate. *Held*, the tenancy continued as before and when it was not shown that the accounts in the Collector's office were not correctly kept the presumption was that they were correctly kept. Arrears according to the accounts were therefore, such as would justify sale (*Sir John Edge.*) *MAHOMED SULAIMAN v. KUMAR BIRENDRA CHANDRA SINGH.* (1922) P. C. 403.

BENGAL PATNI REGULATION, Ss. 8 (2) and 10—Notice to be struck up in Collector's cutchery—Requirements of Patni Regulation—Conformity with. *See* (1921) DIG. COL. 51. RAJA BUPENDRA NARAIN SINGH v. MADAR BUX. 66 I. C. 793.

BEN. TENANCY ACT Ss. 29 and 147 (A)—Suit in ejectment by landlords—Expiry of lease—Compromise—Enhancement of rent, legality of.

S 29 of the B. T. Act applies to the rent of an occupancy raiyat and S. 147 A applies to a suit between a landlord and a tenant as such. Where a suit was brought by the plaintiff for ejectment of the defendants, on the allegation that defendants who had been holding under a time expired *kabuliyat* were trespassers, there was a compromise under which defendants agreed to remain in possession of the land and were to be recognised as tenants with occupancy rights at the rents which were mentioned in the compromise. The defendants agreed to pay a lump sum of money for old arrears. There was default in the payment of

## BURDEN OF PROOF.

the sum agreed upon and the landlord brought a suit for recovery of the amount.

*Held*, that the suit was not governed either by S. 29 or S. 147 A of the B. T. Act, as the prior suit which ended in a compromise was a suit between a landlord and trespasser, (*Counts and Adams, JJ.*) *CHOUDHURI CHED GOBIND SINGH v. MAHABIR MISSER.* (1922) Pat. 319.

S. 50—Payment of rent at uniform rent—Presumption.

The mere fact of payment of rent at a uniform rate for any number of years, apart from the presumption that can be raised under S. 50 B. T. Act, does not raise any presumption of fixing of rent. (*Sukrawardy and Cuming, JJ.*) *YAKUB ALI CHOUDHURI v. RAJ KUMAR DUTTA*

65 I. C. 527.

S. 147 A—Applicability—Suit between landlord and trespasser. *See* BENGAL TENANCY ACT, Ss. 29 AND 147 A. (1922) Pat 319

Ss. 158 B and 159—Purchaser of under-tenure at auction sale under a rent decree—Rights of. *See* LIM. ACT, ART. 139

(1922) Cal. 544.

Ss 159 and 161—Prescriptive title.

Per *Woodroffe, J*: The word encumbrance as used in Ss. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant (*Woodroffe, Wainmsley and Sukrawardy JJ.*) *JNANENDRA MOHAN DUTT v. UMESH CHANDRA GUHA*

26 C. W. N. 985 : (1922) Cal. 544

S. 167—Suit for possession—Auction purchaser of under-tenure at rent sale—Subsequent purchaser more than twelve years after—Limitation. *See* LIM. ACT, ARTS 137 140, 144. (1922) Cal. 544.

## BERAR INAM RULES CLASSES II AND IV—Scope of

Where the Inam certificate itself does not mention the class and in the certificate the purpose of the grant is stated to be the service of the Kazi and maintenance, and the tenure to be in perpetuity conditional on service. *Held* the grant is both a maintenance and a service grant. As a service grant the inam does fall under class II. The main purpose of the inam was the maintenance of the family and the service stipulated for is not necessarily personal service by the particular person in whose name the certificate for the time being stands but is service by any member or members of the family of the first grantee from the British Government. (*Kotwal, A. J. C.*) *SYED WAZIRUDDIN v. SHAHBUDDIN.* (1922) Nag. 254.

BURDEN OF PROOF—Legacy—Validity—Consent of heir as to quantum. *See* MAHOMEDAN LAW—WILL. (1922) P. C. 391.

Common carrier—Liability under Railways Act Effect of Risk Notes. *See* RAILWAYS ACT, Ss. 72, 76. 67 I. C. 664.

Permanent tenancy—*See* LANDLORD AND TENANT—PERMANENT TENANCY. (1922) Lah. 329.

## C. P. LAND REVENUE ACT, S. 160

C. P. LAND REVENUE ACT (1917) S. 160—*Scope*

By S. 12 (1) of the Lim Act, or S. 8 of the General Clauses Act and S. 160 of the Land Revenue Act the period of limitation is not three years but three years and one day. (*Hallifax A. J. C.*) NARAYAN PATEL v. ABDUL GHANI

(1922) Nag 261

S. 46 (5)—*Trees in occupancy holding—Mortgage.*

Mortgage of trees amounts to a transfer of the rights in the occupancy tenure in a portion of the tenancy holding and the document cannot be registered in contravention of S. 46 (5) of the C. P. Tenancy Act of 1898. The mortgage is not operative as regards the other property except the trees covered by it. An instrument so registered cannot operate in respect of any part of the property ostensibly transferred by it, 13 N. L. R. 165 Fol. (*Prideaux, A. J. C.*) TUKARAM v. NAIBA. (1922) Nag 252.

C. P. MUNICIPAL ACT, S. 122—*Conviction under—Absence of that structure proof occupies more space—Notice for prosecution—Authority for sanction*

In the absence of proof that a new structure put up occupied more space than the original one a conviction under S. 122, C. P. Municipal Act cannot be supported. Meaning of 'Building' explained. A prosecution under the Act can take place only after a resolution passed at a meeting properly convened and conducted. (*Drake Brockman J. C.*) THAKUR LAL v. SECRETARY, MUNICIPAL COMMITTEE, KHANDEWA

64 I C 274 :  
22 Cr L J 754C. P. CODE (1908), S. 11—*Adverse finding—Decree in favour of party—Effect.*

Where a decree is one of dismissal in favour of the defendant, but there is an adverse finding against him on one point, he cannot appeal and there is no question of *res judicata*. Cases where a decree is based on two grounds either of which is sufficient to support the decree stand on a different footing. (*Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE CHOUDHURY v. KUMUD BAN MAHATA.

65 I. C. 271

S. 11—*Co-defendants—Decision in prior litigation—When a bar.*

In the absence of an express issue raised between co-defendants and a decision thereon a prior adjudication does not constitute *res judicata* between them. (*Simpson, A. J. C.*) KHABIL v. MAHOMED ISMAIL

90 I. J. 540.

S. 11—*Question of law—Erroneous decision on—Effect.*

A decision on a question of law may be *res judicata* but an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a court from deciding the same question on its arising between the same parties in a subsequent suit. (*Broadway and Abdul Quader, JJ.*) LALA MOTI SAGAR v. DHANNA MAL AND OTHERS.

(1922) Lah. 329.

S. 11—*Explanation IV—Suit for possession—Title by purchase asserted and negatived—Subsequent suit on title by heirship—Bar of.*

## C. P. CODE (1908) S. 98.

When plaintiff sued to recover possession of property from a trespasser on the ground that he was owner by joint purchase with two others, and obtained a decree for his share, and subsequently brought a suit against the same defendant for possession of the remaining portion of the property claiming as heir to a deceased person, a title which he could have put forward in the alternative in the earlier suit but did not, the subsequent suit is barred by *res judicata*.

11 Ben. L. R. 158, 40 Cal. 1. Relied on 41 I. A. 142 distinguished (*Krishnan and Ramesam, JJ.*) THONA SINA NAINA MUHAMMAD ROWTHER v. ABDUL RAHMAN ROWTHER. (1922) M. W. N. 845.

S. 11—*Expl. VI.—Applicability.*

Explanation VI, S. 11 of the Civil Procedure Code provides that where 'persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of that right, be deemed to claim under the persons so litigating. In order to make that explanation applicable, there ought to be a community of interest claimed on the strength of a common title and the claim must have been made in good faith for the enforcement or defence of that common right on behalf of all the persons having such common interest. The common interest may rest on the existence of a joint family, in which that interest is vested or may rest on a joint title otherwise obtained (*Kanhaiya Lal, J. C.*) HANSLA BAKSH SINGH v. RAJ BUKSH SINGH.

4 U. P. L. R. (O. C.) 47.

S. 25—*Judicial Commissioner of Coorg—Transfer of suit to High Court—Trial on the Original Side—Appeal*

Where a case is transferred under S. 25, C. P. Code by the Governor-General in Council from the Court of the Judicial Commissioner of Coorg to the Original Side of the High Court of Madras and the suit is tried by the High Court, there is an appeal under the Letters Patent from the decision. (1913) A. C. 546 applied. (*Schwabe, C. J. and Odgers, J.*) KONGANDRA APPAYYA v. KONGANDRA KUTTAPPA.

(1922) M. W. N. 830.

S. 92—*Scope of—Suit for possession and declaration—Sanction when necessary.*

Where the worshippers of a temple sue for possession of temple property, the suit is not maintainable as *prima facie* it is only the trustees who could claim that relief. They can however sue for a declaration that it is trust property and to such a suit S. 92 will not apply. (*Broadway and Abdul Rufof, JJ.*) SALIG RAM v. BASSAO MAL

67 I. C. 320.

S. 98—*Reference to a third judge—Third Judge deciding case on another point—Procedure.*

Under S. 98 C. P. Code a third judge to whom a point of law is referred on a difference of opinion between the members of a Division Bench of the High Court, cannot dispose of the appeal generally but can only dispose of the point of law referred and then decide the appeal in the manner indicated by the referring judges having regard to the possible answers that might be given. Where the question of law actually referred to a

## C. P. CODE (1908) S. 100.

third judge was not decided by him and the reference consequently proves infructuous, the appeal must be disposed of under S. 98 (2) C P CODE. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT v. UMESH CHANDRA GUHA. 26 C. W. N. 985. (1922) C. 544.

## —S. 100—Custom—Finding as to—Mixed question of law and fact

Where a point of custom raises a mixed question of law and fact the court can in second appeal go into the evidence to see whether it establishes the alleged custom. (*Simpson and Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD v. NARAYAN DAS. 9 O. L. J. 518.

## —S. 100—Finding of fact—Inadmissible evidence—Consideration of—Effect of.

Where a finding of fact is materially based on inadmissible evidence, the High Court will not accept it in second appeal. (*Halifax, A. J. C.*) RAOJI v. WARLU. 18 N. L. R. 182

## —S. 100—Finding of fact—Inferences from fact—Interference in second appeal. See (1921) DIG. COL 185. MT PEWANDBAI v. CHATAN MAL. 15 S. L. R. 84.

## —S. 100—Question of fact—Rebuttal of presumption.

The question whether the presumption of the correctness of the Record of Rights has been rebutted in a particular case is more a question of fact than of law. (*Suhrawardy and Cumming, JJ.*) YAKUB ALI CHOWDHURI v. RAJ KUMAR DUTTA. 65 I. C. 527.

## —S. 100—Tenancy, nature of—Mixed question of law and fact.

A decision on a question of the nature of the tenancy, viz., whether it is a permanent one or a tenancy at will is a mixed question of law and fact and can be decided in second appeal. 44 Cal. 119 and 8 C. W. N. 775 followed. (*Broadway and Abdul Quadir, JJ.*) LALA MOTI SAGAR v. DHAMA MAL. (1922) Lah. 329.

## —S. 109—Legal Practitioner—Refusal to enrol.

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted 4 Pat. L. J. 423 foll. (*Miller C. J. and Adami, J.*) SUDHAN-SU BALA HAZRA *In re*. (1922) P. 603.

## —Ss. 109 and 110—Confirming judgment—Decree confirmed but on different grounds.

When the two judges of the High Court forming a Division Bench confirm the decree of the court below but for different reasons, the judgment of the High Court is one of affirmance. 44 M. 293; 25 A. 109 foll. (*Daniels and Lyle, A. J. C.*) MOHAMMAD ALI KHAN v. GHAZANFAR ALI KHAN. 25 O. C. 277.

## —S. 110—Leave to appeal to the Privy Council—Appealable value—Directly or indirectly involving property over 10,000 rupees in value.

Where a decision given with respect to one half of the property conveyed under a deed can have no possible effect on a future litigation relating

## C. P. CODE (1908) S. 115.

to the other half of the property, such decision cannot be said even indirectly to involve a question respecting the subject matter of the said litigation (*Ashworth and Simpson, A. J. C.*) BHAGWATI PRASAD v. ACHHAIBAR SINGH. 9 O. L. J. 531.

## —S. 110—Leave to appeal to the Privy Council—Valuation—Admissions of parties.

Where the defendants accepted the valuation given by the plaintiffs in the plaint and in their own memorandum of appeal, they cannot afterwards contend that the valuation is wrong and that the case is of the appealable value to the Privy Council (*Ashworth and Simpson, A. J. C.*) BHAGWATI PRASAD v. ACHHAIBAR SINGH. 9 O. L. J. 531.

## —S. 115—Court subordinate to the High Court—Meaning of—Rent Court.

In cases where an appeal would lie to the High Court, the Rent Court is a court subordinate to the High Court within the meaning of S. 115 C. P. Code 14 O. C. 38 foll. (*Simpson and Wazir Hasan, A. J. C.*) CHANHRAJA v. KALKA PANDE. 9 O. L. J. 543.

## —S. 115—Case decided—Other remedy open—Effect.

An order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid does not constitute the decision of a case within the meaning of the section. If the amount is not paid and the case dismissed, there is a right of appeal and the interlocutory order can be attacked therein. (*Daniels, J. C.*) NARENDRA BAHADUR SINGH PANDE v. PEARY LAL. 24 O. C. 225; 64 I. C. 211.

## —Ss. 115 and 144—Case decided—Decision as to payment of court-fee.

An order of the appellate court directing the appellant to pay *advalorem* court-fee is a case decided within the meaning of S. 115 C. P. Code and the High Court can revise the order. (*Oldfield, J.*) SUDALI MUTHU PILLAI v. SUDALI MUTHU PILLAI. (1922) M. W. N. 831.

## —S. 115 and O. 9 R. 13—Dismissal for default—Setting aside—Improper refusal—Revision.

Where a court dismissed an application to set aside an order of dismissal of a suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff the order is open to revision under S. 115 C. P. Code (*Krishnan, J.*) KOWTHA SURYANARAYANA GARU v. YARUDALA VENKAYYA. (1922) M. W. N. 822.

## —S. 115—Other remedy open—interlocutory order—Liability for accounts—Government of India Act 5, 107.

Where the parties have a right of appeal from the ultimate decision after the accounts are taken the High Court should not interfere in revision or superintendence, unless it were proved to its satisfaction that the judge had given improper directions in his interlocutory order as to the mode of taking accounts to the commissioner which unless varied or set aside would result in



## C. P. CODE, (1908) S. 115.

irreparable loss to the parties. (*Miller, C. J. and Mullick, J.*) *HARIHAR PRASAD SINGH v. MAHA'AJA KESHO PRASAD SINGH.* (1922) P. 598

—S. 115—Other remedy open—Appeal from final order of dismissal—Interlocutory orders open to attack under S. 105, C. P. Code—Effect See C. P. CODE, S. 115—CASE DECIDED.

64 I. C. 211.

—S. 115—Wrong view of law.

An alleged wrong view of law taken by the court is not a ground for interference in revision (*Batten, J. C.*) *MT. BARI BAHU v. KUNDAN SINGH.* (1922) Nag. 264

—Ss. 151, 152—Decree—Amendment—Lapse of time.

Where the parties allowed a decree to be enforced for 6 years before attempting to amend it, it should not be amended, specially when there is no clerical or arithmetical mistake (*Prideaux, A. J. C.*) *RAJE UDAJIRAM v. RAJESHWAR.*

67 I. C. 310.

—O. 1, r. 3—Requirements.

O. 1, R. 3 of the Civil Procedure Code requires that all persons should be joined as defendants against whom any right to relief in respect of or arising out of the same act is alleged to exist, whether jointly or severally where, if separate suits were brought against such persons, any common question of law or fact would arise, (*Kanhaiya Lal, J. C.*) *HAUSHA BAKSH SINGH v. RAJ BAKSH SINGH.* 4 U. P. L. R. (O. C.) 47.

—O. 2, R. 2—Mortgage—Suit on—Dismissal of prior suit for possession—Subsequent suit for money.

The dismissal of a prior suit by a mortgagee for possession of the mortgaged land bars a subsequent suit for recovery of the principal and interest due on the mortgage. 25 B 161 foll (*Scott Smith and Leslie Jones, JJ.*) *HARNAM SINGH v. BHOLA SINGH.* 4 Lah. L. J. 502.

—O. 2, R. 2—Mortgagee suing twice for sale.

If the mortgage provided, as mortgages always do in England, for an independent obligation to pay the principal and the interest, then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. In such a case the cause of action would be distinct. The matter is however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action, the non-payment of the interest gives rise, to two forms of relief which the Code provides shall not be split.

The fact that the decree obtained by the mortgagee was not a decree for sale but in the nature of a personal judgment, does not alter the effect of his claiming a decree for money recoverable from the mortgaged property. (*Lord Buckmaster.*) *KHISHAN NARAIN v. BALA MAL.* (1922) P. C. 412.

—O. 6, R. 17—Pleadings—Amendment—Amendment ordered after conclusion of trial—Irregularity—Gross negligence.

## C. P. CODE, (1908) O. 17, R. 3

In a suit for a declaration that a decree obtained against a minor was not binding on him on account of the gross negligence of the guardian and item in the conduct of the prior suit, the plaintiff did not allege and the defendant did not ask for, particulars of the alleged negligence. The parties however went to trial and it was found on the evidence that negligence had been established. Subsequently the court ordered an amendment of the plaintiff. Held that the case having been tried out and a finding of negligence arrived at, no amendment was necessary. (*Krishnan and Venkatasubba Rao, JJ.*) *VEERAPPAN v. MENNAPPAN.* 31 M. L. T. 449 (H. C.)

—O. 6, R. 17—Grounds for.

In a suit for specific performance or in the alternative for damages, plaintiff can be allowed to amend his plaintiff by giving up his claim for specific performance in view of the fact that the property had depreciated in value. It is a well recognised rule of law that under O. 6, R. 17, C. P. C. the powers of amendment vested in the Court are very wide. (*Raymond A. J. C.*) *EANCHOSE NARSE v. ABDUL HUSSAIN* (1922) S. 46.

—O. 7, R. 10—Scope of—Plaint consisting of claims partly within and partly without jurisdiction—Ancestral home, if a test.

O. 7 R. 10 does not specifically state what is to be done when a plaintiff consists of a claim within the court's jurisdiction and also a claim outside the jurisdiction but it obviously means that that portion of such a plaintiff which is outside the jurisdiction shall be treated as though it was a distinct plaintiff by itself.

The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction, is within the jurisdiction does not matter. (*Walsh and Wallach, JJ.*) *KISHORI LAL v. RAM SUNDAR.* 64 I. C. 688.

—O. 13, Rr. 1 and 2—Evidence—Production of—Documents filed at late stage—Admissibility—Power of court.

Under O. 13 Rr. 1 and 2 C. P. C. unlike the corresponding provisions of S. 138 of the Old Code, there is an absolute prohibition of the reception of documents not produced at the first hearing, unless good cause is shown for their non-production at that stage. The Court may however admit the evidence in the interests of justice if the court is of opinion that the reception of the evidence will enable the person tendering it to win a case which he will otherwise lose and that the loss on the case would be an excessive penalty for failure to produce the evidence in time. (*Ashworth A. J. C.*) *SHANKAR LAL v. MAHBUB SHAW.* 25 O. C. 286.

—O. 17, R. 3 and O. 9, R. 6—Absence of defendant on date of hearing—Procedure.

Where the defendant absents himself on the date fixed for evidence in a case, the proper procedure for a court is to proceed under O. 17, R. 3 and not under O. 9, R. 6 C. P. C. (*Simpson and Wazir Hasan, A. J. C.*) *CHAUHARJA v. KALKA PANDE.* 90, L. J. 548.

C. P. CODE, (1908) O. 21, R. 15.

—O. 21, R. 15 and 22—Application under—Defective—If saves limitation. See LIM. ACT ART. 182 (5). (1922) P. 597

—O. 22 R. 4—Appeal—Death of one respondent—Survival of right—No abatement.

Where in an appeal from a suit for a declaration that certain properties had been dedicated to waqf and that their alienation was void, one of the plaintiffs (respondents) dies the right to appeal against him does not survive against his legal representatives and the appeal can proceed without them. (*Broadway and Martineau, JJ.*) RAHIM BAKSH v. CHANNAH DIN. 4 Lah. L. J. 511

—O. 22, R. 10—Devolution or transfer of interests Preemption suit—Right of transferee to continue suit.

Pending a suit for preemption by the plaintiff he gifted away all his property to his son who thereupon applied to continue the suit under O. 22, R. 10, C. P. Code Held, that the son as donee could continue the suit. The general principle is that the right of preemption runs with the land and a transfer of the property carries with it the right of pre-emption (*Simpson and Wazir Hasan, A. J. C.*) SADIQ HUSAIN KHAN v. MOHAMMAD KARIM. 25 I. C. 319,

—O. 23 R. 1—Application to withdraw suit—Withdrawal of application.

An application to withdraw a suit can itself be withdrawn for proper reasons and the suit could be proceeded with thereafter 1912 M. W. N. 997 Ref. (*Oldfield, J.*) LAKSHMANA PILLAI v. APPALWAR ALWAR AYYANGAR. 31 M. L. T. 451 (H. C.)

—O. 32, R. 15—Guardian of a defendant alleged to be of unsound mind by one party and denied by the opposite party—Judicial inquiry, if necessary

Where the plaintiff does not allege but denies that defendant is of unsound mind or mentally infirm to defend the suit, it is desirable that there should be a judicial inquiry in the matter and that both parties be allowed to adduce evidence (*Woodroffe and Ghose, JJ.*) RAM SUNDAR SAHA v. KALI NARAIN SEN CHOUDHRY. (1922) Cal. 86

—O. 40, R. 4—Receiver—Liability of, to estate—Procedure for determination—Fixing of approximate amount—Illegal See C. P. CODE. O 43 R. 1 (s). 43 M. L. J. 707

—O. 41, R. 1—Several appeals, from one judgment—Copies of judgment necessary with memo

Where there are several appeals from one judgment by different appellants, the High Court will insist under the rules to have copies of judgment filed with each memo of appeal though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals. (*Dawson Miller, C. J. and Coutts, J.*) RAJAN THAKUR v. CHARITAR THAKUR. (1922) P. 580.

C. P. CODE, (1908) O. 43, R. 1.

—O. 41, R. 22—Cross objections—Hearing of—Dismissal of appeal—Co-respondents.

A cross appeal should ordinarily be directed against the appellants and not against the correspondents. Where an appeal is dismissed for failure to furnish security under O. 41, R. 10, C. P. Code in the presence of the respondent and without any objection on his part he cannot subsequently proceed with his cross objections. 5 Pat. L. J. 328; 8 O. L. J. 358 foll. (*Daniels Lyle, A. J. C.*) QARA MAHOMED SHAHAN v. BAZAR ARA BEGUM. 25 O. C. 280.

—O. 41, R. 23—Remand—Order for—Decision when conclusive.

In the case of a remand under O. 41, R. 23 points decided by the order of remand are final subject to appeal and cannot be reopened at any subsequent stage of the litigation. 48 C. 499, 43 A. 379 Ref. (*Daniels and Dalal, A. J. C.*) JANKI SHAH v. MAHOMED ABBAS. 25 O. C. 245.

—O. 41, R. 27—Additional evidence—Admission of, on appeal—Considerations governing.

A party cannot claim admission of additional evidence oral or documentary, as a matter of right. O. 41, R. 27, C. P. Code gives a discretion to the Court of appeal to allow the production of such evidence and lays down definite limits within which additional evidence may be produced in an appellate court. The words "any other substantial cause" mean a *causa ejusdem generis* to the grounds already mentioned in O. 41 R. 27 C. P. Code or in other words as meaning a case at least analogous to those specified previously. Further the appellate court has a discretion in the matter and when it has exercised its discretion in one way it is not open to a court of second appeal to interfere with that discretion. 42 M. 737 Rel. (*Wazir Hasan, A. J. C.*) BADRI PRASAD v. MUKANDI. 9. O. L. J. 505.

—O. 43, R. 1 (c)—Application to execute decree dismissed for default of prosecution—Application for restoration—Appeal—Maintainability.

Where an application to restore to file an execution application is dismissed for default of prosecution there is no right of appeal. (*Piggott and Walsh, JJ.*) BABU BHARATINDER v. HAKIM ASHGAR ALI KHAN. L. R. 3 A. 622.

—O. 43 R. 1 Cl. (a)—Appeal against order under Or. 40, R. 4 directing attachment of Receiver's property for failure to pay amount fixed as due from him—Scope of—Correctness of amount—Right to question—Receiver's indebtedness—Procedure for fixing—Fixing of approximate amount—Legality.

In an appeal from an order under O. 40, R. 4 C. P. C. directing attachment of the property of a receiver on the ground that he failed to pay the amount directed to be paid by him, it is open to the receiver to question the amount fixed as due from him by the lower court.

C. P. CODE (1908), O. 45 R. 7.

*Held*, that the Court below erred in law in not fixing the exact amount of the receiver's indebtedness and in directing him to pay an approximate amount.

Observations on the proper procedure to be followed in fixing the amount to be paid by a receiver and in directing attachment of his property in default of payment. (*Krishnan and Venkatasubba Rao, JJ.*) R. M. P. PALANIAPPA CHETTI v. M. S. A. PL, PALANIAPPA CHETTI.

43 M. L. J. 707

—O. 45 R. 7—Time for furnishing security—Extension of.

The High Court has no power to extend the period of 6 weeks prescribed for the granting of security. (*Lyle and Ashworth, A. J. C.*) ASHIG ALI v. ARJUNAANUN NISSA.

25 O. C. 254

—O. 47 Rr. 4 and 8—Order granting application for review—Effect of—Procedure

The granting of an application for review merely amounts to a decision to rehear the case in which the decree or order (in respect of which a review is claimed) was passed. The judge hearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted the judge who has allowed the review becomes vested with jurisdiction to pass any order which the original judge could have passed. It may be sufficient for him merely to alter the order of the original judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue. (*Ashworth and Simpson, A.J.C.*) BHAGWATI PRASAD v. ACHHAIBAR SINGH.

9 O. L. J. 531

**CONTRACT**—Sale of goods—Indents—Relationship between indenter and person supplying goods—Ownership of goods—Property when passes—Tender of cheque for price of goods—Delivery. See (1921) DIG. 494. NAZARALI SAM SUDDIN v. MALUN & Co.

64 I. C. 943

**CONTRACT ACT, S. 30—Wagering contract—What amounts to.**

Where the plaintiff expects that the goods would be delivered to him and he enters into the contract with that expectation, and also in the hope of making some profit upon the difference in price. *Held*: the defendants might or might not have intended to deliver the goods, but that would not make the contract as a contract of wager. In order to bring a contract under S. 30 of the Contract Act it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference between the price at the time of the bargain and the price at some later time shall be paid; but if only one of the parties intends that no delivery shall take place the contract is not vitiated. Speculation does not necessarily involve a contract by way of wager and to constitute a contract a common intention to wager is essential. 44 Bom. 373 followed, referred to. (*Prasad, J.*) FIRM SANEHIRAM BAIJNATH AND OTHERS v. DEEPAJAL MARWARI.

(1922) P. 220.

**COURT FEES ACT, SCH. II ART. 11**

**CONTRACT ACT, S. 65—Scope of.**

S. 65 deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) of S. 2 an agreement not enforceable by law is said to be void. An agreement discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

An agreement to sell the right of a reversioner is manifestly void from its inception because its subject matter is incapable of being bound by sale (*Sir Lawrence Jenkins.*) THAKURAJN HARNATH KUAR v. THAKUR INDAR BAHADUR SINGH, (1922) P. C. 403.

—S. 74—Remission

Where the deed recited "I will claim a remission of annas-4-per cent, per month from the interest, if I pay the amount as stipulated. I will not claim remission if I do not repay the amount as stipulated". *Held*, the reduction in the rate of interest contemplated on punctual payment of instalments does not amount to a penalty. (*Prideaux, A. J. C.*) KESHEO PAO v. KRISHNA RAO.

(1922) Nag. 263.

**CO-SHARER—Title—Proof of—Right to use of water.**

The mere fact that the plaintiff has the right to use the water on the defendant's land does not make him a co-sharer in the land itself nor does it affect the defendant's title to the land. (*Shadi Lal and Wiberforce, JJ.*) SADAMAN v. LAKKU

4 Lah. L. J. 514.

**COURT FEE—Cross objections—Subject matter incapable of money valuation.**

Where the subject matter of certain cross objection cannot be valued in money the Court should accept any reasonable valuation put by the appellant. (*Kanhaya Lal, J. C. and Lyle, A. J. C.*) REJEO LOCHAN MAHARAJ v. RAM MANOHAR PRASAD.

25 O. C. J. 275.

**COURT FEES ACT, S. 7 (4) (e)—ART. 17 (vi) SCH. II—Scope.**

A suit under S. 31 of the Sp. Rel. Act brought for a declaration with consequential relief, for purposes of court-fees and jurisdiction is governed by S. 7 (4) (c) of the Court Fees Act, and Art. 17 (vi) of Sch. II of the Court-fees Act cannot apply where it is possible to estimate the money value of the claim. 7 N. L. R. 190 Foll. (*Batten, J. C.*) MT. BARI BAHU v. KUNDAN SINGH.

(1922) Nag. 264.

—S. 17—Redemption of usufructuary mortgage.—T. P. Act, S. 76 (H).

Where the plff. seeks to redeem the usufructuary mortgage the Court fee is payable on the principal amount exclusive of any surplus profits realised by the mortgagee and claimed in the suit. S. 17 of the Court Fees Act relates only to a suit which embraces two or more distinct subjects and does not apply to such a case. 29 All. 471; 8 N. L. R. 179, Foll. 16 Mad. 324; Dist. (*Drake Brockman, J. C.*) GOPIKISAN v. SARABJI

(1922) Nag. 259.

## COURT FEES ACT SCH. II, ART. 11.

—Sch. I, Art 11 or 17—Memorandum of cross objections—Valuation—Subject matter incapable of valuation. *See* COURT FEE.

25 O. C. 275

—Sch. II, art. 11—*Restitution proceedings—Appeal—Court-fee.*

Proceedings in restitution are proceedings in execution and the court fee payable on an appeal therefrom is under Sch. II art 11 of the Court Fees Act (*Oldfield, J.*) SUDALAI MUTHU PILLAI *v.* SUDALAI MUTHU PILLAI. (1922) M. W. N. 831

—Sch. II Art. 17 (vi)—Applicability of—Money value capable of being estimated. *See* COURT-FEES ACT, S. 7 (IV) C. (1922) Nag 264

CRIMINAL PROCEDURE CODE, Ss 107 and 112—*Allegations not specific—Effect.*

Where the allegations against the petitioners are too vague and do not give the necessary details which are required to inform the petitioners of the accusation that they have to meet, the Magistrate should not call up in the petitioners to show cause why they should not be bound down to keep the peace. 6 All. 25 and 41 Mad. 246 referred to (*Ross, J.*) MAHARAJ KUMAR NAND KISHORE NATH SAHI DEO AND OTHERS *v.* THE KING EMPEROR. (1922) P. 209

—S. 110—*Power of the Magistrate—Information—S. 192 if applies.*

The law in no way limits the method in which the Magistrate, who is empowered by the Local Government to receive the information and even if the information is addressed to the Judicial Commissioner or to another Magistrate and is then received by the Magistrate, there is nothing in the section which would preclude him from acting on the information so received. S. 192 Cr. P. C. applies to proceeding under the section. (*Mullick and Coutts, JJ.*) HIRANAND OJHA *v.* KING EMPEROR. (1922) P. 586.

—S. 110—*Proceedings under—Joint trial Legality of—Evidence—Weight due to.*

In proceedings under S 110, Cr. P. Code the joint trial of several persons is illegal. Where there is a large volume of evidence in favour of the accused which was as good as, if not better than that of the prosecution, there is no ground for ordering security under S. 110, Cr. P. Code. (*Scott Smith, J.*) KRISHNA *v.* THE CROWN. 4 Lah. L. J. 531

—Ss. 145, 146—*Evidence of possession on both sides equally unreliable—Order under S. 145 based on presumption of possession arising from the title, if valid—Such presumption when applicable—Interference by High Court—Magistrate directed to act under S. 146.*

Where in a proceeding under S 145, Cr. P. C. a Magistrate found that the evidence of possession on both sides was equally unreliable, but declared the second party to be in possession relying on the presumption as to possession arising from title;

*Held*, that the order of the Magistrate under S. 145 was bad and he was directed to act under S. 146, Cr. P. C.

## CR. P. CODE S. 503.

Where a Magistrate finds the evidence on both sides, which in itself is reliable, equally balanced, and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side. But this principle does not apply in a case where the Magistrate finds that the evidence of possession on both sides is equally unreliable. (*Sanderson, C. J. and Chotsner J.*) ASHOY KUMAR BHATTACHARJIA *v.* BROJESWAR GHATTAK. 26 C. W. N. 1000.

—S. 164—*Examination like cross-examination*

Statement made during examination of the accused which amounts to cross examination cannot be used against him (*Coutts and Adams, JJ.*) NIRA BHAGAT *v.* KING EMPEROR. (1922) P. 582.

—Ss. 192 and 110—*Scope of.*

S. 192 applies to a proceeding under S. 110, the proceeding being a case. (*Mullick and Coutts, JJ.*) HIRANAND OJHA *v.* KING EMPEROR. (1922) P. 586.

—S. 423—*Appeal disposed of on the merits—Pleader not heard—Power to revise judgment. See* CR. P. CODE, Ss. 439 AND 423. (1922) P. 587.

—Ss. 435 and 439—*Criminal revision—Dismissal for non-payment of printing charges—Power to rehear.*

Once a criminal revision case has been dismissed for default of payment of printing charges it is not competent to the High Court to rehear the case or entertain a fresh application for revision 23 M. L. J. 321 foll. (*Wallace J.*) NARRA APPAYYA *v.* DARSU VENKATAPPAYYA. (1922) M. W. N. 821.

—S. 439—*Findings of fact—When open to question in revision.*

Ordinarily the High Court would not in revision, go behind the concurrent findings of the courts below on a question of fact (*Devadoss, J.*) MARUTHAYEE *v.* APPAVU PILLAI. 31 M. L. T. 388 (H.C.)

—Ss. 439 and 423—*Appeal disposed of on merits—Pleaders' absence.*

Where the appeal is disposed of on the merits under S. 423, there is no power in the High Court under S. 439 to set aside the judgment of the court below, merely upon the ground that the pleader or the Counsel on behalf of the petitioner was not heard in the court below. (*Jwala Prasad and Coutts, JJ.*) OLAYAT KHAN *v.* KING EMPEROR. (1922) P. 587.

—S. 503—*Commission for examination of witnesses—Refusal—Unreasonable expense*

The District Magistrate is given under S. 503 a discretion in the matter of issuing a commission and in the attendance of a witness cannot be secured without enormous or unreasonable expense the District Magistrate might direct his examination on commission. 5 A. 92; 6 A. 224; 8 C. 896 Rel. (*Martineau J.*) PARMANAND *v.* THE CROWN. 4 Lah. L. J. 538.

## CR. P. CODE, S. 522.

—S. 522—House trespass—Unlawful possession during absence of owner—Owner kept out by force—Order under S. 522, legality of

Where a wife who had deserted her husband for several years took advantage of his temporary absence from his house, broke open the lock and entered into the house and subsequently kept out the husband by force, an order under S. 522 Cr. P. Code is legitimate (*Devadoss, J.*) *MARUTHAYEE v. APPAVU PILLAI*, 31 M. L. T. 388 (H. C.)

## CRIMINAL TRIAL—Confession.

When the story of confession was not told by the witness until after a fortnight of the occurrence, the evidence is unreliable (*Coutts and Adams, JJ.*) *NIRU BHAGAT v. KING EMPEROR* (1922) P. 582.

## —De Novo trial—Change of Magistrate—Application for new trial

Where after the charge had been framed, the Magistrate was transferred and the case was taken up by a new Magistrate, the accused is entitled to a *de novo* trial if he applies for it. A general allegation that an application was made but rejected, without specifying the date or the person who made it, is not entitled to much weight, (*Sanderson, C.J. and Panton, J.*) *SHAIKH AZIZ MANDAL v. GIRISH CHANDRA CHOUDHURY* 63 I. C. 38 : 23 Cr. L. J. 502.

## —Leading question.

A leading question to the prosecution witness by the prosecution cannot be allowed nor can the reply be used, (*Coutts and Adams, JJ.*) *NIRU BHAGAT v. KING EMPEROR*. (1922) P. 582.

## —Local inspection—Effect of.

Where a ter taking the evidence, the Magistrate at the request of both parties and in the presence of their pleaders inspected the locality solely for the purpose of understanding the evidence already given, there is nothing illegal in it, (*Sanderson, C. J. and Panton, J.*) *SHAIKH AZIZ MANDAL v. GIRISH CHANDRA CHOUDHURY*. 63 I. C. 38 : 23 Cr. L. J. 502.

## —Non-production of material witnesses

The non production of material witnesses like the investigation officers and the failure to explain it are serious omissions which cannot but throw suspicion on the whole prosecution case. (*Coutts and Adams, JJ.*) *NIRU BHAGAT v. KING EMPEROR*. (1922) P. 582.

## CUSTOM—Alienation—Necessity—Proof of—Old alienation—Onus—Ancestral property.

Where an alienation purporting to have been made for necessity is challenged a very long time afterwards the burden of proof is shifted to the plaintiffs to prove its invalidity. Property inherited through a female may be ancestral. 65 P. R. 1900 ; 18 I. C. 114 ; 10 I. P. R. 1916 32 P. R. 1895 Rel. (*Abdool Raoof and Baven Petman, JJ.*) *SOHAWA v. DEBI DIAL*. 4 Lah. L. J. 516.

## —Compromise by collaterals—Binding effect.

A compromise arrived at by a collateral in good faith believing it to be the best in the circumstances, is binding on his successors also.

## DAMAGES.

Where doubtful questions of fact or law have arisen between two parties and each of them has agreed to waive what he honestly believes to be his lawful claim in whole or in part the transaction amounts to a compromise, the waiver or abandonment of either side furnishing the consideration, provided of course, that both parties were fully aware of the circumstances, (*Broadway and Abdul Raoof, JJ.*) *JAI RAM v. SELU*. 66 I. C. 362.

—Essentials of—Easement—Custom and prescription See (1921) DIG. COL. 438 *GOPAL KISHNA SIL v. ABDUL SAMAD CHAUDHURI*. 66 I. C. 640

## —Proof—Pleading—Variation—Evidence of—Judicial decisions.

Although a custom must be sufficiently defined for its application to the facts of the particular case in which that custom is pleaded, so that it may be clear and undoubted, yet the party pleading the custom can be allowed to prove the same in a sense narrower than that stated in the pleadings. Decisions by courts on questions of custom afford valuable evidence as to the existence of the custom. 45 C. 450 ; 49 I. A. 119 Ref. A usage of recent date cannot be regarded as a custom. A custom must be proved by clear and unambiguous evidence to be ancient and invariable. In this respect there is no difference between a family custom and local custom. 14 M. I. A. 170 ; 45 C. 450, 461 ; 3 C. W. N. 21 Ref. (*Ashworth and Simpson, A. J. C.*) *THAKUR RUDRA PRATAP NARAIN SINGH v. THAKUR NORMAN PRASAD SINGH*. 9 O. L. J. 552.

## —Proof of—Custom at variance with law—Onus.

The person who sets up a custom must establish it to the whole length of abrogating the law under which the opposite party claims title and if this is not done the general law must prevail. Possible inferences or probable implications cannot uphold a custom (*Simpson and Wazir Hasan, A. J. C.*) *BALBHADDAR PRASAD v. NARAYAN DAS*. 9 O. L. J. 518.

—Succession—Sons and daughters—Right of representation—Daughter excludes father's brother or sister. See (1921) DIG. COL. 491. *AHMAD UN-NISSA v. NASIL-UN-NISSA*. 4 Lah. L. J. 496

## DAMAGES—Prize proceedings—Claim as alternative to claim for release.

A claim for damages in prize proceedings cannot be had as an alternative to a claim for the release of the vessel and consistently with her condemnation (*Lord Sumner*.) *SOCRATES ATYCHIDES v. SECY. OF STATE*. (1922) P. C. 371.

## —Negligence—Railway accident—Measure of damages—Professional man.

When a claim for compensation to families killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a court or a jury to make in addition a compassionate allowance. 13 A. C. 800 Rel. (*Lord Parmoor*.) *THE*

**DEKHAN AGR. RELIEF ACT, S. 10.**

ROYAL TINS COMPANY *v.* THE CANADIAN PACIFIC RAILWAY CO. 31 M. L. T. 317 (P. C.)

**DEKHAN AGRICULTURISTS RELIEF ACT, S. 10 A—Sale—Contemporaneous agreement to re-transfer—Kabuliat—Evidence Act, S. 92.**

Defendant executed a sale deed in favour of plaintiff. At the same time there was an oral agreement to reconvey on payment of purchase money, and an unregistered kabuliat was executed subsequently embodying the terms of the agreement. In plaintiff's suit for possession, defendants pleaded that the transaction was only a mortgage. *Held*: S. 10 A of the Dekhan Agriculturists Act, empowers a court, notwithstanding the provisions of S. 92 of the Evidence Act, to inquire into and determine the real nature of such a transaction. The plaintiff whose title is based on the sale deed, cannot succeed, if defendants prove the transaction to be only a mortgage. (*Kennedy, J. C. and Raymond, A. J. C.*) HAMBIRKHAN *v.* MURIJMAL. (1922) Sind 39.

**DEED—Construction—Principles of—Sale deed**

Where construing a document described as a sale deed, all the covenants must be looked into and it must then be judged whether the intention of the parties as expressed in the deed was to effect an immediate transfer of proprietary right. (*Daniels and Lyle, A. J. C.*) BISHESHAR DAYAL *v.* MT. HAR KAJ KUAR. 66 I. C. 622.

**Execution—Formal delivery—Necessity.**

No particular technical form of words or acts is necessary to render an instrument the deed of the party who has executed it. For as soon as there are acts or words showing that it is intended to be executed as his deed that is sufficient. The usual way of showing this is formal delivery. A deed may be validly executed even though it remains in the custody of the grantor. (*Viscount Haldane.*) J. C. MACEDO *v.* BEATRICE STROUD. 31 M. L. T. 312 (P. C.)

**DIVORCE—Discretion of court—Judicial separation—Law of Canada.**

The law of Canada makes a distinction between the case of a separation on the ground of adultery, which is a thing as of right and judicial separation based on ill-treatment or grievous insult, which is in the discretion of the court. In the latter case the Judicial Committee would be reluctant to interfere with the discretion exercised by the courts below. (*Viscount Haldane.*) BALDWIN *v.* BALDWIN. 31 M. L. T. 302 P. C.

**DOMICILE—Commercial domicile—Prize of war.**

Where every act of the claimant at the time of the breaking of the war was consistent with the intention to retain his commercial domicile at Constantinople and inconsistent with any intention to divest himself of it, and he did his best to continue the voyage to a Turkish port although he was not able to show that there was any particularly pressing commercial object in sending her to Basra, where there was no cargo engaged, where no agent had been appointed and where there was no trade to be expected, he being in the Piraeus and his ships being in the hands of the Turkish Government, *Held* the claimant had not discharged the burden of proof which lay upon

**EVIDENCE ACT, S. 92.**

him of showing that he was no longer commercially domiciled in Turkey as he had been before. The condemnation must therefore stand. (*Lord Sumner*) SOCRATES ATYCHIDES *v.* SECY. OF STATE FOR INDIA, (1922) P. C. 371.

**EASEMENT—Right to burial—Acquisition by prescription—Possibility of—Customary right.** See (1921) DIG. COLM 518 GOPALKRISHNA SIL *v.* ABDUL SAMAD CHOUDHURI 66 I. C. 640.

**ESTOPPEL—Auction sale—Decree holder failing to mention incumbrance in sale proclamation—Effect**

Where the execution application asked for a sale of property subject to a mortgage in the decree holder's favour but by some mistake it was omitted in the sale proclamation and there was nothing to show there was any misrepresentation, no estoppel arises. (*Mears, C. J. and Bancroft, J.*) RAM SARTI *v.* BHARAT SINGH 43 ALL 703 : 19 A. L. J. 744 : 64 I. C. 763.

**—Mortgage—Denial of title—Decree.**

Where a person professes to have an interest in property and mortgages the same and a decree is passed thereon, the decree is binding on whatever interest he has on the property and the mortgagor is estopped from denying that he had no title in the property. (*Lord Phillimore.*) BHOLANATH SEN *v.* BALARAM DAS. 31 M. L. T. 306 (P. C.)

**EVIDENCE—Inadmissibility—Effect.**

It does not follow a document is invalid, merely because it may not be admissible in evidence. (*Priacaux, A. J. C.*) KAJE UDAJIRAM *v.* RAJESHWAR. 67 I. C. 310.

**EVIDENCE ACT S. 35—Record of admission made before a court.**

The statement of a court that a person admitted the claim of another person in a case pending before it is relevant under S. 35 of the Evidence Act as the statement forms part of the record. (*Ashworth and Simpson, A. J. C.*) THAKUR RUDRA PRATAP NARAIN SINGH *v.* THAKUR NIRMAL PRASAD NARAIN SINGH. 9 O. L. J. 552.

**S. 92—Lease compulsorily registrable—Failure to register—Oral evidence proving terms—If allowed.** See T. P. ACT, S. 107, (1922) Lah. 329.

**S. 92—Recitals in documents—Oral evidence to contradict—Admissibility.**

Where there is a duly signed receipt for the payment of rent oral evidence could not be admitted in supersession of the recitals in the receipts. But if the case is that false entries were made in the receipts there is a question of fraud and oral evidence is admissible under S. 92 proviso (1) of the Evidence Act. (*Wazir Hasan, J.*) KUNEWAR BASHARI LAL *v.* KALKA. 25 O. C. 282.

**S. 92—Transaction, nature of—Oral agreement varying—Dekhan Agriculturists Relief Act S. 10 A Effect of.** See DEKHAN AGR. RELIEF ACT, S. 10 A. (1922) Sind 39.

## EVIDENCE ACT, S. 108.

—S. 108—*Presumption as to death—Suit by Hindu claiming as heir of a deceased person—Father of plaintiff unheard for 10 years before suit—Hindu Law rule—Applicability of.*

In a suit by plaintiffs for the recovery of the properties of one T. as the persons entitled to them as his heirs or nearest reversioners, they alleged that their father K, had not been heard of for nearly 10 years before suit and that they were thus the nearest reversioners. *Held* that the rule of Hindu law that at least 12 years should elapse before a man unheard of should be treated as dead was inapplicable to the case but that the 7 year's rule under S. 108 of the Evidence Act applied and that as he had not been heard of for 10 years before suit he must be presumed to have died on the date of suit. The rule of Hindu law referred to is only a rule of evidence and is not applicable after the passing of the Evidence Act (*Krishnan and Venkatasubba Rao, JJ.*) PONDURI ADEYYA v. JALADI BUREYYA. 43 M. L. J. 725.

—S. 114—*Will—Improbability of a will entirely written by the testator being forged—Burden of proof.*

There is nothing unnatural in a Hindu sonless and not in a good state of health writing a document by which directions are given to a widow to adopt the testator's nephew. It is certainly extremely improbable that a person wishing to put forward a forged will would run the risk of imitating the hand writing of the deceased or get it imitated by some one else when it would be so easy to attack a forged document when it runs over a folio page and purports to have been written by the testator. The plaintiff has to prove the document on which he relies but when once he has gone as far as putting before the Court a *prima facie* case which bears the signs of being genuine, then it is for the defendant to produce reliable grounds for upsetting the plaintiff's case and satisfy the court that it is not only improbable but impossible (*Macleod, C. J. and Coyagee, J.*) IRABASAPPA v. BHADRAWA. (1922) Bom. 296.

—S. 145—*Absence of note about directing attention.*

Where the purpose of the production of the document must have been well understood by the witness and from the record of his deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was not at a particular place on the alleged date as was clear from the document and where on re-examination no attempt was made to elicit any explanation, *Held* the witness was properly contradicted. (*Sir Lawrence Jenkins*) BAIKUNTHA NATH CHATTORAJ v. PRASANAMOYI DEBYA. (1922) P. C. 409.

—Ss. 146 to 152—*Questions—Relevancy.*

A question put to a female witness whether she was made pregnant by one X. in a case relating to title to property, would be relevant if the point was whether by reason of unchastity she could not inherit her husband's property. But if the object was to impeach her credit, Ss. 146 and 148 to 152 of the Evidence Act must be considered. (*Chatterjee and Pearson, JJ.*) SUBALA DAS v. INDRA KUMAR HAZRA. 65 I. C. 692.

## HINDU LAW—Impartible Estate.

—S. 165—*Power of court to call for and admit evidence.*

Even though a document is not produced at the first hearing of a case the court can call for the document under S. 165 of the Evidence Act. (*Ashworth, A. J. C.*) SHANKAR LAL v. MAHMUD SHAH. 25 O. C. 286.

GENERAL CLAUSES ACT, S. 3 (59)—*Calendar—Interest.*

Where the probabilities are not, and the evidence does not show, that the parties usually went by the Gregorian Calendar, provisions of General Clauses Act S. 3 (59) do not apply. (*Batten, J. C.*) SETH BHOJRAJ v. PANDA SHANKAR-NATH. (1922) Nag. 265.

HINDU LAW—*Applicability—Converts—Halai Memons of Porebunder.*

There are among the Mahomedans certain groups whose ancestors were Hindus and professed the Hindu religion and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni Borahs, Molesalam Girasias, Cutchi Memons, Nassapooria Memons and lastly, Halai Memons. Halai Memons domiciled in Porebunder follow the Hindu law with regard to the succession of females. (*Lord Dunsedin.*) KHATUBAI v. MAHOMED HAJI ABU. (1922) P. C. 414.

—*Debts—Antecedent debt—Personal covenant by father—Effect.*

A covenant for personal liability by a Hindu father in a mortgage deed does not make the debt an antecedent debt.

If the debt is incurred without the aid of family property, it would be an antecedent debt, but if the debt is not wholly irrespective of the credit obtainable by reason of the ownership of family or is not wholly apart from the ownership of that property, it would not be an antecedent debt. (*Mears, C. J. and Banerjee, J.*) RAM SARUP v. BHARAT SINGH. 43 ALL. 703 : 19 A. L. J. 744 : 64 I. C. 763.

—*Debts—Nature of—Proof.*

General evidence of immoral character or misconduct is insufficient to prove that the debts in question were tainted with immorality. (*Mears, C. J. and Banerjee, J.*) RAM SARUP v. BHARAT SINGH. 43 ALL. 703 : 19 A. L. J. 744 : 64 I. C. 763.

—*Evidence—Rules of—Not in force after the Evidence Act. See EVIDENCE ACT, S. 108.*

43 M. L. J. 725.

—*Impartible Estate—Family custom—Proof of—Estate not absolutely owned by the family.*

Impartibility never attaches to small estates and it cannot survive as a family custom independently of some particular estate. A family custom of succession to an estate not absolutely owned by the family can never exist. An impartible estate in Hindu law is not only consistent with but postulates that the family to which it belongs is joint. No presumption against indivisibility of possession or title can arise by reason of joint living. (*Ashworth and Simpson, A. J. C.*) THAKUR RUDRA PRATAP NARAIN SINGH v. THAKUR NIRMAL PRASAD SINGH. 9 O. L. J. 552.

**HINDU LAW—Joint Family.**

———*Joint family—Alienation—Rate of interest.*

In a suit by the mortgagee regarding joint family properties mortgaged to him, he has to show it was necessary to borrow the money at the rate of interest specified, if it happens to be exorbitant. (*Mears, C. J. and Banerjee, J.*) **RAM SANEP v. BHARAT SINGH.** 43 All. 703 : 19 A. L. J. 744 : 64 I. C. 763

———*Joint family—Property—Inheritance by collateral succession.—Nature of.*

Property claimed to have been inherited by a person by right of collateral succession cannot be treated as joint family property in respect of which the manager as such can sue or be sued so as to bind the rest of the family. (*Mr. Kanhaya Lal, J. C.*) **HAUSLA BAKHSH SINGH v. RAJ BAKHSH SINGH AND ANOTHER.**

4 U. P. L. R. (O. C.) 47,

———*Joint family—Self acquisition—Repurchase of property which has passed out of the family.*

Where a member of a joint Hindu family purchases with his own funds property which has validly and voluntarily passed out of the family by a conveyance, the property so purchased is the absolute and self-acquired property of the member. 5 M. H. C. R. 156 Ref. (*Schwabe, C. J. and Wallace, J.*) **MAGDOON MUHAMMAD MARKAYAR v. MARLAYAN v. BANSILAL.**

(1922) M. W. N. 824.

**INDIAN SOLDIERS LITIGATION ACT (IX of 1908)**—*Deliberate omission to implead as defendant, cannot defeat law.*

The provisions of the Soldiers Litigation Act cannot be defeated by deliberate omission to implead a person as a defendant. (*Kanhaya Lal, J. C.*) **HAUSLA BAKHSH SINGH v. RAJ BAKHSH SINGH.** 4 U. P. L. R. (O. C.) 47

**JURISDICTION**—Test of—Ancestral home—Residence abroad—Effect. See C. P. CODE, O. 7, R. 10. 64 I. C. 688.

**LAMBARDAR**—*Suit in ejectment by co-sharers—Compromise of a litigation by the widow on his death—Whether binding on other co-sharers.*

Where the widow of a Lambardar compromises an ejectment suit brought by her husband by conferring occupancy right in consideration of an increased rent, the compromise is not binding on the other co-sharers. (*Hopkins S. M.*) **KHAMAN SINGH v. KUAR INDES SINGH.**

L. R. 3 A. 166 (Rev.)

**LANDLORD AND TENANT**—*Permanent tenancy—Burden of proof.*

The onus of proving the permanent nature of a tenancy is on the person who sets it up. Long possession of a tenure by the tenant and his ancestors and the landlord having permitted them to erect substantial structures would warrant the presumption of permanency. (*Broadway and Abdul Qadir, JJ.*) **LALA MOTI SAGAR v. DHARMA MAL.** (1922) Lah. 329.

**LETTERS PATENT.**

———*Tenancy—Proof of—Long possession.*

The mere fact of long possession does not give rise to a presumption of permanent tenancy. (*Hopkins S. M. and Fremantle, J. M.*) **MR. JOFFRI BEGAM v. RAM PAL.** L. R. 3 A. 406 (Rev.)

**LAND TENURES**—*Enhancement of rent.*

In this country, every tenure whether permanent or otherwise is subject to the incident of enhancibility of rent. (*Sukrawardy and Cumming, JJ.*) **YAKUB ALI CHOUDHURI v. RAJ KUMAR DATTA.** 65 I. C. 527.

**LEASE**—*Two tenants of a holding—Kabuliyat executed and attested by one, if binding on other—Retrospective effect.*

Where there are two tenants of a holding, a *kabuliyat* executed and attested by one cannot be held to be executed on behalf of the other and is not binding on him.

Where a 7 year's lease was executed about the end of the agricultural year and there was no evidence that any agreement was made prior to the execution of the lease that the tenancy would commence from the beginning of the year:

Held that retrospective effect could not be given to the lease. (*Hopkins S. M. and Fremantle J. M.*) **RAM DAS v. SARDAR SUNDAR SINGH.** L. R. 3 All. 36 (Rev.)

**LETTERS PATENT, MADRAS CL. 12**—*Leave to sue—Jurisdiction—Discretion of Court—Decree of Malabar Court obtained by fraud—Suit in High Court to set aside—Leave for—Grant of—Several defendants residing in Malabar—Balance of convenience in instituting there—Cause of action for suit—Fraud—Discovery of fraud—"The defendant" in cl. 12 of Amended Letters Patent (Madras)—If includes case of one of defendants.*

Plaintiff was surety for the due performance of his duties and due accounting by an agent. In a suit instituted in Malabar by the principal a decree was passed against the agent and the plaintiff for the balance due by the agent to the principal and that decree was on appeal affirmed by the High Court. Alleging that in allowing that decree to be passed, the agent or his representative conspired with the principal in suppressing material documents with a view to make the plaintiff pay the decree amount, the agent being impecunious, that the said fraud was practised in Madras, and that it was discovered in Madras, the plaintiff instituted a suit in the High Court (Original Side), Madras for having the prior decree set aside on the grounds alleged. The defendants were the agent's representatives, who resided in Malabar. In order to bring the suit within the ordinary Original Jurisdiction of the High Court, plaintiff applied for and obtained leave under S. 12 of the Amended Letters Patent to sue the defendant living in Malabar. The leave so granted was after notice set aside. On an appeal from the order setting aside the leave, held that, assuming that the High Court had jurisdiction, to grant the leave, it should in the exercise of its discretion, refuse the same.



## LETTERS PATENT (MADRAS) CL. 13.

Nearly whole of the alleged cause of action arose in Malabar. There would be no ground at all for bringing the suit here but for the fact that two of the defendants reside here who, it is alleged, have in their power there a very material document. The fact that some difficulty is anticipated in getting the document produced in Malabar is not a sufficient ground for holding that the suit, which is essentially a Malabar suit, not a Madras suit, should be brought in Madras.

*Per The Chief Justice.*—The discovery of the fraud is not part of the cause of action, but the fraud itself is.

*Quære* whether the fraud alleged is a sufficient ground for setting aside the decree.

*Semble* S. 12 of the Amended Letters Patent does not confer jurisdiction upon the High Court in cases where one or more of the several defendants reside within jurisdiction. (*Schwabe, C. J. and Wallace, J.*) *PARAMESWARA PATTAR v VIYATHAN MAHADEVI.* (1922) M. W. N. 841.

—Clis 13 and 15—High Court—Madras—Case transferred to High Court from Judicial Commissioner of Coorg—Trial—Appeal under cl. 15 of the Letters Patent. See C. P. CODE S. 25. (1922) M. W. N. 830.

## LIMITATION ACT, Art. 113—Agreement to sell on the success of litigation—Limitation—Commencement.

Where there was an agreement to sell a property in the event of success in a litigation, Art. 113 of the Lim. Act applies to a claim based on it and limitation begins to run from the date of success in the suit. (*Daniels and Lyle, A. J. C.*) *BISHESHAR DAYAL v. MT. HAR RAJ KUMAR.*

66 I. C. 622.

## —Art 120—Suit for declaration of partnership right—Limitation.

Where more than six years before the date of a declaratory suit regarding a partnership the defendant had to the knowledge of the plaintiff set up that he was a partner, the suit is barred (*Simpson, A. J. C.*) *KHALIL v. MAHOMED ISMAIL.*

9 O. L. J. 540.

## —Art 127—Hindu Joint family—Exclusion—What constitutes—Possession of guardian, if adverse—Ouster—Suit for partition—Limitation.

Coparceners in a joint Hindu family are entitled to claim partition of property even though they are excluded from possession and partition is one of the modes of enforcing a right to share in joint family property. 3 C 228 Ref. Under art. 127 of the Lim. Act the defendant has to show when the plaintiff was excluded from enjoyment of the property and when the exclusion became known to him. Exclusion by a co owner of other co owners will not become adverse to those other co owners until they become aware of it but none the less there may be exclusion in fact. Where a guardian takes possession of the property of the ward, the presumption is that his possession is taken on behalf of the ward but the presumption is not irrebuttable. 35 B. 79 dist.

The word "exclusion" in art. 127 of the Lim. Act involves a mental as well as a physical element. Not only the physical act but also the intention accompanying the act has to be looked to.

## LOWER BURMA COURTS ACT, S. 30.

Where therefore a cosharer holds the property under an express assertion of his title to hold as sole proprietor and makes gifts to other cosharers as such sole proprietor there is exclusion of the latter and the gifts do not save limitation, (*Ashworth and Simpson A. J. C.*) *THAKUR RUDRA PRATAP NARAIN SINGH v. THAKUR NIRMAL PRASAD SINGH.* 9 O. L. J. 552.

## —Arts 137, 140 and 144—Scope of.

Plaintiffs were owners of a miras tenure and under them was a *darmiras* tenure held by the defendants. This under tenure was sold in execution of a rent decree and purchased by a stranger who never obtained possession. In execution of a rent decree obtained against the stranger the under-tenure was again sold more than twelve years after and purchased by the plaintiffs who sued for possession. Held *Per Walmsley, J.* (*Woodroffe and Suhrawardy JJ. contra.*) Art 137 applied to the case and the suit was barred. *Per Suhrawardy J.* Art 140 or Art. 144 applied to the case. *Per Woodroffe, J.* None of the articles of the Limitation Act applied to the case but the suit was barred under S. 167 of the Bengal Tenancy Act (*Woodroffe, Walmsley and Suhrawardy JJ.*) *JNANENDRA MOHAN DUTT v. UMESH CHANDRA GUPTA* 26 C. W. N. 985 : (1922) Cal. 544.

## —Art. 139—B. T. Act, -Ss. 158 B and 159 Applicability.

*Per Woodroffe J.*—Article 139 of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the Bengal Tenancy Act. Where a rent-decree has been properly obtained the tenure itself passes to the purchaser and not the right, title and interest of the judgment debtor only. The rights of the purchaser must be determined by the provisions of the B.T. Act under S. 158 B and S. 159. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) *JNANENDRA MOHAN DUTT v. UMESH CHANDRA GUPTA.*

26 C. W. N. 985 : (1922) Cal. 544.

## —Art. 156—Memo. without copy of judgment

It being required by rules of Patna High Court that where several appellants appeal from the same judgment, each memo. of appeal must be accompanied by a copy of the judgment appealed from, the mere presentation of memo of appeal does not save time though one of the memos. is accompanied by a copy of judgment and there is a request that in other cases the copy of judgment be dispensed with. (*Miller, G. J. and Coulters, J.*) *RIJAN THAKUR v. CHARITER THAKUR.* (1922) P. 580.

## LOWER BURMA COURTS ACT S. 30—Scope of appeal—Concurrent findings of fact—Interference

Taking S 30 as a whole, it is clear that the special appeal re-opens the whole case, but it does not mean that the court will depart from the well established rule as to concurrent findings of fact being not interfered with unless very good grounds for that interference are made out. (*Robinson, C. J. and Duckworth, J.*) *C. R. M. CHETTY FIRM v K. M. M. A. K. MUTHU MAHOMED & Co.* 66 I. C. 500.

**MADRAS LOCAL BOARDS ACT, S. 221.****MADRAS LOCAL BOARDS ACT (XVII of 1920) S. 221—Court exercising power—Criminal court.**

The Magistrate in acting under S. 221 of the Mad Local Boards Act is acting as a criminal court, and his orders are subject to the revisional jurisdiction of the High Court. In imposing a fine in addition to the recovery of the fees due, the Magistrate is acting beyond the jurisdiction conferred on him by S. 221 of the Local Boards Act. (*Wallace, J.*) *PUNIYA SYAMALI v. EMPEROR.* (1922) M. W. N. 840

**MAHOMEDAN LAW—Applicability—Halai Memons of Probunder—Ancestors—Hindus—Effect, See HINDU LAW—APPLICABILITY.**

(1922) P. C. 414.

**Gift—Completion of—Absence of intention—Effect of.**

The mere absence of an intention on the part of the donor to make the gift effectual is not sufficient to invalidate the gift. Once it is found that the donee meant to take under the gift and he accordingly took possession of the property that will complete the gift. (*Ashworth and Simpson, A. J. C.*) *SHARFURZAMAN v. SIR HENRY STANYAN* 25 O. C. 291.

**Minor—Sale by de facto guardian—Necessity.**

A sale by a de facto Muhammadan guardian if effected for imperative necessity or for a purpose which is found to be beneficial to the minor, must be upheld. (*Wilberforce and Martineau, J.*) *MAHOMAD v. MT. BHOLI* 64 I. C. 51

[This view of the law is wrong and is opposed to 45 Cal. 178 (P. C.) which is not referred to in the judgment Ed.]

**Partition—Partial partition—Law of administration.**

Mahomedans under their own law are never joint in estate but only tenants in common whether they live together or whether they do not. Tenants in common are not obliged when anxious to distribute a particular property, to sue for a partition of all other properties in which they are interested. There is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items of property. Under Mahomedan Law, the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is therefore futile to describe a suit, in which one heir claims to receive his share of the property of the deceased from another heir, as a suit for partial partition and to say that therefore the suit is not maintainable. Both the terminology and the principles of Hindu Law are in such case inapplicable. 28 All. 39, 6 B. L. R. 140 foll. 38 Mad. 684 Referred to, (*Kinkard, J. C., Raymond and Kennedy, A. J. C.*) *VAZIR v. D. W. ORAMAL* (1922) S. 41.

**Waqf—Dedication—Burden of proof—Mutation of names—Effect of absence of.**

The burden of proving that a land has been dedicated to Waqf is on those asserting it. It is open to a court to infer a dedication from reputed 33 P. R. 1917; 8 I. C. 578 Rel. The mere omission to have mutation of names effected does not

**PENAL CODE, S. 490**

affect the character of the property as waqf (*Broadway and Martineau, J.*) *RAHIM BAKHS v. CHANNAN DIN,* 4 Lah. L. J. 511

**Waqf—Dedication—Implication from user.**

It is open to a court to infer dedication of land to waqf from user or reputation. But there were no circumstances in the case from which such an inference could be made. (*Le Rossignol and Broadway, J.*) *UMAR DIN v. AISHAN.*

4 Lah. L. J. 528.

**MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT, Ss. 5 and 6—Decree in ejectment—Application for revvaluation of improvements—Execution See (1921) DIG. COL. 826**  
**NEELAKANDAN NAMUDRIPAD v. SANKARAN NAIR** 66 I. C. 129.**MORTGAGE—Construction—Usufructuary mortgage—Deed of further charge—Effect of foreclosure decree—Variation of terms of original mortgage.**

There was at first a usufructuary mortgage. Thereafter there was a deed of further charge to the effect that if the mortgagor did not pay the mortgage money on the due date, the original mortgage was to become an absolute sale. Held that the effect of the further charge was merely to add the right of foreclosure to the rights already granted under the usufructuary mortgage. (*Ashworth and Simpson, A. J. C.*) *SANGART BAKHS SINGH v. DILDEO SINGH,* 9 O. L. J. 511.

**NEGOTIABLE INSTRUMENTS ACT, S. 4—Promissory note—Interest payable annually—Effect**

An instrument in writing containing an unconditional undertaking to pay a certain sum to X or order, contained a further clause undertaking to pay interest annually. Held, it was inconsistent with the document being a promissory note. Such a note if improperly stamped, is inadmissible for any purpose under S. 85 of the Stamp Act. (*Broadway, J.*) *JOTI PARSHAD v. BRIJ RAJ SHARAN* 52 F. L. R. (1922) 4 U. P. L. R. (Lah.) 97; 68 I. C. 461.

**ODDH CIVIL DIGEST PARA. 272 (XI)—Pleader's fee—Taxation.**

Where one pleader appears for the respondent at an earlier stage of the case and another pleader appears at the hearing of the appeal, full fee should be allowed and not merely half the full scale (*Daniels and Lyle, A. J. C.*) *RAHU INDRA PRATAB SAHI v. RAJA ABU JAFAR.* 25 O. C. 279.

**PENAL CODE, Ss. 441 and 448—Criminal trespass—Desire to cause annoyance.**

To constitute criminal trespass as distinguished from a civil trespass there must be an intention by the trespasser to cause annoyance. Where a decreeholder under colour of enforcing his decree invades the privacy of the judgment debtor's household, he is guilty of an offence under S. 441 I. P. C. (*Dundas, J.*) *LAKSHMI DAS v. THE CROWN.* 4 Lah. L. J. 532.

**S. 498—Continuing offence—Prosecution—Acquittal prior to charge—Effect.**

The detention of a married woman is a continuing offence and a person guilty of the same is always liable for prosecution except for such period

**PENAL CODE, S. 899.**

during which he has been found innocent. An acquittal in respect of a previous detention is no bar to a fresh charge. (*Wilberforce, J*) **NADAR v THE CROWN.** 4 Lah L. J. 535.

—**S. 499 — Defamation—Person defamed if to be identified specifically—Rumours—Duty of journalist.**

It is not part of a journalist's duty to publish every foul rumour that may be reported to him. Where the truth could be elucidated by a few enquiries, he ought to do so.

To amount to an offence under S. 499, the words must contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an association or collection of persons jointly may also amount to defamation within the meaning of the section, but it must be such as is capable of being brought home to a particular individual or collection of individuals as such.

It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if, on the evidence, it can be shown that the imputation was directed towards a particular person or persons who can be identified, (*Miller, C. J. and Ross, J.*) **GOVERNMENT ADVOCATE, BEHAR AND ORISSA v. GOPABANDHU DAS.**

3 Pat L. T. 209 : (1922) Pat. 117 :

4 U. P. L. R. (Pat) 27 : 1 Pat. 414 :

(1922) P. 101 : 23 Cr L.J. 433 : 67 I. C. 609.

—**S. 504—Arora being called a Kirar.**

The word *kirar* may sometimes no doubt have a somewhat contemptuous signification. *Aroras* are *kirars*. Though no doubt they may not be pleased to be called so, calling an Arora a kirar is no offence under S. 504 (*Chevis, J.*) **Haji MUHAMMAD BAKSH v. EMPEROR.** (1922) Lah 455.

**PLEADINGS—Plea of limitation in written statement—If to be explicit—Reference to article of Lim. Act if essential. See PRACTICE.**

(1922) Cal. 544

—**Point of limitation,**

*Per Walmesley, J.* : Where the written statement asserts that the suit is barred by limitation, it cannot be held that the plea ought to be stated more explicitly, as by reference to the particular article of the Limitation Act (*Woodroffe, Walmesley and Suhrwardy JJ.*) **GNANENDRA MOHAN DUTT v. UMESH CHANDRA GUHA.**

26 C. W. N. 985 : (1922) Cal. 544.

**PRACTICE—Appellate court—New plea.**

An appellate court will not allow a new plea to be taken before it for the first time.

4 Lah. L. J. 516.

**PRIZE PROCEEDINGS—Damages—If can be claimed as alternative to release. See DAMAGES.** (1922) P. C. 371.

**PRE-EMPTION—Right to—Remedy of pre-emptor Procedure.**

A pre-emptor is not confined to a suit in the Civil Court to enforce his right. He must do one of two things within limitation ; he must institute a suit for pre-emption or he must obtain a conveyance from the vendee. If he has done neither of these things, the mere fact that he has stated

**PUNJAB COURTS ACT, S. 70.**

that he possesses the right, that he has approached the vendee or that they have referred their matter to arbitration, will not prevent the bar of limitation. A pre-emptor who refers the claim to arbitration and then makes an application under Sch. II para 20 is proceeding by suit and the case is governed by the limitation applicable thereto. (*Simpson and Wazir Hasan, A. J. C.*) **SHEO DUTT BAHADUR v. BISHUNATH SINGH.**

9 O. L. J. 546.

—**Right to — Transfer of land — Right enures for the benefit of transferee. See C. P. CODE O. 22, R. 10.** 25 O. C. 319.

**PRINCIPAL AND AGENT—Commission agents—Duty of.**

Commission agents are not liable to supply goods at any particular rate or otherwise than at the market rate at the time of supply. (*Lindsay and Kanhaiya Lal, JJ.*) **FIRM BABU LAL KEDAR NATH v. FIRM NET RAM KHALI RAM** (1922) All 400 64 I. C. 6.

**PROVINCIAL INSOLVENCY ACT (III of 1907) S. 36—Transfer of property—Voluntary transfer—Voidable by Official Receiver.**

A transfer of property falling under S. 36 of the Prov. Ins. Act remains valid until it is set aside by the Official Receiver and the only court having jurisdiction to annul the transfer is the Insolvency Court 42 M. 322 foll. ; 19 O. C. 192 : 28 C. L. J. 536, 21 C. 866 Ref. (*Ashworth and Simpson, A. J. C.*) **SHARFUZZAMAN v. SIR HENRY STANYON.** 25 O. C. 291.

—**S. 37—Scope of.**

Where the purchase is made in view of the balance of the account due since over 2 years to the purchaser who himself is a creditor, the transaction may be void. (*Kotwal, A. J. C.*) **VITHAL v. GOPAL.** (1922) Nag 260.

—**S. 46—Appeal by creditor—Sale affected by S. 37—Discharge of receiver.**

Where the Receiver was discharged by the order of the Court and one of the creditors who made other creditors respondents appealed from an order in matter of alienation affected by S. 37 held, the appeal was maintainable. (*Kotwal, A. J. C.*) **VITHAL v. GOPAL.** (1922) Nag 260.

**PROV. S. C. COURTS ACT (IX of 1887) ART. 35 (II) Criminal intention, necessary.**

Where in the plaint there is no definite allegation that the defendants had the intention requisite for the commission of the offences mentioned the suit is not excepted under the article (*Shadi Lal, C. J. and Brasher, J.*) **SHIV GIR v. KHAZAN GIR.** (1922) Lah. 451.

**PUNJAB COURTS ACT (1884) S. 70—Revision filed before new Act came into force—Admission by mistake—Power of treating it as appeal.**

A revision petition filed under S. 70 of the Punjab Courts Act of 1884 was admitted after the Act of 1912 came into force by mere inadvertence. Held, as at the time of filing it, the petitioner could file an appeal he could go on with the merits. (*Broadway and Abdul Raoof, JJ.*) **JAI CHAND v. SHAHZADA.** 67 I. C. 358.

## PUNJAB PRE-EMPTION ACT, S. 2.

**PUNJAB PRE-EMPTION ACT (I of 1913) S. 22 — Preliminary deposit — Production of security bond — Deficient security.**

Where the plaintiff in a pre-emption suit was directed to furnish security for the full amount of the sale price or pay into court a fifth of the amount and after the expiry of the time prescribed by the Court for during the aforesaid acts the plaintiff filed a security bond for less than the required amount and after the expiry of the time fixed: *Held* that the suit was rightly dismissed for non-compliance with the order of the court. (*Abdul Raouf, J.*) **SULTAN v. SHERE.**

4 Lah. L. J. 526.

**RAILWAYS ACT, Ss. 72, 76 — Risk note — Forms A and B — Effect of — Liability of company — Onus — Difference.**

The effect of risk notes A and B is to limit the ordinary liability of the Railway Company under Ss. 72 to 76 of the Railways Act: The company becomes bailee under Ss. 151, 152 and 161 of the Contract Act and are common carriers. The ordinary liability to which under Ss. 72, 76 the Railway Coy will be subject for loss, destruction etc. as carriers, is intended to be limited under these Risk Notes, the consideration being the reduction in the tariff rate. Under them, the company is only liable for the loss of one or more complete packages due to wilful neglect of its servants, transport agents or carriers. The plaintiff in such a case must set forth all the particulars constituting wilful neglect or default and substantiate the same, the onus being on them. The onus would have been otherwise in the absence of risk notes, if the case were simply under the Railways Act. Case law on this point of distinction referred to. (*Jwala Prasad, J.*) **G. I. P. RY COMPANY v. JITAN RAM NIRMAL RAM 3 Pat. L. 222:** (1922) P. 17: 67 I. C. 664.

**REGISTRATION ACT, S. 17 — Creation or declaration of interest — What amounts to.**

An agreement to pay "at the time of redemption" all sums expended by the mortgagee on the repair or improvement of the mortgaged property neither creates nor declares any right to add those sums to the price of redemption. That right is created and declared by S 63 of the Transfer of Property Act. The assent of which that section speaks may be oral or even tacit, which would be impossible if it could be said to be a transaction creating an interest in immoveable property. (*Hallifax, A. J. C.*) **RAMBILAS v. LAXMINARAYAN.** (1922) Nag. 282.

**S. 32 (b) — Security bond executed to District Court — Presentation for registration by clerk — Validity of registration.**

Where a security bond executed to the District Court is presented to the Registrar for registration by a clerk of that court, he is not a representative of that Judge within the meaning of S. 32 of the Registration Act and the registration is invalid, 42 I A 22 P. C. Ref. (*Viscount Cave*). **MA SHINGE MYAW v. MAUNG HO HNAURY.**

31 M. L. T. 304 (P. G.)

**S. 49 — Lease deed — Not registered — Admissibility in evidence — Oral evidence to prove terms — If allowed. See T. P. ACT, S. 107.**

(1922) Lah. 329.

## T. F. ACT, S. 6.

**SPECIFIC PERFORMANCE — Suit for — Doubt in title — Effect.**

In a suit for specific performance, if the Court comes to the conclusion that there is a great possibility of plaintiff's title becoming the subject of later litigation, that is a sufficient ground for refusing to grant specific performance. *Fry on Specific Performance* Ch. XVIII referred to. (*Hallifax and Macnair, A. J. C.*) **BALLABHDAS v. KANHAIYALAL.** 64 I. C. 87.

**SPECIFIC RELIEF ACT, S. 9 — Scope of.**

Prior peaceable possession furnishes a good title as against a mere trespasser. If a true title may be defeated by twelve years' adverse possession by a trespasser, there is nothing shocking to sense of justice in a legislative rule that the period of limitation for a suit by a mere trespasser or squatter to recover possession should be six months from the date of his dispossession. 15 C. W. N. 163; 41 Cal. 394 dist. (*Richardson and Suhrwardy, J.J.*) **NABA KISHORE TILAKDAS v. PORA BEWA.** (1922) Cal. 198.

**S. 42 — Suit for declaration of title — Shifting possession — Maintainability of suit.**

Where the plaintiff, a cosharer in possession of certain portions of the common land either individually or exclusively sued for declaration of title against another cosharer and it was found that possession of the land in dispute had been in a state of flux, *Held* that the suit was maintainable. 100 P. R. 1913, 15 M. 307; 21 M. L. J. 952; 26 C. 11: 118 P. R. 1918 Rel. (*Broadway and Martineau, J.J.*) **LABHU RAM v. NATHU.**

4 Lah. L. J. 504.

**STAMP ACT, S. 35 — Document insufficiently stamped — Admissibility in evidence. See NEG. INSTRS. ACT, S. 4.** 68 I. C. 461.

**S. 61 — Document not duly stamped — Admitted in evidence — If can be questioned later.**

Where an instrument has been admitted in evidence, such admission should not, except as provided in S. 61 of the Stamp Act, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. (*Prideaux, A. J. C.*) **RAJE UDAJIRAM v. RAJESHWAR.** 67 I. C. 310.

**S. 62 — Conviction under — Unstamped receipt.**

A conviction under S. 62 of the Stamp Act for filing an unstamped receipt, when it was quite evident that the accused had no intention of evading the provisions of the Stamp Law, cannot be sustained. The Act itself provides for the levy of penalties in such cases, but not for a prosecution. (*Bucknill, J.*) **NEMAI CHARAN SAHU v. EMPEROR.** 64 I. C. 286: 22 Cr. L. J. 766.

**TRANSFER OF PROPERTY ACT, S. 6 (e) — Transfer of property — Mesne profits — Right to.**

A transfer of arrears of rents with immoveable property is valid and is not obnoxious to S. 6 of the T. P. Act. (*Krishnan, J.*) **KOUWTHA SURYANARAYANA GARU v. YARUDALA VENKAYYA UARVUA.** (1922) M. W. N. 822.

## T. P. ACT, S. 54.

## —S. 54—Sale—Price—Consolation of.

Where the consideration for a sale is the amount of money to be spent later for purposes of a litigation, the fact that the latter amount is not ascertained and definite does not vitiate the transaction, for it was certain by capable of being ascertained. Dr. Gour's notes on "Price" referred to. (*Daniels and Lyle, A.J.C.*) BISHESWAR DUYAL v. MT. HAR RAJ KUAR. 66 I. C. 622.

## —S. 60—Clog on redemption—Deed of further charge—Effect of.

The doctrine as to clog on redemption relates only to dealings which take place between the parties at the time when the original contract of mortgage is entered into and they are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had. 20 O. C. 97, 24 O. C. 240, 25 O. C. 134 Rel. (*Asiworth and Simpson, A.J.C.*) SANGAT BAKSH SINGH v. DIJDEO SINGH. 90 L. J. 511.

## —S. 72—Interest

The mortgagee is entitled to interest on the sums which he as tenant lent to his landlord (mortgagor) owner of the house, for repairs which did not enhance the letting value but merely kept that value at its former level. (*Halifax A.J.C.*) RAMBILAS v. LAXMINARAYAN. (1922) Nag. 262.

## —S. 107—Landlord and tenant—Nature of tenancy.

An unregistered deed of lease compulsorily registerable is not admissible in evidence, nor can it be admitted in evidence to prove the nature and character of the possession held by the defendant or that the property to which it relates was let for a term of years. Any attempt to prove the terms of the lease by oral evidence would be excluded. 63 I. C. 90 followed (*Broadway and Abdul Quader, J.J.*) LALA MOTI SAGAR v. DHANNA MAL. (1922) Lah. 329.

## U. P. BOARD CIRCULARS R. 4—Plea of want of evidence—Certificate necessity for under Board's circular R. 4 of 8-11—Second appeal.

A plea of want of evidence to support a finding must be supported by a certificate under R. 4 of Board's Circular No. 8-11 to maintain a second appeal. (*Hopkins, S. M.*) BINDESHRI v. NANDA KHEVAT. L. R. 3 A 227. (Rev.)

## —S. 131—Scope of.

When by partition the *khudkast* land of a proprietor in a joint Mahal is allotted as land to be held by him as a tenant in a mahal in which he is not a co-sharer, his tenancy commences from the date of the partition takes effect under S. 131, Land Revenue Act, viz., from the first day of July following the confirmation of the

## WORDS.

partition. (*Feard, S. M. and Hopkins, J. M.*) DWARKA PRASAD v. SHRI KANT PANDEY AND OTHERS. L. R. 3 All 277 (Rev.)

## WAJIB-UL-ARZ—Weight due to—Circumstances.

The weight due to a *wajib-ul-arz* may be very slight or may be considerable according to the circumstances of the case. (*Simpson and Wazir Hason, A.J.C.*) BALBHADAR PRASAD v. NARAYAN. 90 L. J. 518

## Will—Execution—Draft.

The draft of a will is material evidence if the question was whether the testator understood an instrument admitted or proved to have been executed by her, or if her mental capacity had been questioned. (*Sir Lawrence Jenkins.*) BAIKUNTHA NATH CHATTORAJ v. PRASANNA MOYI DEBEYA. (1922) P. C. 409.

## —Proof—Probabilities.

The fact that the alleged testator did not sign the will, the absence of her relations, the proponent's conduct, and delay in putting forth the will, the absence of some of the attesting witnesses from the witness box were held to be sufficient circumstances to justify the finding that the Will was not proved in view of the trial court's finding that it did not believe the proponent's witnesses. (*Sir Lawrence Jenkins.*) BAI KUNTHA NATH CHATTORJEE v. PRASANNA MOYI DEBEYA. (1922) P. C. 409.

## WORDS—Dhardhura—Meaning of.

Dhardhura is not a term of art, signifying necessarily always and under all conditions that the deep stream continues a permanent boundary between two estates on the opposite banks of a river. There are many variations in the sense of the word. (*Simpson and Wazir Hason, A.J.C.*) BALBHADDAR PRASAD v. NARAYAN DAS. 90 L. J. 518.

## —Occupation—Meaning of—Transvaal—Prohibition of Asiatic occupation.

The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability, and it is in this sense that it is said that the occupation of premises by a servant if such occupation is subservient and necessary to the service, is the occupation of the master. At other times occupation denotes nothing more than physical presence in a place for a substantial period of time. Held that the expression was used in the latter sense in S. 4 (b) of Vrededorp Stands Act 1907 (South Africa) prohibiting Asiatic occupation of the stand. (*Viscount Cave.*) THE MADRASSA ANJUMAN ISLAMIA v. THE MUNICIPAL COUNCIL OF JOHANNESBURG. 31 M. L. T. 114 (P. C.): 4 U. P. L. R. (P. C.) 97.

# THE YEARLY DIGEST

## OF

### SELECT ENGLISH CASES.

#### APPRENTICE.

##### **Apprentice—Minor—Misconduct — Dismissal if valid.**

The covenants in an indenture of apprenticeship are not dependent on one another and misconduct which is a breach of the covenant entered into by the infant does not entitle the master to dismiss him.

An infant cannot assent to a revocation, unless it is for his benefit.

Even where the minor apprentice had so misbehaved himself that his conduct indicated he had no intention of continuing to be bound by the contract, a master is not entitled to dismiss him unless the repudiation of the contract is for the infant's benefit. *WATERMAN v FRYER.* (1922) 1 K. B. 499.

##### **Arbitration—Award — Interference by Courts—Principles of.**

In a submission in which the parties have agreed, that the decision of the umpire, on the matters referred to him, shall be final, the court will not inquire whether the conclusion of the umpire on the matters referred to him is right or wrong, unless an error appears on the face of the award, or in same document so closely connected with it that it must be regarded as part of his award, or unless the umpire himself states he has made a mistake of law or fact, leaving it to the court to review his decision.

Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award the award can be set aside. *ATTORNEY—GENERAL OF MANITOBA v. KELLY.* (1922) A. C. 268.

##### **—Award—Power to set aside—Error apparent on the face of the award.**

The power of a court to set aside an award on the ground of an error apparent on the face of it is a very limited power and the jurisdiction has to be administered with great care in order that extraneous considerations not appearing on the face of the award are not introduced into the matter. *JONES AND CARTER'S ARBITRATION In re.* (1922) 2 Ch. 599.

##### **—Power of arbitrator to state a case—Clause ousting jurisdiction of Court—Validity of.**

It is a principle of the English Law that an agreement to oust the jurisdiction of the Courts is invalid. An agreement that the rights of the

#### BANKER AND CUSTOMER.

parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the Court. In such a case there is no cause of action and therefore no jurisdiction until an award is made, and when made the courts have complete jurisdiction. A clause in a commercial contract ousting the special statutory jurisdiction of the Court to intervene to compel arbitrators to submit a point of law for determination by the Courts is opposed to public policy and is unenforceable. *CZARNIKROW v. ROTH, SCHMIDT & Co* (1922) 2 K. B. 478.

##### **—Procedure—Right of parties to be present at hearing.**

Where in arbitration proceedings, the arbitrators heard the evidence of one party in the absence of the other.

*Held.* the procedure was absolutely wrong. *RAMSDEN & Co LTD. v. JACOBS.* (1922) 1 K. B. 640.

##### **Bailment—Garage proprietor—Deposit of motor car for sale by customer—"Customer's sole risk"—Effect of the clause—Negligence of bailee's servant—Liability for loss or damage.**

A common carrier is liable for acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. A contract relating to the driving of a motor car and the risk therein involved is a contract of a special kind presenting features which distinguish it from a contract of carriage by a railway company or a common carrier. A garage proprietor received a motor for sale on commission from the owner upon the terms of a printed document containing a number of conditions one of which was "customer's sole risk." The car was taken by a driver of the garage proprietor to be shown to a prospective purchaser. While it was being so driven it came into collision with lamp post and the car was seriously damaged as a result of negligent driving. In an action for damages by the owner of the car against the garage keeper. *Held* that the clause in question protected the latter from liability for the negligence of his servants and that the action failed. *RUTTER v. PALMER.* (1922) 2 K. B. 87 (C. A.)

##### **Banker and Customer—Money paid into Bank as agent—Failure of consideration—Right to sue agent—Mistake—Effect.**

**BANKRUPTCY.**

Where under the terms of a contract, a certain sum of money was paid into a Bank, which received the money as the agent of one of the contracting parties, and thereafter on the ground of failure of consideration a suit was brought against the Bank for the recovery of the sum paid;

*Held*, the action was not sustainable in the absence of the principal agent alone.

*Held* also, if a person pays money under a mistake of fact, there being a liability to pay it, if the fact of which he was ignorant does not discharge him from that liability, he cannot recover it back. *STEAM SAW MILLS Co v. BARING BROTHERS AND Co.* (1922) 1 Ch. 244

**Bankruptcy—Act of bankruptcy—Non-compliance with notice—Scottish order of sequestration—Receiving order.**

A bankruptcy notice was issued and served upon the debtor requiring payment of a judgment debt and the debtor, before the expiration of the time fixed for compliance with the notice, obtained upon his own petition, an order of sequestration in Scotland whereby all his assets became vested in the Scottish trustee. *Held* that notwithstanding the sequestration in Scotland, the English Court had jurisdiction to make a receiving order, there being assets and creditors in England. *In re A DEBTOR.*

(1922) 2 Ch. 470 (C. A.)

**Receiving order—Creditor's petition—Inadvertent omission to state useless security—Amendment after receiving order—Bankruptcy Act, (1914) Ss. 109 (3) and 147.**

On an application by a debtor to set aside a receiving order in bankruptcy on the ground that the petitioning creditors had erroneously stated that they did not hold any security on the debtor's estate or any part thereof for the payment of the debt the subject matter of the petition, except a charge therein specifically mentioned it was found that they had inadvertently omitted to mention in the petition a security which had been given many years ago in respect of another and which was admittedly valueless. *Held*, that the said omission did not invalidate the receiving order and the court had power in any event to amend the petition even after the making of the receiving order. *In re A, DEBTOR.*

(1922) 2 K. B. 109 (C. A.)

**Rights of trustee—Right to recover bets paid by bankrupt—Statutory debt—Gaming Act S. 2.**

In 1919 Scranton paid the defendant, a bookmaker, various cheques for bets lost on horse racing and these cheques were cleared through various banks as holders. In 1920 Scranton was adjudicated a bankrupt and in 1921 the trustee in bankruptcy commenced an action in the King's Bench Division to recover the amount of the cheques. The defendant pleaded that such an action ought not to be brought by an officer of the court, as the claim, however legal, was practically dishonest. *Held* that the debt of which the recovery was sought in the action by the trustee was a statutory debt and there was nothing dishonest or dishonest in the trustee, an officer of the court, suing for its recovery.

**CARRIER**

Scope of the rule laid down in *Ex parte James L. R.* 9 Ch. 609, 614 considered. *SCRANTON'S TRUSTEE v. PEARSE.* (1922) 2 Ch. 87 (C. A.)

**Vesting in Official trustee—Trade secret—Formula—Disclosure.**

A debtor was carrying on the business of making certain proprietary articles, formerly in partnership with his brother and then singly. The articles were manufactured according to secret formulas invented by the bankrupt and his brother with whom he was in partnership. The trustee in bankruptcy applied to the Court to direct the bankrupt to disclose in writing the formulae. The bankrupt objected to the disclosure on the ground that the formulae had never been reduced to writing but were in the brain of the parties and that the disclosure would contravene the agreement between himself and his brother. *Held* that the formulae were part of the good will and assets of his business and that he was bound to communicate them to his trustee. *In re KEENE.* (1922) 2 Ch. 475 (C. A.)

**Bill of Lading—Booking slip—Conditions of lading—"On Deck" clause.**

A bill of lading is not, as between shipper and shipowner, conclusive of the true contract. It may be inconsistent with a prior overriding and express written bargain as to the terms on which goods shall be carried or the form in which bills of lading shall be issued. Whatever the prior express bargain has been, a shipper is free to accept any bills of lading he chooses. If therefore he has chosen to receive without protest a bill of lading permitting the shipowner to carry the goods below or on deck, he is ordinarily bound by it. Apart therefore from a special contract, the shipowner is under no duty to give notice to the shippers of the storage of goods on deck in order to enable the latter to effect an appropriate insurance if they chose. *ARMOUR AND CO. LTD v. LEOPOLD WALFORD.* (1921) 3 K. B. 473.

**Carrier—Railway—Consignment of goods at owners risk—Special terms—Burden of proof—Wilful misconduct.**

Goods were handed over to a Railway Company for being taken over to a certain place under a special contract according to which in view of certain concessions in the tariff, the owner agreed to hold the company free from liability for any loss, damage, etc. "except upon proof of wilful misconduct". The goods did not reach the consignee and though correspondence ensued between the parties the company did not vouchsafe any explanation for the loss of the parcel. In a suit for damages, the defendants kept up their former attitude and declined to call in any evidence.

*Held*, as per the terms of the special contract plaintiffs could succeed only on proof of wilful misconduct, and the mere refusal on the part of the Railway company to offer any explanation for the loss of goods would not justify an inference of wilful misconduct on their part (1896) 2 I. R. 183 doubted. *H. C. SMITH LTD v. G. W. R. COMPANY.* (1922) 1 A. C. 178.

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**Carrier—Railway—Carriage of goods—Dangerous goods—Warranty—Damage to other goods—Liability of carrier—Rights against consignor.**

The common carrier is a creation of the common law in the sense that his peculiar rights and obligations depend upon the Common law. He may, subject to statutory limitations, make a contract, defining or limiting his responsibility, and in every case where such a contract is made the question must be whether the contract so made is one qualifying the common law obligation or one substituting a purely contractual obligation for the common law obligation. A common carrier does not by limiting his liability assume for all purposes the position of a bailee for reward who is liable only for negligence of himself or his servants, unless the limitation of liability is so extensive as to be inconsistent with the profession or contract of a common carrier. Whether the carrier is a common carrier or whether the carrier is a railway company bound by statute to afford reasonable facilities for the receiving, forwarding and delivering of goods, the consignor of goods who tenders for carriage goods apparently harmless but in fact dangerous, must give warning of the danger. Otherwise the consignor impliedly warrants that the goods are safe and fit for carriage. *GREAT NORTHERN RAILWAY CO v L. E. P. TRANSPORT AND DEPOSITORY LTD.* (1922) 2 K. B. 742 (C. A.)

**Certiorari—Writ of—When issued—Want of evidence to convict**

Where none of the ordinary grounds for certiorari such as informality disclosed on the face of the proceedings or want of qualification in the judge or magistrate who acted, exist, where the charge was one which was triable in the court which dealt with it and the magistrate who heard it was qualified to do so, where there is no suggestion that he was biased or interested or that any fraud was practised upon him, where his conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry and where no conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete, the superior court will not interfere by certiorari and examine the proceedings of the inferior court for finding out whether the evidence warrants the conviction.

Cases on the subject reviewed *REX v. NAT BELL LIQUOURS, LTD* (1922) 2 A. C. 128.

**Charity—Bequest—Legality of—Gift of five shillings a week to the oldest respectable inhabitants of a parish.**

Where a testator bequeathed the income derived from all his securities to "the oldest respectable inhabitants in Gunville to the amount of five shillings per week each" *Held*, that the gift was a good charitable bequest. Though age and age alone would not constitute a gift a good charitable bequest, still age coupled with the poverty of the recipients would render the gift valid. Even if words expressly referring to persons in necessitous circumstances are not found in a will, still if the court can gather that the persons to be

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benefitted were intended to be persons in necessitous circumstances, then that introduces the ingredient of poverty and will turn a gift which might otherwise be not a charitable gift into a good charitable gift. The bequest of five shillings a week indicated that the object of the testator was the benefiting of old people who were in straitened circumstances and to whom five shillings a week would bring comfort and relief. *LUCAS, In re*. *RHYS v. ATTORNEY GENERAL.* (1922) 2 Ch. 52

**Club—Admission of members to cricket matches—Subscription—If any part liable to tax**

The members of a cricket club were allowed to witness matches without any payment in addition to others privileges, *Held* part of their annual subscription was in lieu of admission charges, and entertainment tax is leviable thereon. *ATTORNEY-GENERAL v. SWAN* (1922) 1 K. B. 682.

**Debentures—Power of committee to issue—Charge on property—Money raised used to repay mortgage—Subrogation.**

There is no irrebuttable presumption that a debenture creates a charge. It cannot be presumed that a committee of a club having a general power to issue debentures have an implied power to issue them with a charge on the club's property. If such a power was intended to be conferred it must have been expressly provided for by the rules. Even if the rules of the Club give a Committee the power to issue debentures of any description including debentures constituting a charge on the property and assets of the club, it is open to them to abstain from creating a mortgage or charge while issuing the debentures. The mere use of the term "security" in connection with the debentures does not necessarily import that a security in the nature of property charged to secure the debt was contemplated.

An individual who advances money to another for the purpose of enabling that other to pay specific mortgage debts does not in the absence of a special bargain, thereby acquire the right of the persons whose debts are discharged out of his moneys, against the property of the debtor. *WYLIE v. CARLYON.* (1922) 1 Ch 51

**Company—Promoter—Who is—Secret profit—Liability to account**

The mere purchase of property by a person who contemplates subsequently promoting a company does not, of itself, make him a promoter. But persons who purchase property and then create a company to purchase from them the property they so possess, stand in a fiduciary position towards that company and must faithfully state to the company the facts which apply to the property and which would influence the company in deciding on the reasonableness of acquiring it, and must provide the company with a board of directors capable of arriving at an honest and independent conclusion. The company, is in law a legal "person" and it is of vital importance in the administration of the law relating to limited liability companies that their promotion should as far as possible, be kept clean and honest.

The promoters of a company formed for purchasing a business obtained a large number of fully paid up shares and debentures forming part of those originally allotted to the vendor as the



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ostensible consideration for the purchase. The said consideration was considerably overstated, without the knowledge of the company, in the purchase agreement adopted by the memorandum and articles of association. The debentures were valuable but the shares were worthless. The promoters realised the debentures at their market value and also obtained a considerable sum for the useless shares by fraudulent unloading. Eventually the company went into liquidation and on a misfeasance summons taken out by the Official Liquidator *Held*, that the promoters had made a secret profit out of the shares and debentures purported to be allotted and they were accountable to the liquidator for the whole of the profits made *JUBILEE COTTON MILLS LTD In re.* (1922) 1 Ch 100.

——— *Winding up—Crown debts—Priority of*

In the case of a Company which is being wound up the right of priority which ordinarily attaches to Crown debts has now been taken away in England by the companies (Consolidation) Act of 1908. The exact scope of Crown Prerogatives considered *In re H. J. WEBB AND COY. LTD.* (1922) 2 Ch 369.

*Conflict of laws—Will—Administration—Testators domiciled in America—Assets in England—Claim by American administrator,*

The administration of the estate of a deceased person is governed entirely by the *lex loci* and it is only when the administration is over that the law of his domicile comes in. A testator, domiciled in New York died in England leaving assets and liabilities in England and New York and administration proceedings were taken in both countries. In England there was a surplus after payment of all English creditors and the beneficiaries claimed the surplus. In America there was an excess of liabilities over assets but the debts due and payable in America were barred by limitation under the English Act. The American creditors did not prove their claims in the English Court though given an opportunity to do so. The American administrator applied to have the surplus English assets transferred to him for distribution among the American creditors, *Held*, that in the circumstances of the case, the English Court was not bound to transfer the surplus assets to America *LOVILLARD In re GRIFFITHS v. GAFFORTH.* (1922) 2 Ch 638 C. A.

*Constitutional Law—Canada—Disallowance of Provincial Act—Effect on acquired title.*

Where in pursuance of a provincial legislative enactment, title to a piece of land has been vested in a certain person, the disallowance of the Act by the superior authorities does not invalidate the title already acquired—*WILSON AND OTHERS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY.* (1922) 1 A. C. 202.

——— *Ultra vires—Canada—Legislation interfering with property and civil right in the provinces*

Legislation by the Parliament of Canada creating a statutory body and vesting it with such wide powers as restraining and prohibiting trade combinations, preventing the accumulation of

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food, clothing and fuel beyond reasonable requirements, regulating sales thereof at fair prices and launching prosecutions for any breach of the provision thereof, is *ultra vires* the legislature, since it tended to undermine "the property and civil rights in the Provinces"—*In the absence of exceptional circumstances such as war* S. 92 (2) of the British North American Act, 1867, operated as a bar to the passing of any such enactment the subjects dealt with being reserved exclusively to the Provincial Legislatures. *In re THE BOARD OF COMMERCE ACT, 1919 AND THE COMBINES AND FAIR PRICES ACT, 1916.* (1922) A. C. 191.

*Contempt of Court—Action if maintainable, after judgment—Misrepresentation of judgment.*

When judgment is delivered in a case and all proceedings connected therewith are at an end, a report which amounts to a misrepresentation of the judgment will not amount to contempt of court provided it does not contain anything scandalising the court by making attacks on the judge who presided—If any wrong is done, the parties are left to their remedy by action for libel.

Applications for alleged contempt ought to be very carefully scrutinised and a court ought not in any way enlarge its jurisdiction or apply it to matters which are outside the well established lines. *DHUN v. BEVAN* (1921) 1 Ch. 276.

*Contempt—Proceedings for—Corporation—Mandamus—Disobedience—Attachment—Procedure.*

Where a mandamus is directed to a corporation to do a corporate act and no return is made, an attachment can be granted only against those persons who refuse to pay obedience to the mandamus. The corporation is a national body and it cannot be attached for disobedience to the writ. Where there is no governing body controlling the actions of a corporation, a mandamus addressed to the corporation is a command addressed to every member of the corporation. Where it is sought to attach individual members of the corporation for disobedience to a mandamus addressed to the corporation, the proper procedure is to insert their names in the rule nisi and to serve it on each of them personally with an affidavit indicating the nature of the contempt with which he is charged. *REX v. POPLAR BOROUGH COUNCIL (No. 2).*

(1922) 1, K. B. 95 (C. A.)

*Contract—Breach—Frustration of adventure—Impossibility of performance—Outbreak of war—Illegality—Dissolution of contract.*

Control is in the case of a company the analogue of residence in the case of an individual for the purpose of ascertaining enemy character. If at the outbreak of war the control of a limited company is in the hands and power of persons resident in an enemy country, then on the outbreak of war the company assumes an enemy character. Consequently current contracts entered into with such a company become dissolved by the outbreak of war as being current contracts entered with a company which *eo instanti* assumed enemy character. The doctrine which declares illegal and abrogates executory contracts with enemies existing at the outbreak

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of war applies to all contracts which involve intercourse with the enemy or tend to assist the enemy, even though no enemy be a party to the contract. The test is, not whether one of the parties to the contract is an enemy, but whether the contract involves an intercourse with the enemy or confers an immediate or future benefit on the enemy.

Where a contract is made on the basis that existing commercial conditions would continue and that basis ceases to exist by outbreak of war between England and Germany the commercial object of the contract is frustrated and the contract becomes dissolved by the outbreak of war.

The doctrine of frustration applies also to contracts for the sale of unascertained goods. The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The terms to be implied must not be inconsistent with any express term of the contract. *BADISCHE CO. LTD. 2n re.* (1921) 2 Ch. 331.

— **Enforcement of—Injunction restraining breach—Practice—New plea, when allowed by appellate Court.**

There is no more direct way of enforcing an agreement than by an injunction to prevent a person from breaking it, and if an injunction to prevent a person from breaking an agreement is claimed, that is an action brought directly to enforce that agreement.

Per Lord Sterndale *M. R.*:—The Court of Appeal should refuse to allow to be raised before it a contention which was not only not raised before the Judge in the Court of first instance, but which, if it had been raised, would have given rise to issues of fact which were not presented to him, would have required an amendment of the pleadings and the giving of evidence that was not given before him. *MC. LUSKEY v. COLE.* (1922) 1 Ch. 7 (C. A.)

— **Insurance (Marine)—Reinsurance—Variation in head insurance—Effect on re-insurance contract.**

The insurer under a contract of marine insurance has an insurable interest in his risk and may re-insure in respect of it. Where however the head policy is altered by reducing the value of ship on which payment was to be based, without the knowledge or consent of the reinsurers, they are not liable at all under the Contract of reinsurance. *NORWICH UNION FIRE INSURANCE SOCIETY v. COLONIAL MUTUAL FIRE INSURANCE COMPANY.* (1922) 2 K. B. 461.

— **Principal and agent—Charterers signing "as agent" Personal liability.**

In a contract of charterparty where the document was signed by the charterers as agents.

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*Held, by Bankes and Atkins L. JJ.,* (Scrutton L. J. dissenting) notwithstanding their description as charterers in the body of the document, they were not liable as principals.

Per Bankes, L. J. In dealing with such cases, it must be determined first of all whether the words relied on as relieving an agent of personal liability are merely words of description or whether they are words of qualification. If the former, no effect can be given to them; if the latter, the document must be read as a whole for ascertaining whether the qualification is sufficiently expressed to govern the document—Where the signature is unqualified the presumption is that the agent is personally liable, but where sufficient words of qualification are annexed, the presumption is the other way. Case law referred.

Per Scrutton, L. J. Unqualified description as a party to the contract is at least equally strong as importing personal liability as an unqualified signature, unless negatived by very strong language in the rest of the contract, and a later description as agent does not necessarily exclude personal liability. *ARIADNE STEAMSHIP CO. LTD v. JAMES MC KELVIC AND CO.*

(1922) 1 K. B. 518.

— **Restraint of trade—Sale of business—Vendor's covenant.**

In considering the reasonableness of a covenant in restraint of trade entered into by a vendor on the sale of a business, the court must merely consider whether it was reasonably necessary for the protection of the purchaser in respect of the particular business sold. The purchaser's existing businesses are not the legitimate subject of this protection, and their nature and extent must be disregarded. Covenants of this kind are severable where the severance can be effected by striking out restrictions which are excessive with respect to area or subject matter or classes of customers, provided any such restriction is so expressed that it can be dealt with as a separate negative obligation; but the courts will not split up a single restriction expressed in indivisible terms. *BRITISH CONCRETE CO. v. SCHELEFF.*

(1921) 2 Ch. 563.

— **Sale of goods—C. I. F. contract—Tender of shipping documents—Sufficiency of.**

A seller under a C. I. F. contract has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination. Where the bills of lading tendered by the seller were not through bills of lading and did not offer the buyers protection on the initial voyage for about thirteen days, it is no a valid performance of the contract. On a sale of goods on C. I. F. terms the contract of affreightment must be procured on shipment, and a bill of lading issued thirteen days after the original shipment at another port in another country could not be said to be procured on shipment. *HANSON v. HAMELAND HORLEY, LTD.* (1922) 2 A. C. 36.

— **Sale of goods—Time of shipment—Condition—Description of goods.**

A requirement in a contract for sale of goods that the goods are to be shipped at a given time

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is far more than a mere description of the goods ; it is a condition precedent. A contract for shipment of goods during a particular month is not fulfilled unless the goods are put on board during that month. A clause in the contract that the buyers should not be entitled to reject delivery on account of difference in value "from the grade to type or description specified" has reference only to the goods themselves as articles of commerce and not to the non-fulfilment of a specific provision in the contract as to the time of shipment.

Cases reviewed by Mc Cardie. J. ARON & Co v. COMPTON WEGIMONT. (1921) 3 K. B. 435.

—**Sale of goods—Cargo on board—Smuggled goods if pass by the sale.**

Under a contract of sale the buyer purported to buy "the cargo. . . per S S. 'Rijn' . . . as per bill of lading or bills of lading dated about March 8, 1921." The only goods on board the Rijn as per bills of lading at that date were 2800 odd tons of maize. During the voyage about 58 tons of tobacco had been smuggled on board without the knowledge of the seller and the tobacco was not mentioned in the bills of lading. On the arrival of the ship at the port of destination the buyer rejected the cargo of maize on the ground that it was not the "cargo" contracted for. *Held* that the contract was for the sale of the cargo of maize actually on board at the time when the contract was entered into as comprised in the bill of lading and that the buyers were not entitled to reject. PAUL LTD., PIM & Co., (1922) 2 K. B. 360.

**Criminal Law—Charge—Limited Company—Prosecution for offence.**

A limited Company cannot be committed for trial on an indictment and a conviction of the Company must be quashed. REX v. DAILY MIRROR NEWSPAPER. (1922) 2 K. B. 530.

**Criminal Trial—Joinder of charges—Abortion—use of instruments and drugs—Evidence—Admissibility.**

Where a person was charged at one and the same trial with having used instruments to procure miscarriage in some instances and having used drugs to procure miscarriage in other instances, *held* there was no misjoinder of charges.

Evidence that the person administered drugs to one person to procure abortion is admissible in support of a charge for having used an instrument to procure an abortion upon another and *vice versa*, the point being not to prove thereby that he used the instrument or administered the drug, but to rebut the defence of the accused that he did so innocently. THE KING v. STARKIE. (1922) 2 K. B. 275.

**Crown—Interpleader issue—Crown when can be impleaded.**

The rule that no action lies against the Crown at the suit of the subject is part of the wider principle that the king cannot, against his will, be made to submit to the jurisdiction of the King's courts. An interpleader would not lie against the Crown. Where the Crown objects to be made a party, there is no jurisdiction in the court to make an interpleader order as against the Crown. THE MOORE v. (1922) P. 122 (C. A.)

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**Damages—Author and publisher—Breach of contract to publish—Measure of damages.**

A publisher who has agreed to publish a work must publish it, but is not bound to continue publishing it, the author has a right to determine the agreement after publication of an edition unless the agreement otherwise provides. In an action for damages by an author against a publisher for non-publication of a book as agreed, everything likely to affect the amount of profit must be considered ; the nature and popularity of the subject matter, the reputation of the authors, the cost of producing a book on that subject, the price at which it would command a sale, the business capacity of the publishers and the chances of earning a profit by the sale of the book. On the other hand the publishers are not bound to run risks contrary to their judgment, they would naturally and properly allow for fluctuation in the public taste for literature of this kind ABRAHAMS v. HERBERT REICH, LTD. (1922) 1 K. B. 477.

—**Breach of negative covenant—Injunction if discretionary.**

*Prima facie* where a defendant commits a breach of a negative covenant with his eyes open and after notice, the court will grant a mandatory order, but there is and must be, some limitation to this practice. If there is really no damage of any sort suffered by a plaintiff by reason of the breach of the negative covenant, and if the granting of a mandatory injunctions would inflict damage upon the defendant out of all proportion to the relief which the plaintiff ought to obtain, the court ought to refuse it—case law reviewed. SHARP v. HARRISON. (1922) 1 Ch. 502.

—**Measure of—Negligence—Loss of life—Claim for compensation by widow and children—Pensions granted by state if taken into account—Fatal Accidents Act, 1846 S. 2.**

In an action by a widow under the Fatal Accidents Act, 1846 (commonly known as Lord Campbell's Act) for damages consequent on her husband's death the plaintiff is entitled to damages proportioned to the injury resulting to her from the death and that injury must be pecuniary injury. She is not entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society. She is entitled to claim on the one hand any pecuniary benefit which it is reasonably probable she would have received if the deceased had remained alive. It is not necessary that she should have a legal right to have received that benefit from the deceased or should have actually received any such benefit before the death. It is enough that she had a reasonable expectation of pecuniary advantage in the future had the deceased survived, which pecuniary advantage may be a voluntary contribution from the deceased. On the other hand, as the question is what is her pecuniary loss by the death, any pecuniary advantage she has received from the death must be set off against her probable loss. This is so whether the advantage accrues to her as of legal right or as a voluntary benefit. The probability of a voluntary contribution bestowed in consequence of death may be used to reduce the claim

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by showing what loss the claimant has in fact sustained by the death. A crown pension allowed to the widow consequent on the death of her husband, ought to be taken into consideration in assessing damages, even though the pension is dependant on the bounty of the Crown. *BAKER v. DALGLEISH STEAM SHIPPING CO.*

(1922) 1 K. B. 361.

———*Negligence—Railway—Level crossing—Omission to lock gate—Injury—Liability.*

In an action for damages caused to a person by collision with a running train at a railway level crossing it was found that the practice of the railway company was to keep the wicket gate always locked if a train was approaching, and only to have it unlocked when no train was approaching, and that on the occasion in question, owing to the negligence of a servant of defendants the gate was left unlocked at a time when a train was approaching. *Held*, that to those who, like the plaintiff knew of the practice of the railway this was an invitation to cross the line and that the Railway Company was liable in damages. *MERCER v. SOUTH EASTERN & CHATHAM RAILWAY.*

(1922) 2 K. B. 549.

———*Charter party—Fire—Exception clause—Negligence—Natural and probable Cause.*

In an action for damages by a shipowner against charterers for loss caused to the ship by fire, *held* that the exception clause as to "fire" in the charterparty did not protect the charterers against loss by fire due to the negligence of their servants. To enable the charterer to escape liability there must be an express stipulation to that effect.

To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damages: if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact, directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. *Greenland v. Chaplin* (1850) 5 Ex 243, 248 Per Pollock C.B. disapproved. *Smith v. J. and S. W. Ry Co.* L. R. 6 C. P. 21; *H. M. S. London* (1914) Pp 72, 76; *Weld Blundell v. Stephens* (1920) A. C. 983 Relied on. *POLEMIS AND FURNESS, WITBY & Co. In re.*

(1921) 3 K. B. 560 (C. A.)

———*Breach of contract—Rate of exchange applicable.*

In an action against an English subject in an English Court for recovery of a debt payable abroad on a particular day but not so paid, *Held*, that in arriving at the proper equivalent of the debt in English currency, the rate of exchange prevailing between the two countries on the date when the debt was due should be adopted and not that prevailing at the date of the judgment. [Compare also (1921) 2 A. C. 54] *SOCIETE DES HOTELS, ETC. v. CUMMING.*

(1921) 3 K. B. 459.

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———*Breach of Contract—Tort—Foreign currency—Conversion into British currency.*

In translating damages from foreign currency into sterling, the date at which that process has to be effected is the date of the breach of contract and the rule in contract and tort is the same. If a creditor has to prove in a winding up for the debt in respect of a breach of contract the debt which is lawfully payable to him in such a case would be a debt in sterling at the rate of exchange at the date of the breach of the contract. *BRITISH AMERICAN CONTINENTAL BANK LTD. In re,*

(1922) 2 Ch. 575 (C.A.)

———*Loss of life—Measure of damages—State pension payable to widow.*

In an action under the Fatal Accidents Act for damages by the widow of a seaman killed by the negligence of the defendant, the court cannot take into account the fact that the plaintiff is in receipt of a pension dependent on the bounty of the Crown, in assessing the damages. The death is not the cause, in any proper sense, of the voluntary contribution by the Crown and the benefit of such contribution should not be assessed in relief of the wrong doer. *BAKER v. DALGLEISH-STEAM SHIPPING CO.*

(1921) 3 K. B. 481.

[See (1922) 1 K.B. 361.]

———*Measure of—Breach of contract or tort—Loss proved in foreign currency—Rate of exchange.*

In an action for damages for breach of a contract or tort, the court ascertains the rights of the parties and awards that which measures the loss at the time when the loss occurs. If these damages be assessed in a foreign currency, the judgment of an English court, which must be expressed in sterling, must be based on the amount required to convert this currency into sterling at the date when the loss occurred. The subsequent fluctuation of exchange one way or the other, ought not to be taken into account.

So held by the majority of the House of Lords. (*Lord Carson dissenting*) *S. S. "CELIA" v. S. S. "VOLTURNO"*

(1921) 2 A. C. 544.

———*Nuisance—Explosives—Non-natural user of land—Liability of occupier.*

The accumulation of combustible chemicals on land with a view to manufacturing high explosives is a non-natural user of the land and the person who is in control of the noxious substance is liable in damages for injury caused by its explosion to neighbouring land owners. The liability is based on the principle of *Fletcher v. Rylands* L. R. 3 H. L. 330 and the absence of negligence does not matter. Where persons carrying on an inherently dangerous business as the manufacture of high explosives, transfer it to a company but do not effectively divest themselves of the occupation of the premises where the manufacture is carried on, they remain liable in damages as occupiers for injury caused to neighbours by an explosion. *RAINHAM CHEMICAL WORKS, LTD. v. BELVEDERE FISH GUANO CO.*

(1921) 2 A. C. 465.

———*Sale of goods—Banker—letter of credit—Repudiation—Quantum of damages.*

Piffs were a company manufacturing machinery in Great Britain. They agreed to sell and ship in

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monthly instalments, to certain traders at Calcutta a quantity of machinery at prices mentioned in a *proforma* invoice, subject however to a stipulation that should the cost of labour or wages advance there would be a corresponding advance in the prices to be paid by the buyers. The goods were to be paid for by means of a confirmed irrevocable credit to be opened by the buyers in favour of the pliffs with a bank in Great Britain who were to pay the pliffs. for each shipment as it took place. In pursuance of this arrangement, the debt bank at the instance of the buyers undertook up to certain amount and with a certain limit of time, to pay the pliffs. against bills drawn upon the buyers accompanied by corresponding invoices and shipping documents, the amount of such invoices. Having received a letter of credit from the debt bank, the pliffs. manufactured the machinery and actually shipped two instalments of it, receiving payments from the debts under the letter of credit against bills accompanied by the invoices and other documents called for by that instrument. Before the third shipment was made, the buyers finding, that the pliffs. were including in their invoices an addition to the prices originally quoted in respect of an alleged rise in the cost of the wages or materials, instructed the debts. only to pay so much of the next invoices as represented the original prices. The debt obeyed these instructions but the pliffs. refused to part with the documents representing their goods unless they received the full amount of their invoices: and upon the debt maintaining their position cancelled the contract as to further shipment, as upon a repudiation by the buyers and brought an action against the debt bank claiming as damages the loss on material thrown on their hands and loss of profit; in other words, the same damages as they would claim against the buyers on the repudiation of the contract. *Held*, that having regard to the fact that the credit was irrevocable the refusal of the debt, to take and pay for the particular bills on presentation of the proper document constituted a repudiation of the contract as a whole. The pliffs. were therefore entitled to damages. The amount of damages was the difference between, on the one hand the value of the materials left on the pliff's hand the cost of such as they would have further provided, and on the other hand, what they would have been entitled to receive for the manufactured machinery from the buyers the whole being limited to the amount they could in fact have tendered before the expiry of the letter of credit. *URQUHART LINDSAY AND CO. v. EASTERN BANK, LTD.* (1922) 1 K. B. 318.

— *Sale of premises with the business carried thereon—Default of purchaser—Loss in business—Liability to indemnify.*

A contract for the sale of premises together with the good will of a business carried thereon was not completed owing to the wilful default of the purchaser. The vendor carried on the business at the risk of the purchaser and informed him that the business was being carried on at a loss and at the purchaser's risk. The purchaser kept quiet. In an action by the vendor against the purchaser for recovery of the loss sustained by the former in continuing the trade,

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*held* that the vendor having sold the business as a going concern was entitled to be indemnified against all losses incurred in carrying on the business after the date fixed for completion. As between the vendor and the purchaser, the vendor was, as from the date fixed for completion, a trustee of a somewhat modified kind. He was entitled *prima facie* to continue to carry on the business he had sold at the risk of the purchaser—subject to his taking steps to inform the purchaser with reasonable promptitude of what he was doing. *GOLDEN BREAD CO. LTD. v. HEMMINGS.* (1922) 1 Ch. 162.

— *Shipping—Timecharter—Power to withdraw ship if hire not paid—Default in payment of hire—Withdrawal of ship—Subsequent loss.*

A steamship was let for 36 months under a charterparty which provided that the charterers should pay the monthly hire in advance and in default of such payment "the owners shall have the power of withdrawing the said steamer from the service of the charterers, without prejudice to any claim they (the owners) may otherwise have on the charterers under this charter." The charterers made default in paying the third and fourth months hire whereupon the shipowners withdrew the steamship. In an action by the shipowners against the charterers for arrears of hire due at the date of withdrawal and for damages for loss of hire during the remainder of the chartered period. *Held* that, besides the hire in arrear, the plaintiffs could recover damages for loss of the future hire inasmuch as these damages were the natural and probable result of the default of the defendants in paying the hire and not of the withdrawal of the steamship by the plaintiffs. The measure of damages was the difference between the rate of hire fixed by the charter and the hire that could be got apart from the charter. *LESLIE SHIPPING CO. v. WELSTEAD* (1921) 3 K. B. 420.

**DEBT—Foreign currency — Conversion— Rate of—Company—Winding up.**

In an action in England for recovery of a debt due in a foreign country in the currency of that country, the correct date for conversion into English money is the date on which that debt became due in the foreign country. The same principle applies to a claim in the winding up of a company in England for a debt due from the company to the claimants (a foreign company,) in a foreign currency. *BRITISH AMERICAN CONTINENTAL BANK LTD., In re.* (1922) 2 Ch. 589.

**Debtor and Creditor—Payment after due date—Payment after action—Costs—Debt payable in foreign currency—Action in English Court—Payment in foreign currency—Effect of.**

Payment of a debt made and accepted after the time of payment, but before action, is a complete defence, and the creditor is not entitled to sue for nominal damages. Payment after action brought is not a complete defence unless made in satisfaction of all damages and costs of the action as well as of the debt. If it is made in respect of the debt only the plaintiff is entitled to continue the action for nominal damages and the costs, of the action. Where a debt is payable in France to a French subject in French currency it does not cease to be

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a French debt merely because the creditor has sued the debtor, an English subject, in an English Court. Consequently payment of the debt in France by the debtor in French currency, after the action is a good discharge of the debt for the purposes of the English action notwithstanding the devaluation of the French franc as expressed in English currency since the date when the money became due. *SOCIÉTÉ DES HOTELS LE TOUQUET PARIS—PLAGE v. COMMINGS.*

(1921) 1 K. B. 451

**Declaratory suit—Mortgage — Redemption — Action for declaration as to terms of redemption — Trial as a commercial cause — Rules of the Supreme Court O. 152, R. 5.**

An English bank obtained a loan from a Russian bank on the security of certain bonds. A question having arisen as to whether the loan was repayable in roubles or in sterling, the mortgagors sued in the King's Bench Division for a declaration that they were entitled to possession of the bonds upon payment of the loan in roubles and for an injunction restraining the lenders mortgagors from parting with the bonds save by delivery of the same to them. The action was transferred to the commercial court and the trial judge dismissed it holding that the loan was repayable in sterling. The court of appeal allowed an amendment, admitted additional evidence and held that the loan was repayable in roubles and gave liberty to the mortgagors to institute proceedings in the Chancery Division for redemption. On appeal to the House of Lords,

*Held* by the majority (*Viscount Finlay and Lord Wrenbury* dissenting) that the action being one for relief incidental to a redemption suit, ought to have been properly brought in the Chancery Division but the error or defect was however, one of procedure only and that the discretion of the Court of Appeal in granting the declaration ought not to be interfered with.

Per *Lord Dunedin*: To sustain an action for declaration the following elements must be present: The question raised must be a real and not a rhetorical question; the person raising it must be able to secure a proper contradictor that is to say, some one presently existing who has a true interest to oppose the declaration sought. *RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v. BRITISH BANK FOR FOREIGN TRADE, LTD.*

(1921) 2 A. C. 438.

**Deed—Construction—Repugnant clauses—Effect**

If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause the later clause is to be rejected as repugnant and the earlier provision in the deed prevails over the later. *FORBES v. GIT.*

(1922) 1 A. C. 256.

**Divorce—Damages—Costs—Knowledge of marriage—Absence of—Effect of.**

In an action for divorce the fact that the co-respondent had no knowledge that the respondent was a married woman is no bar to the award of damages. The fact of knowledge is an aggravation, but the absence of knowledge is not a bar. A Judge has discretion to direct the costs of the petitioner in a divorce case to be paid by the co-respondent even though he was ignorant that the

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respondent was a married woman. *SMITH v. SMITH AND REED.* (1922) P. 1

**Grounds for — Desertion — What constitutes.**

It is difficult to define the matrimonial offence of desertion. Neglect or contempt, however hard to hear do not constitute desertion. Where a husband forsook his wife's bed, avoided her society, shut himself in a separate part of the house, refused her access to it, and this conduct continued for two years. *Held*, that there was desertion by the husband though the husband and wife resided under the same roof. *POWELL v. POWELL* (1922) P. 278

**Husband's adultery—No defence by husband—Intervenor successful in appeal—Effect on decree nisi.**

A wife put in a petition for dissolution of marriage on the ground of her husband's adultery. He failed to put in any defence but the other party to the alleged adultery intervened and filed an answer. A decree nisi was granted by the trial judge, but the intervenor appealed and the appellate court held the alleged adultery had not been committed by her. On the question arising as to the effect of the appellate order on the decree nisi against which no appeal had been preferred. *Held* it must be set aside and the petition for dissolution of marriage dismissed. *RUTHERFORD v. RUTHERFORD* (1922) P. 144.

**Husband's petition—Claim for damages against co-respondent — Death of wife—Abatement.**

A claim for divorce against the wife and a claim for damages against the co-respondent are distinct causes of action and the latter does not abate on the death of the respondent. *MONSELL v. MONSELL AND CAIN.* (1922) P. 34.

**Nullity — Impotency quoad hanc—Evidence.**

Under the English law an averment of impotency *quoad hanc* is sufficient to support a decree of nullity. In such actions if the evidence of the parties is conflicting and the medical evidence is consistent with either story, the court may if it thinks fit act on the evidence of the petitioner in preference to that of the respondent. *C. v. C.*

(1922) P. 399.

**Easements—Ancient light — Obstruction—What constitutes — quia and in et action—Business carried on in premises.**

In a *quia and in et* action by the plaintiff to restrain by an injunction the erection of proposed building unless the plaintiff establishes affirmatively that the light which would be lost is insufficient for the ordinary purposes of his business according to the standard of the locality he must fail. There is no right to any kind of special light either in quantity or quality. *CHARLES SEMON & CO., LTD. v. BRADFORD CORPORATION* (1922) 2 Ch. 737.

**Evidence—Admissibility—Declaration by person in possession of property against proprietary interest.**

A person in possession of his wife's property after her death made a declaration that he took a

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life interest under her will but destroyed the will. In probate proceedings subsequent to his death the question arose whether his declaration was admissible in evidence. *Held*, the legal presumption arising from possession being that he was owner in fee, a declaration that he had only a life estate was one against proprietary interest and as such admissible. *In re ADAMS BENTON v POWELL.* (1922) P 240

—Admissibility—Negotiations for compromise—Letters without prejudice—Not admissible in evidence—Solicitor—Duties of—Implied trust in respect of client's moneys.

Where in a dispute between parties letters are written and statements made by the solicitors of the parties and such letters and statements are declared or stated to be "without prejudice" they are inadmissible in evidence not only against the parties but also against the solicitors. To rule otherwise would in many cases make negotiations for the settlement of litigation impossible. It is for the benefit of litigants, and others that statements should be freely made in order to settle litigation.

If a chattel is transferred, admissions made by the transferor at the time of or prior to the transfer, which qualify or affect his title, are admissible in evidence against the transferee, but such evidence is inadmissible where no question of title arises and the only dispute is as to the right to a sum of money.

A solicitor who receives money from his client for her defence in an action is not affected by any trust attaching to the money in his client's hands and he can apply the moneys in her defence or otherwise as she directs. *LA ROCHE v. ARMSTRONG.* (1922) 1 K. B. 485

—Criminal intention—Causing death by poisoning—Evidence of administration of poison to another person—Admissibility.

On a charge of causing the death of his wife by arsenic poison, prisoner's defence was that the wife had committed suicide by taking the poison. The prisoner had purchased a quantity of arsenic and made it into small packets each containing a fatal dose and his explanation was that he had purchased it for destroying weeds in his garden. The prosecution, in order to prove the guilty intention of the prisoner, offered evidence that eight months after the death of his wife he administered arsenic to another person. *Held* that the evidence was admissible to show that the prisoner's intention in buying and keeping arsenic was criminal, and not innocent. *REX v ARMSTRONG.* (1922) 2 K. B. 555.

—Criminal trial—Evidence of good character of accused—Rebuttal.

A statement not voluntarily made by an accused but extorted from him by repeated questions in cross examination cannot be treated as evidence given by the accused of his good character and does not justify the prosecution in letting in evidence of his previous convictions. *REX v. BEECHAM.* (1921) 3 K. B. 464.

—Indecency—Charge—Particulars of complaint—Admissibility of.

**GAMING ACT, S. 1.**

In cases of rape and kindred sexual offences, including the commission of an act of gross indecency with a boy of the age of 15, the fact that the victim of the act made a complaint soon after the commission of the offence as well as the particulars of the complaint are admissible in evidence, not as evidence of the facts complained but to show consistency of conduct and as corroboration of the testimony of the boy. *REX v. CAM ELLERI.* (1922) 2 K. B. 122

**Excess Profits Duty Act, S. 45, Sub S (2)—Change of ownership of business—Liability of successor to pay duty.**

The persons assessable to excess profits duty under S. 45 sub S (2) of the Finance Act 1915, as being the person for the time being owning or carrying on the business is the person who owns or carries on the business at the time of assessment and not the person who owned or carried it on during the accounting period in respect of which the assessment is made.

*Per Lord Buckmaster.* Arguments based on the ground of injustice have but little weight in determining the meaning of an Act of Parliament unless, indeed, its provisions are so ambiguous that the hardship inflicted by one construction can be used to show that such a purpose could not be properly attributed to the legislature. If the words of the statute can only reasonably bear one meaning, it is not within the competence of the courts to consider the fairness or unfairness of the result that ensues. *WANKIE COLLIERY COMPANY v. COMMISSIONERS OF INLAND REVENUE.* (1922) 2, A. C. 51.

**Gaming—Cheque given for racing bet—Indorsement in blank to banker for collection—Banker, if a "holder"—Suit for recovery of the amount—Maintainability—Gaming Act, 1835, S. 2.**

The loser of a bet on a horse race drew a cheque in favour of the winner and crossed it "Not negotiable a/c Payee only"; The payee indorsed the cheque in blank in favour of his bankers for the purpose of collection. The bankers presented the cheque and obtained payment of the same. In an action by the loser against the winner to recover the amount of the cheque. *Held* that the bankers were indorsees and holders of the cheque within the meaning of S. 2 of the Gaming Act, 1835 and that the plaintiff was entitled to recover.

The expression "holder of a note or bill" in S. 2 of the Gaming Act includes the original payee as well as a banker who receives the note or bill for collection.

*Dey v. Mayo* (1920) 2 K. B. 346 approved. *Nicholls v. Evans* (1914) 1 K. B. 118 overruled. *SUTTERS v BRIGGS.* (1922) A. C. 1.

**Gaming Act, 1892, S. 1—Gaming—Cheque given for racing bets—Right of drawer to recover—Gaming Act, 1845, S. 18**

Plaintiff made bets with the defendant on horse races, and having incurred losses on these transactions he paid the defendant by means of cheques drawn by him in favour of the defendant. Subsequently he sued to recover the moneys paid by him under S. 2 of the Gaming Act, 1835. *Held* that the right to recover the money was given by statute and consequently there was no necessity for



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any promise to pay by the defendant to render the money recoverable. *COHEN v. HALL*.

(1922) 2 K. B. 37.

**Highway—Local authority—Road surface—Tar spray—Damage to adjacent owners—Liability.**

A local authority empowered or directed to pave and repair roads can tar a road so as to prevent a dust nuisance. But if in so doing they cause damage to private property they are liable, unless they show that such damage is a necessary consequence of the exercise of the power, or the discharge of the duty. *DELL v. CHESHAM URBAN DISTRICT COUNCIL*.

(1921) 3 K. B. 427

**Husband and wife—Gift—Household furniture—Registration—Omission of—Subsequent possession—Doctrine of reputed ownership—Bills of Sale Act, 1878 ss. 4 and 8—Married Woman's Property Act, 1882 s. 10**

The doctrine that possession follows title applies to chattels as well as to lands: Where the husband and wife are living together in the conjugal domicile there is no presumption that the household goods are in the apparent possession of the husband. Where by a post nuptial deed a husband gave his wife certain household furniture in the house where they were living together, and the furniture remained in the house occupied by them, it could not be said that the furniture was in the possession or apparent possession of the husband or in his order and his possession or reputed ownership.

The doctrine of reputed ownership does not require any investigation into the actual state of knowledge of belief, either of all creditors, or of particular creditors and still less of the outside world, who are no creditors at all as to the possession of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the mind of those who knew their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make enquiries on the subject. *FRENCH v. GETHING*.

(1922) 1 K. B. 286 (C. A.)

**Income-Tax—Canons of construction—Trade exercised within United Kingdom—Test of—Non-resident persons—Liability of.**

Where it is desired to impose a new burden by way of taxation, it is essential that the intention should be stated in plain terms. If a section of a taxing statute is of doubtful and ambiguous meaning, it is not open to courts to extract out of it a new and added obligation not formerly cast upon the tax payer.

A non-resident person can be taxed in the United Kingdom only if he carries on trade there. Where the contract was made abroad and the delivery in pursuance thereof was also made abroad, a trade cannot be said to have been carried within the United Kingdom. *GREENWOOD v. F. L. SMIDTH & CO*.

(1922) 1 A. C. 417.

**Case stated by Commissioners—Death of respondent—Addition of legal representative—Taxes Management Act, 1880, s. 5.**

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The Surveyor of Taxes being dissatisfied with an assessment by the General Commissioners required them by notice in writing to state and sign a case for the opinion of the High Court. Subsequently and before the case was actually signed and filed, the assessee (respondent) died and the Surveyor sought to prosecute the case against the legal representative of the assessee. *Held* that the proceedings did not abate on the death of the respondent (assessee) and that they could be continued as against the executor of the deceased assessee.

In the absence of a specific rule enacted by statute, the court had power to mould a convenient form of procedure to enable the case to be heard on the merits. *SMITH v. WILLIAMS*.

(1922) 1 K. B. 158.

**Foreign company—Branch in England—Liability to pay tax—Carrying on business**

A Danish firm of manufacturers and exporters of machinery had an office in London in charge of an Engineer who received inquiries, sent orders for machinery to Denmark and after its arrival advised the purchasers as to erection of the machinery.

The contracts for sale of the machinery were made in Denmark where the orders were accepted. The crown sought to assess the Danish firm in the name of the branch in England to income tax. *Held*, negating the contention of the crown, that the Danish firm did not exercise a trade in England and it was therefore not liable to pay income tax. The place where a trade is carried on is the place where the transactions forming the alleged business are closed, in the case of a selling business by the sale of the commodity and realisation of the profit. The Danish firm exercised their trade in Denmark and they could not in respect of the same profits and gains exercise their trade elsewhere. *SMIDTH v. GREENWOOD*.

(1921) 3 K. B. 583 (C. A.)

**Husband and wife—Liability of husband to pay—Recoupment—Income Tax Act (1918) R 16.**

For the purposes of the Income Tax Act, the profits accruing to a married woman are deemed to belong to the husband and he is assessable on the same. He has no right of indemnity under the Act against her estate for the tax so paid by him. *INRE WARD; HARRISON v. WARD*.

(1922) 1. Ch 517.

**Profits—Calculation of—Deduction for bad debts—Practice.**

Under s. 10 of the Income Tax Law of Jamaica (which closely follows the English law) an assessee in computing the profits of his trade or business cannot deduct a debt found to be bad in the year of assessment but incurred in a previous year. The right to a deduction in respect of bad debts is confined to debts incurred in the year of assessment. *GLEAVER COMPANY, LTD. v. ASSESSMENT COMMITTEE*.

(1922) 2 A. C. 169

**Salary—Computation of—Contribution to superannuation fund—If a deduction.**

In computing the profit or gain for purposes of income tax the fact that the taxpayer does not



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actually receive the same is immaterial, nor does it matter what he does with the sum.

Where in accordance with a superannuation scheme, a certain percentage of the salary of a member of the staff of a College was deducted as contribution to the fund, the amount cannot be deducted for purposes of income-tax. *E. H. BRUCE v. J. L. S. HATTON.* (1922) 2 K B 206

— *Super-tax - Company - Dividends - Distribution of shares in another company - Liability of shareholder to pay super-tax.*

Where a company declared an extra dividend out of its accumulated profits and this dividend was paid partly in cash and partly in the shape of shares in another company in which the reserves of the former were invested, the amounts realised by the sale of the shares so distributed form income in the hands of the shareholder and would be liable to super-tax, and income-tax. The distribution was not of capital of the company but of its profits and gains. The true test as to whether a distribution of assets falls to be taxed depends on two questions (1) whether there has been a release of assets (2) if so, whether the assets released were capital or income.

*Inland Revenue v. Blott.* (1921) 2 A. C. 171 distinguished. *POOL v. THE GUARDIAN INVESTMENT TRUST CO., LTD.* (1922) 1 K B 347.

— *Statement of case by Commissioners for the opinion of the Court - Form of*

In stating a case for the opinion of the Court the Commissioners of Income-tax should set forth the conclusions of law at which they have arrived separate and distinct from their conclusion of fact. Any other course leads to embarrassment; and they should not express their conclusion in the form that they were of opinion that the contentions put forward on one side or the other should succeed. *GREAT WESTERN RAILWAY CO. v. BATER.* (1922) 2 A. C. 1.

*Injunction - Mandatory injunction - Grant of - Damages - Discretion of Court - Continuous works - Erection of.*

As a general rule the Court will not grant a mandatory injunction in general terms to repair or maintain, and in considering whether it will do so or not one of the circumstances which may influence it in coming to a conclusion not to grant such an injunction is that the work will have to be done upon land which is not the land of the defendant. Ordinarily the Court will not enforce specific performance of works, such as building works, the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the liability of the Court to see that the work is carried out.

In the circumstances of the case the Court granted a mandatory order compelling the execution by defendant of specific works required for remedying existing defects in the remedial works erected on the plaintiff's land. *KENNARD v. CORY BROS.* (1922) 2 Ch 1.

*Insurance - Contract - Disclosure of material particulars - Insurance against burglary - Nationality of assured person.*

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The mere fact that a person is a foreigner and not a British subject is not in all cases a material fact, so that the nondisclosure of it invalidates the policy of insurance. At the same time it is impossible to say that matters such as nationality, caste and early domicile of the assured cannot be of importance in judging as to the risk that underwriters run in entering into such a contract. Held that in the circumstances of the case, the omission of the assured to state that he was Rumanian by birth though settled in England for long time and that he was registered as an alien under the war legislation, vitiated a policy of insurance against burglary effected by him. *HOME v. POLAND.* (1922) 2 K B 364.

— *Fire - Questions in proposal form - Condition and warranty - Distinction - Misrepresentation - Effect on record*

The owner of a motor lorry insured it against damage by fire and third party risks under a policy of insurance which stated that the proposal should be the basis of the contract and held as incorporated in the policy. The policy was granted under conditions printed at its back one of which was that "material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void." On a question arising as to whether the insurers were free from liability under the policy by reason of inaccuracy in a statement made by the insured in the proposal submitted when the policy was issued, to the effect that the motor would usually be garaged at a certain address whereas it was garaged elsewhere. Held that under the policy the proposal was the basis of the contract between the parties; that the truth of the statements in the proposal, apart from their materiality was a condition of the liability of the insurers; and that condition having been broken, though by inadvertence, the insurers were not liable under the policy. So held by the majority of the House of Lords. *Viscount Findlay and Lord Wrenbury dissenting.* *DAWSONS LTD. v. BONNIN.* (1922) 2 A. C. 413.

*Interest - Mortgage - Compound interest - Annual rests - Capitalisation of interest - Income Tax - Right of mortgagor to deduct tax before payment of interest.*

All that the expression "compound interest", really means is, that if the interest, or a portion thereof, is not paid, then that interest or that portion of it which is not paid, shall itself bear interest. The words "yearly rests" occurring in a provision for payment of compound interest merely define the periods at which the interest is to become payable upon what may be called the overdue interest. In ordinary practice the way in which compound interest with yearly rests is calculated is that at the end of the first and every succeeding year the interest for the year which is unpaid is added to the capital; at the end of the second year the interest for that year, if it is unpaid, together with interest on the first year's unpaid interest is added to the sum made up of the capital and the first year's interest, and upon those aggregate sums interest is calculated for the

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following year, and so on. This is commonly spoken of as capitalising the interest though it has not that legal effect. The interest does not become capital for the purposes of income tax.

A mortgagor redeemed a mortgage containing a provision for payment of compound interest with yearly rests, under which however no interest had been paid for several years after the due date. The mortgagor on redemption paid the whole of the principal and interest due on the mortgage as per its terms less income tax on the total amount of interest for all the years basing his claim on Rule 19 (1) of the General Rules under the Income Tax Act, 1918. The mortgagee claimed that the mortgagor could deduct tax only on the interest payable for the year of redemption and that the interest for the previous years had been capitalised under the provisions of the mortgage. *Held*, that the compound interest had not been "capitalised" for legal purposes and that the interest had remained as such all along so as to entitle the mortgagor to deduct the income tax on the whole of that interest on payment to the mortgagee. *MORRIS IN RE MAYHEW v. HALTON* (1922) 1 Ch 126.

**International Law — Recognition of foreign government—British Courts—Soviet Russia**

British Courts will not inquire into the validity of the acts of a foreign Government which has been recognised by the Government of the United Kingdom. It does not matter whether the foreign Government has been recognised as a Government *de jure* or *de facto*. The Government of the United Kingdom having recognised the Soviet Government as the Government really in possession of the powers of sovereignty in Russia the acts of that Government must be treated by British Courts with all the respect due to the acts of a duly recognised foreign sovereign state. *AKSIONAIRNOYE OBSHCHESTVO A. M. LUTHER v. JAMES SAGOR AND CO.* (1921) 3 K. B. 532 (C. A.).

**Landlord and tenant — Breach of covenant — Waiver—Sale of reversion subject to lease.**

An unequivocal act by the lessor recognising the continued existence of the lease is a waiver of known breaches. Where with the knowledge of a breach of covenant the vendor executes and the plaintiff accepts a conveyance of the property subject to and with the benefit of the lease, it constitutes a waiver of the past breach and the right of re-entry in respect thereof. *DAVENPORT v. SMITH.* (1921) 2 Ch. 270.

**—Covenant against alienation—Forfeiture—Declaration of intention by landlord—Suit to eject assignee in possession**

A lessee who was bound by the covenants in his lease not to sublet or assign without the written permission of the lessors assigned his term to the defendant without such permission and subsequently disappeared. The lessor, as soon as he came to know of the assignment sued to eject the assignee in possession. *Held* that on the disappearance of the lessee, the issue of a writ against the assignee in possession was a sufficient declaration by the lessor of the exercise of his option to forfeit the tenancy for breach of the

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covenant not to assign. Consequently the tenancy of the original lessee and that of his assignee were both thereby determined. *COMMISSIONERS OF WORKS v. HULL.* (1922) 1 K. B. 205.

**—Covenant for renewal—Construction—Perpetual renewal—yearly tenancy—Suit for declaration without consequential relief**

Courts lean against construing a covenant to be for a perpetual renewal unless it is perfectly clear that the covenant does so provide. A perpetual right of renewal is repugnant to a strict tenancy from year to year, and if a lease in fact creates such a tenancy the right of renewal must be rejected.

A claim for a declaration not followed by any claim for consequential relief is as a rule useless and should be discouraged. For instance, a landlord who claims that a tenancy was terminated by notice to quit ought to ask for possession. *GRAY v. SPYER.* (1921) 2 Ch. 549.

**—Covenant to repair sea wall—Suit for damages—Notice if necessary.**

In cases where a landlord has agreed to keep the premises in good order, executing the necessary repairs there is a duty on the part of tenant to give notice to the landlord about the want of repairs; the duty springs from the special knowledge of the need of repairs which his occupancy of the demised premises is presumed to give him, coupled with the state of ignorance of that need in which the absence of such occupancy is presumed to leave the landlord.

Where in consideration of keeping the sea-walls always in repair a revision of rents took place and the landlord had to employ an agent whose duty it was to see to the safety of the sea-walls, *held* there was no duty on the tenants to give such notice, and it was not a condition precedent to the institution of suits for damages. *MURPHY v. HURLEY.* (1922) 1 A. C. 369.

**—Covenant against sublease — Underletting of a portion of the premises with consent of the landlord and of the remainder without such consent—Breach—Forfeiture.**

Covenants against alienation ought to be construed strictly. Under a lease the tenant covenanted not to assign, underlet or part with the possession of the demised premises without the consent of the landlord, such consent not to be unreasonably withheld. The tenant underlet a portion of the premises with the consent of the landlord and the remainder without such consent and delivered possession of the premises to the two sub-tenants. In an action by the landlord for a declaration that there was a forfeiture of the lease by breach of the covenant aforesaid, the tenant pleaded that the covenant did not extend to subletting of a portion of the premises without consent and that there was no breach of the same. *Held*, that though the subletting had been effected in two separate transactions, the tenant had parted with the possession of the whole of the premises without the consent of the landlord, that the consent given to the first subletting did not extend to the second and that the covenant had been broken so as to involve a forfeiture of the lease. *TERRELL v. CHATTERTON.* (1922) 2 Ch. 647 (C. A.).

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—Covenant to use as dwelling house—Assignment of lease—Breach of covenant by under-lessee—Failure of assignee to take legal proceedings—Effect

The lessee of a dwelling house covenanted with the lessor that he would not use the premises otherwise than as a dwelling house nor do or suffer to be done anything likely to injure or annoy the lessors. The assignees of the lease sublet it again, and the sub-lessee covenanted in the same terms, but without the assent of the assignee in the premises in separate tenancies to a number of weekly tenants—On this the assignee sued his sub-lessee for possession and got judgment against him but he did not implead therein the weekly tenants. He advised them later to apply to the lessor for permission to remain in possession and also gave them legal advice for safe-guarding their interests.

In a suit by the lessor against the assignee claiming forfeiture for breach of the original covenant, *Held*, the assignee had taken reasonable steps in the matter and had not failed to take proper legal steps; and even giving legal advice to the weekly tenants did not amount to a breach of the covenant. *BORTON v ALLIANCE ECONOMIC INVESTMENT CO. LTD.* (1922) 1 K B 742.

—Notice to quit—Withdrawal—Creation of a new tenancy—Breach of covenant.

The giving of a notice to quit and its subsequent withdrawal create a new tenancy between the parties.

Per *Lord Sterndale M. R.*—A notice to quit must be unconditional, and must not give to the tenant an option which he can accept without the permission of the person giving the notice to do something other than is required by the notice. *FREEMAN v. EVANS* (1922) 1 Ch 36.

—Notice to quit—Yearly tenancy—Monthly tenancy—Essentials of valid notice.

A contract for the letting of land or houses is to be construed as any other contract, so as to give effect to the true agreed intention of the parties. If the parties have by clear language expressed their agreed intention as to the time when that contract shall cease the only duty of the court is to enforce its cessation at the time. In the absence of agreement or local custom to the contrary, a yearly tenancy can only be determined by a notice to quit expiring on the last day before the anniversary of its commencement. If it is given to expire on a wrong day it will be invalid. In the case of a quarterly tenancy a notice to quit expiring with same quarter calculated from the commencement of the tenancy is required to determine it. But the law relating to yearly or quarterly tenancies is not necessarily applicable to monthly or weekly tenancies and in the case of the latter reasonable notice to quit is sufficient to determine the tenancy. Such notice if in other respects reasonable is not rendered unreasonable and invalid merely because it expires on some day other than the last day of a month or week calculated from the commencement of the tenancy. *SIMMONS v. CROSSLEY.*

(1922) 2 K. B. 95.

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—Sub-tenancy—Tenants giving notice to quit, to landlord and sub-tenant—Statutory right of sub-tenant to remain—Tenant if liable for use and occupation.

A tenant who had taken the premises on lease, sub-let a portion to another. After some time, he gave due notice to his landlord of his intention to quit at the same time. But as the latter had a statutory right to remain, he refused to quit. The tenant gave up possession of his portion of the premises, but under the circumstances could not do so as regards the rest. In a suit against him by the landlord for use and occupation

*Held*, the tenant having done everything he could possibly do to vacate he was not liable in damages for use and occupation. *REYNOLDS v. BANNERMAN.* (1922) 1 K. B. 719

—Rent—Assessment for purposes of income tax—Deduction—Income Tax Act, 1918 Sch A. No VIII R. 4.

Where for purposes of Income Tax a property is rated at a certain figure and the tenant pays the income tax on that basis, he is entitled to deduct the amount of tax actually paid from the rent payable. He cannot claim a deduction based on the stipulated rent being higher than the assessment for purposes of income tax. *ROSSDALE v. FRYER* (1922) 2 K. B. 303.

Legacy—Ademption—Principles relating to

If a testator confers a benefit on strangers and not on a person to whom he stood *in loco parentis*, there is no presumption that a gift made *inter vivos* was wholly or in part, an ademption or satisfaction of the legacy.

A legacy given by a testator because of a moral obligation under which he conceived himself to be, is not adeemed by a subsequent gift *inter vivos* unless it is expressly so made. *IN RE JUPP; HARRIS v GRIERSON.* (1922) 2 Ch. 359.

Legitimacy—Presumption—Period of gestation.

The lapse of 331 days between coition and the birth of a child is not by itself sufficient proof that the child could not have been lawfully begotten. Such an interval could not in the present state of medical knowledge be said to be impossible. *GASKILL v. GASKILL.* (1921) P. 425.

Limitation—Acknowledgment—Implied promise to pay—Lord Tenterden's Act 9 Geo 4 Ch. 14.

A written promise to pay a debt given within 6 years before action is sufficient to take the case out of the operation of the statute of James I. Such a promise is implied in a simple acknowledgment of the debt. Where however such an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition on an absolute refusal to pay, it is for the Court to say whether those expressions are sufficient to qualify or negative the implied promise to pay. An acknowledgment even though coupled with a statement of inability to pay at the time of writing is enough to prevent the operation of the statute.

A debtor who was pressed for payment of a loan with interest wrote to the creditor in continuation of the previous correspondence as follows:—It is not that I won't pay you, but that I can't do so . . . . . What I wrote

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was not that I saw no prospect at present of being able to repay the capital, but that prospect of being able to repay the capital at present." *Held*, that the letter was a sufficient acknowledgment to take the case out of statute of limitation. *SPENCER v. HEMMERDE* (1922) 2 A. C. 507.

——— *Mortgage — Reversionary interest in realty and personality — Real Property Limitation Act, S. 8.*

A person who had a reversionary interest in an estate which consisted partly of realty and personality mortgaged it 15 years before the reversion fell in. No interest was ever paid or acknowledgment made during that period; on the death of the previous owner when the reversion fell in, most of the realty was collected. *Held*, the mortgage was barred under S. 8 of the Real Property Limitation Act. *In re WITHAM CHADBURN v. WINFIELD* (1922) 2 Ch. 413.

*Local authority — Lighting by electricity — Default — Penalty — Exception of "force majeure" — Probability of strike.*

A local authority were under a statutory obligation to supply electric energy for the purposes of lighting a district and were liable to a penalty on default unless such default was caused by "inevitable accident or force majeure." *Held*, that "force majeure" meant some physical or material restraint and did not include a reasonable fear or apprehension of such restraint; consequently the probability of a strike among the workmen of the local authority did not constitute "force majeure" within the clause in question.

*Per Branson, J.* "Force majeure" cannot be established by showing that the consequences of doing the act which would be suffered by the person relying upon the clause would be unpleasant, troublesome or perhaps disastrous. In order to succeed the local authority must show that what the statute ordered them to do has become impossible; it is not enough for them to say that it has become inconvenient or unpleasant for them to do it. *HACKNEY BOROUGH COUNCIL v. DOSE*. (1922) 1 K. B. 431.

——— *Statutory duty — Reasonable performance — Cleansing of cess pools — Public Health Act, Ss 42, 43.*

The obligation cast by statute upon a local authority as regards the cleansing of cesspools in a particular area is a question of degree; it is always a matter of the reasonable interpretation of the statutory duty. It may be a reasonable fulfilment of the statutory obligation if the local authority cleanses the cesspools once in three months free of charge and at earlier intervals on payment by the house-owner. Whether the undertaking to empty cesspools at certain intervals is reasonable must be judged by reference to the needs of the community as a whole and not to the case of a particular individual who wants an excessive amount of user of his cesspool. *LECK v. EPSOM RURAL DISTRICT COUNCIL*. (1922) 1 K. B. 383.

*Mandamus — Corporation — Refusal to grant licence.*

"A mandamus will not be granted if a local authority bona fide and on reasonable grounds believes that the erection of a proposed building would be

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in contravention of some provision of law and therefore refuses license for the said building. If the local authority in refusing the license acts on irrelevant considerations and there are no reasonable grounds for the belief that the proposed building contravenes or infringes some provision of the law, then a mandamus will issue. *REX v. CAMBRIDGE CORPORATION* (1922) 1 K. B. 250.

——— *Statutory body — Refusal to perform statutory duty — Remedy of aggrieved party.*

Mandamus is the regular remedy where it is desired to compel a public body to fulfil a public duty which they without legal excuse decline to perform, and the performance of which would be for the benefit of the person or body complaining. Where however the statute creating the duty has prescribed a form of remedy for a breach of that duty other than mandamus, then as a general rule the court will not allow any other remedy to be pursued. There may also be cases where the party complaining may have some alternative remedy as convenient, beneficial and effectual as mandamus, and if so in its discretion the court will not grant a writ of mandamus. *REX v. POPLAR BOROUGH COUNCIL (No. 1)*: (1922) 1 K. B. 72 (C. A.).

*Marine Insurance — P. p. i. clause in policy — Effect of — Marine Insurance Act, S. 4 — Doctrine of subrogation.*

Under S. 4 of the Marine Insurance Act, every marine insurance policy containing a p. p. i. clause is void as it is a contract by way of gaming or wagering. A right of subrogation does not arise from such a policy. History of the doctrine of subrogation considered. *JOHN EDWARDS AND COY v. MOTOR UNION INSURANCE COMPANY, LTD* (1922) 2 K. B. 249.

——— *Practice — Discovery — Affidavit of papers.*

In actions based on marine insurance policies an affidavit of papers relating to the ship must be made by the plaintiff and all persons interested in the ship. The action itself should not be taken up for trial until plaintiff has disclosed all the material documents relating to the ship in his possession or otherwise, and also what attempts he has made to obtain the documents or why he failed in such attempt. *GRAHAM JOINT STOCK SHIPPING CO LTD v. MOTOR UNION INSURANCE CO. LTD*. (1922) 1 K. B. 563.

*Martial Law — Military court — Unauthorised possession of arms — Conviction and sentence of death — Writ of prohibition — Criminal cause or matter — Supreme court of Judicature Act (1877) S. 50.*

S. 47 of the English Judicature Act, which is similar to S. 50 of the Irish Act, prohibits an appeal from any judgment of the High Court "in any criminal cause or matter." In order that a matter may be a criminal cause or matter it must fulfil two conditions which are connoted by and implied in the word "criminal." It must involve the consideration of some charge of crime, that is to say, of an offence against the public law; and that charge must have been preferred or be about

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to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it, but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction.

The right to administer force against force in actual war does not depend upon the proclamation of Martial Law but on the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorise what are called "courts" to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But these proceedings of so-called "Courts Martial" administering summary justice under the supervision of a Military Commander, are not analogous to the regular proceedings of Courts of Justice. A Court Martial, properly so called, is a tribunal, regularly constituted under military law and is quite different from a body of military officers entrusted by the Commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in his proclamation and of advising him as to the manner in which he should deal with the offences. The "sentences" of this latter body, if confirmed, will derive their force not from the decision of the Military Court, but from the authority of the officer commanding His Majesty's forces in the field.

A writ of prohibition is a judicial writ, issuing out of a Court of Superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it was not legally vested, or in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction. There is no precedent for the issue of a writ against a body which has no statutory or common law authority to act as a Court for the trial of cases and which does not claim any such authority.

On the facts, the House of Lords held that prohibition did not lie against the officers of an advisory military Court (not being a Court martial) on the ground that they did not claim to act as a judicial tribunal in any legal sense and also on the ground that they were *functi officii*. *CLIFFORD v. O'SULLIVAN*. (1921) 2 A. C. 570.

**Master and Servant—Suspension—Reasonable cause—Effect of suspension on liability of employer and employee—Statute—Repeal by implication.**

Where the relations between the parties are those of employer and employed, and there is a power of suspension which was properly exercised by the employer, the obligations on both sides are suspended. The servant or the employed person is excused from the performance of his

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duty and the employer is excused from payment for the discharge of that duty.

*Per Warrington L J* In order that a subsequent statute, not expressly repealing a previous one, or the provisions of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together. *WALLWORK v. FIELDING*. (1922) 2 K. B. 66 (C.A.)

**Mortgagor and Mortgagee—Mortgagee if a trustee of the power of sale—Motive for sale, if material.**

A mortgagee is not a trustee of the power of sale for the mortgagor and if he is entitled to exercise the power, the Court cannot look into his motives for so doing or restrain him from exercising it except on the terms of payment of the mortgage debt. *BELTON v. BASS, RATCLIFFE AND GRETTON, LTD*. (1922) 2 Ch. 449.

**Negligence—Highway—Wall adjoining—Omission to repair—Damages—Liability of owner.**

A landlord who lets a house in a dangerous state is not liable to the tenant's guests for accidents happening during the term. When there is a nuisance on a highway any person lawfully using the highway has a cause of action, but not one who was not using the highway at all. Consequently an invitee on private premises is not entitled to damages for injury caused by something which is a public nuisance to an adjoining highway. *BROMLEY v. MECER*. (1922) 2 K. B. 126 (C.A.)

**Petition of Right—Amendments—If and when allowed.**

The petition of rights being a beneficent instrument for the furtherance of the public weal, Courts must be deemed to have powers of amendment, though restricted. If the suppliant seeks to substitute or add a substantially new cause of action, no amendment should be allowed in the absence of a fiat by the King or a consent by the Attorney General. But if the proposed amendment is a mere variation in the formulation of a contract such as e.g. change of date or of amount, then ordinarily the amendment should be granted. *RUFFY-ARNELL AND BAUMANN AVIATION COY., LTD v. KING*. (1922) 1 K. B. 599.

**Contract by Crown—Enforcement of—Restraint on executive action.**

The Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But as a rangement during the war whereby the Government purports to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to England with a particular kind of cargo, is not a contract for the breach of which damages can be sued for in a Court of Law. It is merely an expression of intention to act in a particular way in a certain event. It is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of

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action in matters which concern the welfare of the State. *REDERIKTIEBOLAGET AMPHITRITE v. THE KING* (1921) 3 K. B. 500

**Pleading—Ultra vires—Grounds for, if to be specifically raised.**

According to the rules of pleading, an allegation of infirmity in any statute on the ground of *Ultra vires* is sufficient without assigning further reasons. *BURLAND v. THE KING*. (1922) 1 A. C. 215.

**Practice—Originating summons—Mortgagee and mortgage—Delivery of possession—Rules of the Supreme Court, 1883, O. 55, R. 5-A.**

A legal mortgagee is not entitled, upon an originating summons under O. 55, R. 5-A of the Rules of the Supreme Court, to an order for delivery of possession of the mortgaged premises without any claim for sale or foreclosure, and the Court has no jurisdiction to make such an order. *WALLIS v. GRIFFITHS*. (1921) 2 Ch. 301.

**Pleadings—Will—Invalidity—Insanity—Undue influence—Particulars—Rules of the Supreme Court O. 19, R. 25-A**

Where in a probate case the defendants contest the validity of the will on the ground of unsoundness of mind on the part of the testator and of undue influence exercised upon him, the plaintiff is entitled to have particulars of the unsoundness of mind and of the specific delusion, if any, and also of the nature of the undue influence and the improper acts alleged in the exercise of it, with the necessary dates, *IN THE ESTATE OF THE EARL OF SHREWSBURY*. (1922) P. 112.

**Precedents—When impliedly overruled**

Per *Warrington, L. J.* In order that a case may be treated as overruled one must find either a decision of a superior Court inconsistent with that arrived at in the case in question, or an expression of opinion on the part of that Court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts. *CONSETT INDUSTRIAL AND PROVIDENT SOCIETY v. CONSETT IRON CO.* (1922) 2 Ch. 135.

**Trial by Jury—Verdict delivered by foreman in hearing of some only of the Jury—Affidavit by Juror challenging unanimity of the verdict—Retrial.**

When once a verdict has been given it ought not to be open to an individual juror to challenge it or to attempt to support it if challenged. The court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision whether the discussion took place in the jury room after retirement or in the jury box itself. When a verdict is delivered in the sight and hearing of all the jury without protest their assent to it is conclusively inferred. But there is no such presumption where some of them did not hear it delivered. On a motion for a new trial of an action tried before a jury the ground alleged was that the verdict as delivered by the foreman was not the verdict of the whole jury and it was

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supported by the affidavits of certain jurors that owing to their position in the court room they could not hear the verdict when delivered. *Held* that the affidavits were admissible in evidence and a new trial should be granted. *ELIAS v. DFHEER*. (1922) 2 K. B. 113.

**Solicitor's lien—Change of solicitor—Retention of papers—Partnership action.**

Solicitors may retain papers and assert their lien so as to embarrass their particular client if he has chosen to incur the costs in question, but they are not entitled to do anything which has the effect of embarrassing not only the particular party but also other parties interested in the proceedings. Where in an action for dissolution of partnership the plaintiff changes his solicitors after the passing of a preliminary decree for dissolution and the appointment of a receiver, the former solicitors are not entitled to embarrass the further proceedings by retaining the papers in assertion of a lien for costs but are bound to deliver the papers to the new solicitors upon receiving the usual undertaking by the latter for preserving the lien of the former. *DRESSER v. PETERS, RUSSTON AND CO*. (1922) 1 Ch. 1.

**Witness—Allowance—Professional men—Compensation for attendance.**

When a seafaring witness is cited and examined in an admiralty case, the Registrar of the Court must include in the bill of costs such compensation as should reasonably be awarded to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was earning about the time of detention, not as an absolute measure but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should not be ignored. *THE IBIS VI* (No 2). (1922) P. 4.

**Principal and Agent—Agent obtaining goods by trick—Ownership—Bona fide purchaser—Title.**

Where an agent gets possession of his principal's goods by fraud, intending from the outset to use it for his own purposes the ownership still remains in the principal and even a bona fide purchaser from the agent acquires no title. *FOLKS v. KING*. (1922) 2 K. B. 348.

**Surreptitious dealing of one principal with agent of the other—Effect.**

Any surreptitious dealing between one principal and the agent of the other is a fraud on the other principal and entitles the latter to rescind the contract (1875) 10 Ch 515 *re'd.* to. *ALEXANDER v. WEBBER*. (1922) 1 K. B. 642.

**Prize—Capture—Test of—Hauling down the flag if conclusive.**

Capture consists in compelling the vessel captured to conform to the captor's will. When that is done *deditio* is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action or abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves

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presenting an appearance of submission were ambiguous and did not result in a completed capture—No particular formality is necessary; hauling down the flag is not conclusive on the matter. **THE PELLWORM AND OTHERS.**

(1922) 1 A. C. 292.

———**Damages to goods—Liability for—Duties and obligations of captors**

The obligation of captors has always been recognized as being one of care and prudence. It has never been placed so high as that of insuring or answering in all events for the safety of the prize. But it is well settled that it is for unreasonable action, for negligence and for wilful wrong doing that captors are liable from the time of seizure to the time when the vessel is placed in the custody of the Prize Court. Insurance of the owners' interest is clearly a matter for the owners themselves.

Where in the interval between the capture of the prize and the delivery of the same to the Marshal, they have been destroyed by fire without negligence, the owner is not entitled to recover for the loss. **THE NEW SWEDEN.**

(1922) 1 A. C. 229.

———**Subjects of—Vessels not taken in pursuit**

Vessels and craft not actually taken in pursuit do not form the subject of maritime prize. **THE ARICAB AND OTHERS.**

(1922) 1 A. C. 235.

**Public authority—Protection of—Negligence—Execution of duty—Public Authorities Protection Act, (1893) S. 1.**

A public body does not necessarily enjoy the protection of S. 1 of the Public Authorities Protection Act 1893 merely because it is acting under a leave or license conferred upon it or under a permission granted to it by an Act of Parliament. To entitle it to protection it is necessary that it should be acting in pursuance or execution or intended execution of an Act of Parliament or of public duty or authority. **EDWARDS v. METROPOLITAN WATER BOARD.**

(1922) 1 K. B. 291.

**Railway—Risk note—Owner's risk—Deviation from route—Loss—Liability.**

If a carrier desires to exempt himself from his common law liability he must do so in clear language. Where the contract between a consignor and the railway provides for the carriage of goods from one place to another through a particular route and the consignor agrees to bear the risk of loss or delay in transit himself and to exempt the railway from liability therefor, the exemption has reference to the conveyance by the prescribed route and by that route alone. When once the goods are diverted by the Railway from the prescribed route and taken on another journey, even though that diversion was the result of a pure mistake on the part of the railway servant, they ceased to be covered by the contract and by the exceptions which it contains.

*Per Scrutton, L. J.:* When a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary intention, they only apply where the excepted events happen in the course of his carrying out the contract, and do not apply where they happen

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while he is doing something which he has not contracted to do. **NEILSON v. L AND N. W. RY. CO.**

(1922) 1 K. B. 192.

**Reinstatement—Basis of—Direct loss or damage—What amounts to**

The plaintiffs, a firm of motor proprietors, were temporarily dispossessed of their premises by the Government during the war. As a result they had to buy fresh premises and convert them to suit their business. When the original premises were quitted by the Government, the newly purchased premises were sold at a loss. **Held,** the loss incurred by the sale was also payable as compensation.

*Per Bankes, L. J.* Direct loss or damage relates to the direct consequence of the act giving rise to the claim.

*Per Atkin, L. J.* The word 'direct' connotes relations which are of the essence of the rule for determining the measure of damages arising from any breach of duty in contract or in tort and giving rise to a claim for damages. **A AND B TAXIS, LTD. v. THE SECRETARY OF STATE FOR AIR.**

(1922) 2 K. B. 328.

**Restitution of conjugal rights—Direction to pay portion of income—Supertax not to be deducted.**

Where a matrimonial court in a suit for restitution directed the husband to pay a certain specified fraction of his income to the wife, he is not entitled to deduct supertax in calculating the amount. Even acquiescence in the deduction does not bar the legal right. **CAMPBELL v. CAMPBELL.**

(1922) P. 187.

———**Suit for—Separation by mutual consent—Sincerity of claimant.**

Where a wife sues for restitution of conjugal rights and it is found that the separation was the result of an agreement between the parties, the court has first to ascertain whether there is a sincere desire on the part of the claimant to resume cohabitation. **MANN v. MANN.**

(1922) P. 238.

**Sale of goods—Bill of sale—Assignment of chattel or proceeds as security—Registration.**

The owner of a motor car gave it to the defendant, a motor engineer, for repair and sale thereafter. Subsequently in order to secure his overdrawn account at the plaintiff's bank, the owner of the car wrote a letter to the defendant to hold the car or its proceeds when sold to the order of the bank. The letter was unregistered. In a suit by the bank for recovery of the proceeds of the sale of the car from the defendant, it was held that the letter in question was a bill of sale and, as it had not been drawn up in the form required by the statute and not registered, the title of the bank to the money failed. The letter in question was not merely an assignment of the proceeds of sale of a chattel but also an assignment of the chattel itself until sold and it was not open to the Court to split the document into two parts and discard the part that assigned the chattel merely because at the time when the plaintiffs put forward their claim the chattel had ceased to form part of the security. **NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND v. LINDSELL.**

(1922) 1 K. B. 21;

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—C. I. F. contract—Incidents of—Bill of lading—Policy of insurance—Certificate in lieu of policy—Buyer's right to reject.

Under a C. I. F. contract the buyer must be ready and willing to pay the price of the goods against tender of these documents, *viz.* the bill of lading, invoice and policy of insurance, which completes delivery in accordance with the contract. A bill of lading is a receipt for goods shipped on board a ship signed by the person who contracts to carry them or his agent and stating the terms on which the goods were delivered to and received by the ship. A bill of lading must acknowledge actual shipment of goods on board a particular ship. A receipt for goods which are at some future time to be shipped on board a named or unnamed ship is not a bill of lading within a C. I. F. contract. A certificate or other document of insurance is not good tender under an ordinary C. I. F. contract unless it be an actual policy and unless it falls within the provisions of the Marine Insurance Act, 1906. *DIAMOND ALKALI EXPORT CORPORATION v. FL. BOURGEOIS*, (1921) 3 K. B. 43.

—Delivery postponed on verbal request of buyer—If a variation—Sale of Goods Act, S. 4.

After the sale of some goods had been effected in writing the buyer verbally requested the owner to withhold delivery for some time. When the goods were actually tendered the buyer refused to take delivery on the ground of delay. In a suit for damages, the defence was that the parol agreement postponing delay was the unenforceable under S. 4 of the Sale of Goods Act.

*Held*, the terms of the verbal agreement did not amount to a variation of the contract and hence need not be in writing. *LEVEY AND CO. v. GOLDBERG*, (1922) 1 K. B. 688.

—Delivery—Delivery at buyer's house—Misappropriation by persons not authorised—Liability for loss.

A vendor who is told to deliver goods at the purchaser's premises discharges his obligation if he delivers them there without negligence to a person apparently having authority to receive them. He cannot know what authority the actual recipient has. His duty is to deliver the goods at the proper place, and of course, to take all proper care to see that no unauthorised person received them. He is under no obligation to do more. If the purchaser has been unfortunate enough to have had access to his premises obtained by some apparently respectable person who takes his goods and signs for them in his absence, the loss must fall on him and not on the innocent carrier or vendor. *GALBRAITH AND GRANT, LTD. v. BLOCK*, (1922) 2 K. B. 155.

—Fixture—Engine attached to the soil—Delivery—Property in the goods when passes—Sale of Goods Act, 1893, S. 18.

An engine weighing thirty tons was affixed to a bed of concrete by means of bolts and screwed down. The plaintiffs, the owners of the engine and of the premises on which it stood, contracted to sell the engine to defendants and to deliver it free on rail in London to the defendants. The plaintiffs detached the engine but while being

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loaded on to a railway truck the engine was so badly injured that the defendants refused to accept it. On a question arising as to whether the property in the engine had, at the date of the injury, passed to the defendants *Held*, that the plaintiffs continued to be the owners of the engine at the time of the injury to it. The defendants intended to buy only a chattel and in order to make it a chattel, the engine had to be severed from the soil. The property in the engine therefore did not pass until it had been severed and delivered under the terms of the contract. *UNDERWOOD LTD. v. BURGH CASTLE BRICK AND CEMENT SYNDICATE*, (1922) 1 K. B. 123.

—Implied warranty—Disclosure of purpose if necessary—Knowledge of buyer and seller

Both under the common law and S. 14 of the Sale of Goods Act, 1893, if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. There is in such a case an implied warranty that the goods supplied shall be reasonably fit for the purpose in view and this implied warranty is not excluded by the fact that at the date of the contract, the buyer knew that the seller's sources of supply were limited *MANCHESTER LINERS LTD. v. REA, LTD.* (1922) 2 A. C. 74.

—Trade fixtures—Passing of property—Delivery—Sale of Goods Act, S. 18.

No general rule can be laid down which will answer the question when the property in goods passes in every contract of sale. In many sales of specific articles to be delivered, the property passes on the making of the contract. But the facts may give rise to other inferences, as regards the intention of the parties.

The owners of a heavy engine weighing 30 tons and bolted to and embedded in a concrete flooring in the owner's premises agreed to sell it at a price F. O. R. London. Before the engine could be delivered on rail it had to be unfastened and then to be dismantled a work requiring several days' work and an expense of £100. The sellers detached the machine but while it was being loaded on a truck it was damaged by accident. The buyers refused to accept the engine while the sellers contended that the property in the engine had passed on the date of the sale, to the buyers.

*Held*, that as the plffs. were bound to do something, which they had not done, for the purpose of putting the engine into a deliverable state, they remained its owners at the time of the accident. Moreover the circumstances attending the contract showed an intention that the property in the engine should not pass until it was placed on rail in London. (1922) 1 K. B. 123 affirmed. *UNDERWOOD, LIMITED v. BURGH CASTLE BRICK AND CEMENT SYNDICATE*, (1922) 1 K. B. 343.

—Warranty of merchantable quality—Goods not lawfully saleable in country of known destination—Sale of Goods Act, S. 14 (2).

In a contract for the sale of goods the implied warranty as to merchantable quality does not



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include the quality of being regally saleable in the market for which they are intended. Consequently the fact that by reason of a local law the goods are unsaleable in the country in which the vendors knew they were intended to be sold, does not constitute a breach of the implied condition as to "merchantable quality."

*Per Scrutton, L. J.*—The expression "merchantable quality" does not cover legal title to goods or the legal right to sell. It means that the goods comply with the description in the contract, so that to a purchaser buying goods of that description the goods would be a good tender. It does not mean that there shall in fact be persons ready to buy the goods. *STUNNER PERMAIN AND CO. v. WEBB & CO.*

(1922) 1 K. B. 55 (C. A.)

**Settlement — Construction — Second marriage "without having been married"**—Meaning of—Principles of construction.

The elementary rule of construction of a document is to ascertain the intention of the party, regard being had to the circumstances under which it was executed, the language used and the context in which it is used.

In the case of marriage settlements there is no rule or principle whereby the words in dispute should be interpreted as excluding merely the husband of the settlor and not as excluding a child whether by that or any other husband.

Where in a settlement executed by a lady before her second marriage, there was a final clause according to which under certain circumstances her properties were to pass as if she died intestate and "without having been married"

*Held*, by *Viscount Birkenhead L. C.*, *Lord Atkinson* and *Lord Sumner*. (*Lord Buckmaster* and *Lord Parmoor* dissenting) the words must be taken to be used in their natural sense of her dying a spinster and as such would exclude a son by the first marriage—Case law on the subject fully discussed. *BOYEE v. WARBROUGH AND OTHERS.*

(1922) 1 A. C. 425

**Shipping—Charter party—Time charter—Impossibility of performance—Frustration of adventure—Freight paid monthly in advance—Right of charterer to pro rata adjustment.**

Under a charterparty a ship was chartered for four months at a fixed hire per month and *pro rata* for any fractional part of a month until redelivery to the owners as therein stipulated. The payment of hire was to be made in London monthly in advance and redelivery of the ship was to be at a United Kingdom coal port. There was a further clause that if the steamer happened to be on a voyage at the expiration of the period fixed by the charter the charterers were to have the use of the steamer at the rate and on the conditions therein stipulated, to enable them to complete the voyage, provided that the voyage was reasonably calculated to be completed about the time fixed for the termination of the charter. Money in dispute between the owner and the charterer was to be deposited in a bank in their joint names until settlement of the dispute by arbitration. In the event of the breakdown of machinery or of the steamer being lost or missing, hire was to cease. The period fixed by the charter expired

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on August 10, 1919, but the charterers had before that date loaded the steamer at Antwerp with a cargo for Toulon with the intention that she should return to the United Kingdom with a Cargo from Toulon. The steamer arrived at Toulon and on August 1916, when she had completed the discharges of her cargo, she was requisitioned by the Shipping Controller and sent to Australia. In an arbitration between the parties the umpire made an award in the form of a special case.

*Held*, (1) that the stipulation for payment in advance applied to a case of extension of the charter beyond the charter term, and that on August 10 a full month's hire was payable by the charterers; and

(2) by the majority of the House of Lords (*Viscount Finlay* and *Lord Wrenbury* dissenting) that the charterers were not entitled to a *pro rata* adjustment by reason of the frustration of the adventure.

*Per Lord Sumner*.—In the absence of any special provision made by the parties with reference to the contingency of further performance of the contract becoming impossible, moneys paid in accordance with the terms of the contract must remain where they are when that contingency occurs, the party who has paid them and by the contract was bound to pay them, cannot recover them back, but as regards future liability, the contract is at an end. *ELLIOTT v. CRUTCHLEY* (1904) 1 K. B. 565 approved. *FRENCH MARINE v. COMPAGNIE NAPOLITAINE ETC.*

(1921) 2 A. C. 494.

**Charterparty—Agreement to deliver in good order—Delivery in damaged condition—Period of repairs—Hire if chargeable**

Under the terms of a charterparty, the ship was to be delivered back in the condition in which it was taken, but when it was tendered it was slightly damaged, and hence the delivery was refused. The necessary repairs were effected and the ship given back. On a claim by the owners for the hire for the period subsequent to the first tender during which it was under repair.

*Held*, the owners were not entitled for the hire for the period, but for some amount of damages for loss of use. *WYE SHIPPING CO., LTD. v. COMPAGNIE DU CHEMIN DE FER PARIS-ORLÈANS.*

(1922) 1 K. B. 617.

**Charter party—Option to renew—Sub-charterer repudiating contract—Failure to exercise option—Damages right to.**

Under the terms of a charterparty, the charterers had an option to renew the same for a further period by giving notice. They had entered into a sub-charterparty for the whole period, including the optional period, but the sub-charterers repudiated the contract so far as the optional period was concerned, and as a result the charterers did not exercise their option to renew. In an action brought by the charterers against the sub-charterers for damages;

*Held*, as they had failed to exercise their option of renewal, they could not have placed the ship at the disposal of the sub-charterers, and hence were not entitled to damages.

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RUTHERFORD SENDER AND CO. LTD. v. GOLDTHORPE, SCOTT AND WRIGHT LTD.  
(1922) 1 K. B. 500.

—Collision—Vessel belonging to foreign state—Maritime lien—Enforceability

Where on account of collision with a ship belonging to a foreign state, damage ensues, a maritime lien for such damage comes into existence; although in this case the owner cannot be impleaded directly, being a sovereign state, nevertheless if the ship be transferred to a private owner the lien can be enforced against him by judicial process. *THE TERVAETE* *in re*

(1922) P. 197.

Slander of title—Essentials of—Malice—Damage—Injunction grant of

Before a plaintiff can recover damages in a common law action for a slander to the title of his property, he has to prove (1) that the published words are false, (2) special damage and (3) that the defendant acted maliciously—What constitutes malice considered.

*Quære* whether injunction may be granted in cases of threatened slander of title where damages would either necessarily or probably result, without proof of actual suffering of special damage. *BRITISH RAILWAY TRAFFIC AND ELECTRIC COMPANY v. THE C. R. C. COY. LTD. AND THE LONDON COUNTRY COUNCIL.*

(1922) 2 K. B. 260.  
Straits Settlements Limitation Ordinance, (1896.) S. 10 and Art. 99—Will—Trust—Suit for declaration that trust is void and for recovery of property—Intestacy—Limitation—Starting point

S. 10 of the Straits Settlements Ordinance (corresponding to S. 10 of the Indian Limitation Act) does not apply to a suit by a person claiming as the legal personal representative of a deceased testator, to recover property on the ground that the trusts for which they were set apart by the testator were void.

The purpose of following the property in the hands of the trustees referred to in S. 10 must be the purpose of restoring it to the trust specified in the section. A specific purpose, within the meaning of S. 10, must be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.

*Balwant Rao v. Puran Mal* I. L. R. 6 All. 1 approved.

Under Art. 99 of the Straits Settlements Ordinance a suit for obtaining a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate cannot be maintained after the lapse of 12 years from the time when the legacy or share becomes payable or deliverable. A suit by the next of kin for a declaration that a gift of a portion of the testator's property is void and for the recovery of the same as upon an intestacy, must therefore be brought within 12 years of the testator's death or of the date fixed by the testator or for division of the estate.

A decision of a competent court declaring the gift to be void and therefore declaring an intestacy to that extent, does not give a fresh starting point.

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The intestacy, if any, has existed throughout. The probate gives no efficacy to the provisions of the will, it is merely proof of the contents. *KHAW SIM TEK v. CHAUH HOOI GOH NELH*  
(1922) 1 A. C. 120

Torts—Contributory negligence—Doctrine, limits of—Collision at sea

In all cases of damages by collision on land or sea there are three ways in which the question of contributory negligence may arise

(i) The person who sues for damages is himself negligent but his negligence had brought about a state of things in which there would have been no damage if the other party had not been subsequently and severally negligent. In this case full damages are awarded. 6 A. C. 217. 9 A. C. 873 *ret to*

(ii) At the other end of the chain, the negligence of the plaintiff makes collision so threatening that though by the appropriate measure the other party could avoid it, he had not really time to think and by mistake takes the wrong measure, in this case plaintiff wholly fails. (1879) 4 P. D. 219. 5 A. C. 876 *ret to*.

(iii) In between these terms come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing while in Admiralty, damages are divided in some proportion or other.

The question of contributory negligence must be dealt with somewhat broadly and upon commonsense principles. Where a clear line can be drawn the subsequent negligence is the only one to look to, but there are cases in which the two acts come so closely together and the second act of negligence is so much mixed up with the state of things brought about by the first act that the party secondly negligent while not held free from blame might on the other hand invoke the prior negligence as being part of the cause of the collision so as to make it a contribution. *THE ADMIRALTY COMMISSIONERS v. OWNERS OF S. S. "VOLUTE."*  
(1922) 1 A. C. 129.

—Negligence—City corporation—Botanical gardens—Public park—Poisonous shrub—Access—Child eating poisonous fruit—Death—Damages—Demurrer—Pleadings—Practice.

Where a court is called upon to decide an issue arising upon a demurrer, the defendant must be taken to admit for the sake of argument that the allegations in the plaint are true *modo et forma*.

The City of Glasgow Corporation were the proprietors and custodians of public gardens in the city. There was in the gardens a play-ground and bandstand to which the public had access. On a small strip of land adjoining the play-ground the Corporation grew shrubs of various kinds including a shrub bearing berries similar in appearance to small grapes and presenting a very tempting and alluring appearance to children. This plot of ground which was enclosed by a fence, was also open to the public, access being obtained to it by a gate in the fence easily opened even by children. The plaintiff's son, aged seven years proceeded with some other children to the play-ground in the gardens and ate some of the poisonous berries and died. It was alleged in the plaint that the Corporation knew that the berries were a deadly poison and that no warning

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had been given to children or their parents or others who had custody of them. of the danger. In a suit by the plaintiff for damages for the death of his son caused by the negligence of the Corporation, the latter pleaded that the allegations in the plaint did not disclose a cause of action. *Held* that the averments in the plaint disclosed a good cause of action and that the action ought to proceed to trial.

*Per Lord Atkinson* :—The liability of the defendants in cases of this kind rests, in the last resort upon their knowledge that by their action they may bring children of tender years, unable to take care of themselves, yet inquisitive and easily tempted, into contact, in a place in which they, the children, have a right to be with things alluring or tempting to them, and possibly in appearance harmless, but which, unknown to them and well known to the defendants, are hurtful or dangerous if meddled with.

*Per Lord Shaw* :—In grounds open to the public as of right the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning or prohibition as reaches the mind of the persons prohibited. CORPORATION OF THE CITY OF GLASGOW *v.* TAYLOR. (1922) 1 A. C. 44.

*Negligence—Police constable entering house left open at night—Injury—Damages—Liability for.*

Where a police constable seeing the door of defendant's warehouse open after dark and in order to see if anything was wrong entered the warehouse in the execution of his duty and injured himself by falling into an unfenced sawpit inside the warehouse. *Held*, that the defendant was not liable in damages to the plaintiff: The police-constable had no legal right to enter the warehouse, being neither an invitee nor a licensee and even assuming he had, the defendant was under no duty to him to make the place safe for him or to warn him of the danger. GREAT CENTRAL RAILWAY CO. *v.* BATES.

(1921) 3 K. B. 578

*Trade name—Injunction—Suit for—Test*

When an injunction absolute is claimed restraining defendants from using a trade name which plaintiffs had been using for a long time previously, one of the tests to apply is to see if confusion is likely to be created in the mind of the public by the use of the name by the defendants. Nature of the injunction to be granted in such cases considered with reference to case law *W. H. DORMAN AND CO. LTD. v. HENRY MEADOWS LTD.* (1922) 2 Ch. 332

*Vendor and Purchaser—Leasehold lands in disrepair—Contract to buy in present condition, after getting landlord's consent—Cost of repairs—Specific performance.*

Leasehold lands in a bad state of repair were agreed to be purchased in that condition, and an assignment to be taken subject to the landlord's assent being obtained—Prior to such consent

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being obtained, in pursuance of a notice to repair served by the landlord, the vendors had to spend a sum of money for effecting the same, as otherwise, there would be a forfeiture of the lease. The vendors then brought a suit for specific performance claiming in addition to the sale price, the amount spent on repairs:

*Held*, they were entitled to get a decree, for from the date of the contract, the property in its state of disrepair belonged in equity to the purchaser and the vendors become as from that date trustees for the purchasers. The latter were therefore liable to indemnify the vendors from liability to put the property into any state of repair other than that in which the purchasers agreed to purchase it. *LOEKHARTS v. BEKRAND ROSEN AND COMPANY.* (1922) 1 Ch. 433.

*Sale of land in fee—Existence of pathway—Latent and patent defect.*

No one who buys the unencumbered fee simple of a piece of land can have forced on him land which is subject to a public right of way. In all cases between vendor and purchaser, it may be taken that the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark. In considering what is a latent defect, one ought to take the general view, that a patent defect, which can be thrust on the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out, if he had pursued an enquiry based upon that which was presented to his eye. He is only liable to take the property subject to those defects which are a necessary consequence of something which is patent to the eye. *YANDLE AND SONS v. SUTTON.* (1922) 2 Ch. 199.

*Will—Construction—Legacies—Bequest of stock—General or specific legacy.*

The bequest of a sum of stock in pounds and its fractions, being the exact amount of the stock that the testator possesses at the date of his will, is a general legacy unless there is something else on the face of the will to indicate that the testator intended it to be specific. *WARWICK v. WILLCOCKS.* (1921) 2 Ch. 327.

*Construction—Power of appointment—Power if can be exercised by court.*

The power of testamentary disposition is essentially a personal one and cannot be exercised by a will merely purporting to delegate to another the distribution of the testator's estate and the ascertainment of the objects of his bounty. But there are some exceptions, apparent or real to this general rule. One is that of the creation of a general power which the donee may exercise for his own benefit for such a power is equivalent to property. Another is that of the creation of a power of distribution amongst charities. A third is that of the creation of a power of selection amongst individuals or a class of individuals who are pointed out as the beneficiaries. With regard to this third head, if there is a power to appoint among certain objects in no gift over in default of appointment, the court implies a trust

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for or gift to those objects equally if the power be not exercised. *HUGHES v. FOOTNER*

(1921) 2 Ch. 209

—Construction—Trust for charity—Executor given discretion—"At his own disposal"—Effect.

A will after providing for certain legacies, left the name of the residuary legatee blank. Subsequently by a codicil, the residue was left to charitable purposes "as I may in writing direct or to be retained by my executor for such objects and such purposes as he may in his discretion select and to be at his own disposal." No written directions were left;

*Held*, in the event which happened, as there was a discretion left to the executor to use it for purposes other than charitable, the trust for charities failed, and as the objects of charity were indefinite, the court could not execute the same.

*Held*, also the concluding words "to be at his own disposal" did not mean the executor was to take the residue beneficially, he was to hold it as trustee for the next of kin. *HALES v. ATTORNEY GENERAL*; *In re CHAPMAN* (1922) 1 Ch. 287

—Construction—Charitable bequest—Absence of—Discretion of executor as to objects and purposes.

A testatrix by her will appointed an executor and after granting specific legacies including two for charitable purposes and one to her executor left in blank the name of her residuary legatee. By a codicil the testatrix desired that her residue should be "applied for charitable purposes as I may in writing direct, or to be retained by my executor for such objects and such purposes as may in his discretion select, and to be at his own disposal." The testatrix left no direction as to the charities to be benefitted. *Held* that there was no valid bequest of the residue to charitable purposes in as-much as the executors had a discretion to devote the residue to objects and purposes other than charitable. The trust for those objects was too indefinite for the court to execute. *CHAPMAN In re*, *HALES v. ATTORNEY GENERAL*. (1922) 2 Ch. 479

—Construction—Vested or contingent interest.

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Where a will provided that the whole estate should be conveyed and transferred to X, as soon as he attained the age of 25 years, and in the interval the trustees appointed under the will were to apply the whole or part of the income as they thought fit for the maintenance and benefit of X, *Held* X took a vested interest and on his attaining majority was entitled to a conveyance and transfer. Case law reviewed. *In re USSHER*; *FOSTER v. USSHER*. (1922) 2 Ch. 321.

—Personally—Contingent reversionary estate in—Testator if competent to re-convey.

A testator who at the time of his death has only a contingent, reversionary interest in a personal estate is not competent to effect a reconversion by means of his will, and hence the property must pass under the will as personally. *In re STUART*; *DE BUNSEN v. HARDINGE*, (1922) 1 Ch. 416.

—Power of appointment—Covenants regarding—Validity.

The donee of a special testamentary power of appointment cannot validly covenant to appoint in a particular way. Such a power is in the nature of a fiduciary power to be exercised by the appointor's will only, so that up to the last moment of his life he may deal with it according to the circumstances. It is not a proper discharge of the donee's duty to fetter his fiduciary discretion by a covenant executed beforehand.

Where the donee of such a power made two covenants one an affirmative covenant to execute a will exercising the testamentary power in a particular way, and the other a negative one not to revoke or alter the will in that respect:

*Held*, both had no legal operation. *In re COOKE*; *WINKLEY v. WINTERTON*. (1922) 1 Ch. 292.

—Soldier's will—"In actual military service"—Meaning of.

The expression "in actual military service" in the Wills Act (England) means 'on an expedition.' Where it begins or ends must be decided by the circumstances of the particular soldier a liberal construction being always given. *IN THE ESTATE OF GREY*. (1922) P. 140.